

**STATE BAR OF CALIFORNIA**  
**COMMISSION FOR THE REVISION OF THE RULES OF**  
**PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**

**OPEN SESSION ACTION SUMMARY**

**Friday, January 20, 2017**  
**(10:00 am – 4:30 pm)**

**Saturday, January 21, 2017**  
**(9:00 am – 4:30 pm)**

**State Bar of California**  
**180 Howard Street**  
**Rooms 4A-C**  
**San Francisco, CA 94105**

**Members Present:** Hon. Lee Edmon (Chair), Dean Zipser (Co-Vice Chair), George Cardona, Danny Chou, Nanci Clinch, Joan Croker, Daniel Eaton, James Ham, Lee Harris, Tobi Inlender (Public Member), Robert Kehr, Howard Kornberg, Carol Langford, Raul Martinez, Toby Rothschild, Hon. Dean Stout and Mark Tuft.

**Members Not Present:** Jeffrey Bleich (Co-Vice Chair) and Hon. Karen Clopton

**Advisors Present:** Wendy Chang, Richard Fybel and Heather Rosing.

**Liaisons Present:** Greg Fortescue (California Supreme Court).

**State Bar Staff Present:** Carissa Andersen (Office of General Counsel, by telephone), (Randall Difuntorum (Office of Professional Competence), Mark Torres-Gil (Office of General Counsel), Gordon Grenier (State Bar Court), Mimi Lee (Office of Professional Competence), Kevin Mohr (Consultant/Reporter), Kevin Taylor (Office of the Chief Trial Counsel) and Andrew Tuft (Office of Professional Competence)

**Others Present:** James Blume (by telephone), Scott Garner and Stanley Lamport

**I. CHAIR'S REMARKS**

**A. Oral Report**

The Chair reported that the State Bar petition seeking Supreme Court approval of proposed amended rules 5-110 and 5-220 were filed in early January. The Chair thanked the Commission members for the special effort to expedite this proposal.

The Chair explained that because the deadline for State Bar submission of a comprehensive report and recommendation is March 31, 2017, there is little time available for further public comment periods. Accordingly, the Chair counseled the Commission members to be thoughtful in determining whether to recommend further revisions to the proposed rules as substantive changes will trigger the procedural requirement for additional public comment.

The Chair requested, and staff provided, information on options for an additional public comment period. It was noted that Commission likely would schedule a teleconference or video conference meeting in early March to consider any rules that might be issued for additional public comment.

## **II. CONSENT AGENDA – APPROVAL OF ACTION SUMMARY**

### **A. Approval of Action Summary – Regular Meeting on October 21 & 22, 2016 (Open Session)**

The consent agenda was presented to the Commission and upon motion made, seconded and adopted, it was

RESOLVED, that the Commission approves the action summary of the Commission's October 21 & 22, 2017 meeting.

All members present voted yes.

## **III. ACTION**

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

The Chair recognized Mr. Martinez who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 1.0 and the public commenter table as revised.

All members present voted yes with the exception of Mr. Eaton who voted no.

### **B. Rule 1.2.1 [3-210] Advising or Assisting the Violation of Law**

The Chair recognized Ms. Langford who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team recommended revisions to the version distributed for public comment but following discussion and input from State Bar staff, the Commission anticipated that these changes would be determined to be non-substantive.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 1.2.1 and the public commenter table as revised.

All members present voted yes with the exception of Mr. Kornberg who abstained.

### **C. Rule 1.3 [3-110(B)] Diligence**

The Chair recognized Mr. Tuft who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 1.3 and the public commenter table as revised.

All members present voted yes with the exception of Mr. Kehr who voted no.

### **D. Rule 1.5 [4-200] Fees for Legal Services**

The Chair recognized Mr. Martinez who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 1.5 and the public commenter table as revised.

All members present voted yes.

### **E. Rule 1.7 [3-310] Conflict of Interests: Current Clients**

The Chair recognized Stanley Lamport who provided oral public comment on this agenda item. The Chair recognized Mr. Cardona who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team recommended revisions to the version distributed for public comment and following discussion and input from State Bar staff, the Commission anticipated that these changes would be determined to be substantive changes and would require an additional public comment period.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 1.7 and the public commenter table as revised.

All members present voted yes with the exception of Mr. Kehr who voted no.

**F. Rule 1.8.1 [3-300] Business Transactions with a Client and Pecuniary Interests Adverse to the Client**

The Chair recognized Mr. Kehr who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 1.8.1 and the public commenter table as revised.

All members present voted yes with the exception of Mr. Kehr who voted no.

**G. Rule 1.8.3 [4-400] Gifts from Client**

The Chair recognized Mr. Ham who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 1.8.3 and the public commenter table as revised.

All members present voted yes.

**H. Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client**

The Chair recognized Mr. Zipser who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 1.8.5 and the public commenter table as revised.

All members present voted yes with the exception of Mr. Tuft who voted no.

**I. Rule 1.8.7 [3-310(D)] Aggregate Settlements**

The Chair recognized Mr. Martinez who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 1.8.7 and the public commenter table as revised.

All members present voted yes.

**J. Rule 1.8.10 [3-120] Sexual Relations with Client**

The Chair recognized Mr. Ham who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 1.8.10 and the public commenter table as revised.

All members present voted yes with the exception of Mr. Ham who abstained.

**K. Rule 1.9 [3-310(E)] Duties to Former Clients**

The Chair recognized Stanley Lamport who provided oral public comment on this agenda item. The Chair recognized Mr. Martinez who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team recommended revisions to the version distributed for public comment but following discussion and input from State Bar staff, the Commission anticipated that these changes would be determined to be non-substantive.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 1.9 and the public commenter table as revised.

All members present voted yes.

**L. Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees**

The Chair recognized Mr. Cardona who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 1.11 and the public commenter table as revised.

All members present voted yes.

**M. Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral**

The Chair recognized Mr. Cardona who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 1.12 and the public commenter table as revised.

All members present voted yes with the exception of Ms. Inlender who abstained.

**N. Rule 1.13 [3-600] Organization as Client**

The Chair recognized Mr. Kehr who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 1.13 and the public commenter table as revised.

All members present voted yes.

**O. Rule 1.14 Client with Diminished Capacity**

The Chair recognized Mr. Tuft who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 1.14 and the public commenter table as revised.

All members present voted yes.

**P. Rule 1.15 [4-100] Safekeeping Funds and Property of Clients and Other Persons**

The Chair recognized Mr. Ham who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 1.15 and the public commenter table as revised.

All members present voted yes.

**Q. Rule 1.16 [3-700] Declining or Terminating Representation**

The Chair recognized Ms. Langford who gave an oral report on the public comment received and the drafting team's recommended response to that comment. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comment received, the Commission hereby adopts proposed rule 1.16 and the public commenter table as revised.

All members present voted yes.

**R. Rule 1.17 [2-300] Sale of a Law Practice**

The Chair recognized Mr. Kehr who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 1.17 and the public commenter table as revised.

All members present voted yes.

**S. Rule 1.18 (Duties to Prospective Client)**

The Chair recognized Mr. Zipser who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 1.18 and the public commenter table as revised.

All members present voted yes with the exception of Mr. Kehr who voted no and Ms. Inlender who abstained.

**T. Rule 2.1 (Advisor)**

The Chair recognized Mr. Lamport who provided oral public comment on this agenda item. The Chair recognized Mr. Eaton who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 2.1 and the public commenter table as revised.

All members present voted yes.

**U. Rule 3.1 [3-200] Meritorious Claims and Contentions**

The Chair recognized Mr. Martinez who gave an oral report on the public comment received and the drafting team's recommended response to that comment. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comment received, the Commission hereby adopts proposed rule 3.1 and the public commenter table as revised.

All members present voted yes.

**V. Rule 3.3 [5-200(A)-(D)] Candor Toward the Tribunal**

The Chair recognized Mr. Tuft who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 3.3 and the public commenter table as revised.

All members present voted yes with the exception of Mr. Kehr who voted no and Mr. Zipser who abstained.



**W. Rule 3.5 [5-300, 5-320] Contact with Judges, Officials, Employees, and Jurors**

The Chair recognized Judge Stout who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 3.5 and the public commenter table as revised.

All members present voted yes.

**X. Rule 3.9 Advocate in Nonadjudicative Proceedings**

The Chair recognized Mr. Tuft who gave an oral report on the public comment received and the drafting team's recommended response to that comment. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comment received, the Commission hereby adopts proposed rule 3.9 and the public commenter table as revised.

All members present voted yes.

**Y. Rule 4.2 [2-100] Communication with a Represented Person**

The Chair recognized Mr. Tuft who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 4.2 and the public commenter table as revised.

All members present voted yes.

**Z. Rule 4.3 Communicating with an Unrepresented Person**

The Chair recognized Mr. Tuft who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 4.3 and the public commenter table as revised.

All members present voted yes.

**AA. Rule 4.4 Duties Concerning Inadvertently Transmitted Writings**

The Chair recognized Mr. Martinez who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. With the exception of a citation change (addition of "see" before the reference to the *Clark* case), the team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 4.4 and the public commenter table as revised.

All members present voted yes.

**BB. Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers**

The Chair recognized Mr. Kehr who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 5.1 and the public commenter table as revised.

All members present voted yes.

**CC. Rule 5.3.1 [1-311] Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Lawyer**

The Chair recognized Mr. Ham who gave an oral report on the public comment received and the drafting team's recommended response to that comment. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comment received, the Commission hereby adopts proposed rule 5.3.1 and the public commenter table as revised.

All members present voted yes.

**DD. Rule 5.6 [1-500] Restrictions on a Lawyer's Right to Practice**

The Chair recognized Mr. Tuft who gave an oral report that no public comments were received. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comment received, the Commission hereby adopts proposed rule 5.6 and the public commenter table as revised.

All members present voted yes.

**EE. Rule 7.1 [1-400] Communications Concerning a Lawyer's Services**

The Chair recognized Ms. Langford who gave an oral report on the public comment received and the drafting team's recommended response to that comment. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comment received, the Commission hereby adopts proposed rule 7.1 and the public commenter table as revised.

All members present voted yes.

**FF. Rule 8.1 [1-200] False Statement Regarding Application for Admission**

The Chair recognized Ms. Clinch who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team recommended revisions to the version distributed for public comment but following discussion and input from State Bar staff, the Commission anticipated that these changes would be determined to be non-substantive.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 8.1 and the public commenter table as revised.

All members present voted yes.

**GG. Rule 8.4 [1-120] Misconduct**

The Chair recognized Mr. Cardona who gave an oral report on the public comment received and the drafting team's recommended response to that comment. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comment received, the Commission hereby adopts proposed rule 8.4 and the public commenter table as revised.

All members present voted yes.

#### **HH. Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation**

The Chair recognized Mr. Andrew Tuft who provided an oral report concerning a possible issue of compelled speech based on requirement imposed on lawyers by paragraph (e). The Chair recognized Mr. Cardona who gave an oral report on the public comments received and the drafting team's recommended responses to those comments. The team did not recommend any revisions to the rule distributed for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team and the public comments received, the Commission hereby adopts proposed rule 8.4.1 and the public commenter table as revised.

All members present voted yes with the exception of Mr. Kehr who voted no and Mr. Ham who abstained.

#### **II. Consideration of Model Rules Rejected by Commission [if warranted by public comment received on a rejected rule or as a result of consideration of any other agenda item]**

The Chair confirmed with staff that no public comments were received on any of the rules that the Commission is not recommending for adoption. No Commission member expressed an interest in reconsidering the Commission's position on any of these rules.

### ***CLOSED SESSION***

*None\**

\*Closed under Bus. & Prof. Code § 6026.5(a) to consult with counsel concerning pending or prospective litigation.

\*Closed under Bus. & Prof. Code Sec. 6026.5(d) to consider a personnel matter.

**Rule 1.0 [1-100] Purpose and Function of the Rules of Professional Conduct  
(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

(a) Purpose.

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

(b) Function.

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

(c) Purpose of Comments.

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

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

**Comment**

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

Cal.4th 61, 71-72 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); *Chambers v. Kay* (2002) 29 Cal.4th 142, 161 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement).

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

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

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

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

**Rule 1.2.1 [3-210] Advising or Assisting the Violation of Law  
(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.
- (b) Notwithstanding paragraph (a), a lawyer may:
  - (1) discuss the legal consequences of any proposed course of conduct with a client; and
  - (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.

**Comment**

[1] There is a critical distinction under this Rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent does not of itself make a lawyer a party to the course of action.

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this Rule, a lawyer shall not violate the lawyer's duty under Business and Professions Code § 6068(a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code § 6068(e)(1) and Rule 1.6. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rules 1.13 and 1.16.

[3] Determining the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal, or of the meaning placed upon it by governmental authorities. Paragraph (b) thus authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes to be unjust or invalid.

[4] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by these Rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must advise the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(4).

[5] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law, and, despite such a conflict, to assist a client in conduct that the lawyer reasonably believes is permitted by California statutes, regulations, orders, and other state or local provisions implementing those laws. If California law conflicts with federal or tribal law, the lawyer should also advise the client regarding related federal or tribal law and policy.

**Rule 1.3 Diligence**  
**(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable\* diligence in representing a client.
- (b) For purposes of this Rule, “reasonable diligence” shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.

**Comment**

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

[2] See Rule 1.1 with respect to a lawyer’s duty to perform legal services with competence.



**Rule 1.5 [4-200] Fees for Legal Services**  
**(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee.
- (b) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. The factors to be considered in determining the unconscionability of a fee include without limitation the following:
  - (1) whether the lawyer engaged in fraud\* or overreaching in negotiating or setting the fee;
  - (2) whether the lawyer has failed to disclose material facts;
  - (3) the amount of the fee in proportion to the value of the services performed;
  - (4) the relative sophistication of the lawyer and the client;
  - (5) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
  - (6) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
  - (7) the amount involved and the results obtained;
  - (8) the time limitations imposed by the client or by the circumstances;
  - (9) the nature and length of the professional relationship with the client;
  - (10) the experience, reputation, and ability of the lawyer or lawyers performing the services;
  - (11) whether the fee is fixed or contingent;
  - (12) the time and labor required;
  - (13) whether the client gave informed consent\* to the fee.
- (c) A lawyer shall not make an agreement for, charge, or collect:
  - (1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or

- (2) a contingent fee for representing a defendant in a criminal case.
- (d) A lawyer may make an agreement for, charge, or collect a fee that is denominated as “earned on receipt” or “non-refundable,” or in similar terms, only if the fee is a true retainer and the client agrees in writing\* after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer’s availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.
- (e) A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services. A flat fee is a fixed amount that constitutes complete payment for the performance of described services regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the lawyer providing those services.

## **Comment**

### *Prohibited Contingent Fees*

[1] Paragraph (c)(1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under child or spousal support or other financial orders.

### *Payment of Fees in Advance of Services*

[2] Rule 1.15(a) and (b) govern whether a lawyer must deposit in a trust account a fee paid in advance.

[3] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. See Rule 1.16(e)(2).

### *Division of Fee*

[4] A division of fees among lawyers is governed by Rule 1.5.1.

### *Written Fee Agreements*

[5] Some fee agreements must be in writing\* to be enforceable. See, e.g., Business and Professions Code §§ 6147 and 6148.

**Rule 1.7 [3-310] Conflict of Interest: Current Clients**  
**(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) A lawyer shall not, without informed written consent\* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.
- (b) A lawyer shall not, without informed written consent\* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,\* or by the lawyer's own interests.
- (c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written\* disclosure of the relationship to the client and compliance with paragraph (d) where:
  - (1) the lawyer has, or knows\* that another lawyer in the lawyer's firm\* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or
  - (2) the lawyer knows\* or reasonably should know\* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm,\* or has an intimate personal relationship with the lawyer.
- (d) Representation is permitted under this Rule only if the lawyer complies with paragraphs (a), (b), and (c), and:
  - (1) the lawyer reasonably believes\* that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law; and
  - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

**Comment**

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent.\* Thus, absent consent, a lawyer may not act as an advocate in one matter against a person\* the lawyer represents in some other matter, even when the matters are wholly unrelated. *See Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. A directly adverse conflict under paragraph (a) can arise in a number of ways, for example, when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict; (ii) a lawyer, while representing a client, accepts in another matter the representation of a person\* or organization who, in the first matter, is directly adverse to the lawyer's client; or (iii) a lawyer accepts representation of a person in a matter in which an opposing party is a client of the lawyer or the lawyer's law firm\*. Similarly, direct adversity can arise when a lawyer cross-

examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require informed written consent\* of the respective clients.

[2] For purposes of this Rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons\*, or a discrete and identifiable class of persons.\*

[3] Paragraphs (a) and (b) apply to all types of legal representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners\* or a corporation for several shareholders, the preparation of a pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. If a lawyer initially represents multiple clients with the informed written consent\* as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients, the lawyer must obtain further informed written consent\* of the clients under paragraph (a).

[4] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) of predecessor rule 3-310 was violated when a lawyer, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, paragraph (a) does not apply with respect to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[5] Even where there is no direct adversity, a conflict of interest requiring informed written consent\* under paragraph (b) exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal. For example, a lawyer's obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture, may materially limit the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients. The risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.\* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably\* should be pursued on behalf of each client. The risk that the lawyer's representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer's firm\*, with a party, a witness, or another person\* who may be affected substantially\* by the resolution of the matter.

[6] Paragraph (c) requires written\* disclosure of any of the specified relationships even if there is not a significant risk the relationship will materially limit the lawyer's representation of

the client. However, if the particular circumstances present a significant risk the relationship will materially limit the lawyer's representation of the client, informed written consent\* is required under paragraph (b).

[7] Ordinarily paragraphs (a) and (b) will not require informed written consent\* simply because a lawyer takes inconsistent legal positions in different tribunals at different times on behalf of different clients. Advocating a legal position on behalf of a client that might create precedent adverse to the interests of another client represented by a lawyer in an unrelated matter is not sufficient, standing alone, to create a conflict of interest requiring informed written consent.\* Informed written consent\* may be required, however, if there is a significant risk that: (i) the lawyer may temper the lawyer's advocacy on behalf of one client out of concern about creating precedent adverse to the interest of another client; or (ii) the lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case, for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients' informed written consent\* is required include: the courts and jurisdictions where the different cases are pending, whether a ruling in one case would have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable\* expectations in retaining the lawyer.

[8] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent\* or provide the information required to permit representation under this Rule. (See, e.g., Bus. & Prof. Code § 6068(e)(1) and Rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of this Rule is likewise precluded.

[9] Paragraph (d) imposes conditions that must be satisfied even if informed written consent\* is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing\* as required by paragraph (c). There are some matters in which the conflicts are such that even informed written consent\* may not suffice to permit representation. (*See Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

[10] This Rule does not preclude an informed written consent\* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably\* understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably\* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably\* understands the risks involved in giving consent. An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

[11] A material change in circumstances relevant to application of this Rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written

consents.\* In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the clients from whose representation the lawyer has withdrawn. See Rule 1.9(c).

[12] For special rules governing membership in a legal service organization, see Rule 6.3; and for work in conjunction with certain limited legal services programs, see Rule 6.5.

**Rule 1.8.1 [3-300] Business Transactions with a Client and  
Pecuniary Interests Adverse to a Client  
(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

A lawyer shall not enter into a business transaction with a client, or knowingly\* acquire an ownership, possessory, security or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

- (a) the transaction or acquisition and its terms are fair and reasonable\* to the client and the lawyer fully discloses and transmits in writing\* to the client the terms and the lawyer's role in the transaction or acquisition in a manner that should reasonably\* have been understood by the client;
- (b) the client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing\* to seek the advice of an independent lawyer of the client's choice and is given a reasonable\* opportunity to seek that advice; and
- (c) the client thereafter provides informed written consent\* to the terms of the transaction or acquisition, and to the lawyer's role in it.

**Comment**

[1] A lawyer has an "other pecuniary interest adverse to a client" within the meaning of this Rule when the lawyer possesses a legal right to significantly impair or prejudice the client's rights or interests without court action. See *Fletcher v. Davis* (2004) 33 Cal.4th 61, 68 [14 Cal.Rptr.3d 58]. See also Business and Professions Code § 6175.3 (Sale of financial products to elder or dependent adult clients; Disclosure) and Family Code §§ 2033-2034 (Attorney lien on community real property). However, this Rule does not apply to a charging lien given to secure payment of a contingency fee. See *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38 [108 Cal.Rptr.3d 455].

[2] For purposes of this Rule, factors that can be considered in determining whether a lawyer is independent include whether the lawyer: (i) has a financial interest in the transaction or acquisition, and (ii) has a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent.

[3] Fairness and reasonableness under paragraph (a) are measured at the time of the transaction or acquisition based on the facts that then exist.

[4] In some circumstances, this Rule may apply to a transaction entered into with a former client. Compare *Hunnicutt v. State Bar* (1988) 44 Cal.3d 362, 370-71 ("[W]hen an attorney enters into a transaction with a former client regarding a fund which resulted from the attorney's representation, it is reasonable\* to examine the relationship between the parties for indications of special trust resulting therefrom. We conclude that if there is evidence that the client placed his trust in the attorney because of the representation, an attorney-client relationship exists for the purposes of [the predecessor rule] even if the representation has otherwise ended [and] It appears that [the client] became a

target of [the lawyer's] solicitation because he knew, through his representation of her, that she had recently received the settlement fund [and the court also found the client to be unsophisticated].") and *Wallis v. State Bar* (1942) 21 Cal.2d 322 (finding lawyer not subject to discipline for entering into business transaction with a former client where the former client was a sophisticated businesswoman who had actively negotiated for terms she thought desirable, and the transaction was not connected with the matter on which the lawyer previously represented her).

[5] This Rule does not apply to the agreement by which the lawyer is retained by the client, unless the agreement confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by Rule 1.5. This Rule also does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees, or costs or other expenses, to be incurred in the future. Such agreements are governed, in part, by Rules 1.5 and 1.15.

[6] This Rule does not apply: (i) where a lawyer and client each make an investment on terms offered by a third person\* to the general public or a significant portion thereof; or (ii) to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client.



**Rule 1.8.3 [4-400] Gifts From Client**  
**(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) A lawyer shall not:
- (1) solicit a client to make a substantial\* gift, including a testamentary gift, to the lawyer or a person\* related to the lawyer, unless the lawyer or other recipient of the gift is related to the client, or
  - (2) prepare on behalf of a client an instrument giving the lawyer or a person\* related to the lawyer any substantial\* gift, unless (i) the lawyer or other recipient of the gift is related to the client or (ii) the client has been advised by an independent lawyer who has provided a certificate of independent review that complies with the requirements of Probate Code § 21384.
- (b) For purposes of this Rule, related persons\* include a person\* who is “related by blood or affinity” as that term is defined in California Probate Code § 21374(a).

**Comment**

[1] A lawyer or a person\* related to a lawyer may accept a gift from the lawyer's client, subject to general standards of fairness and absence of undue influence. A lawyer also does not violate this Rule merely by engaging in conduct that might result in a client making a gift, such as by sending the client a wedding announcement. Discipline is appropriate where impermissible influence occurs. See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].

[2] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner\* or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Such appointments, however, will be subject to Rule 1.7(b) and (c).

**Rule 1.8.5 [4-210] Payment of Personal or Business Expenses  
Incurred by or for a Client  
(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer's law firm\* will pay the personal or business expenses of a prospective or existing client.
- (b) Notwithstanding paragraph (a), a lawyer may:
  - (1) pay or agree to pay such expenses to third persons,\* from funds collected or to be collected for the client as a result of the representation, with the consent of the client;
  - (2) after the lawyer is retained by the client, agree to lend money to the client based on the client's written\* promise to repay the loan, provided the lawyer complies with Rules 1.7(b), 1.7(c), and 1.8.1 before making the loan or agreeing to do so;
  - (3) advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter; and
  - (4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent person\* in a matter in which the lawyer represents the client.
- (c) "Costs" within the meaning of paragraphs (b)(3) and (b)(4) are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court but may include any reasonable\* expenses of litigation, including court costs, and reasonable\* expenses in preparing for litigation or in providing other legal services to the client.
- (d) Nothing in this Rule shall be deemed to limit the application of Rule 1.8.9.

**Rule 1.8.7 [3-310] Aggregate Settlements**  
**(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) A lawyer who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent.\* The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person\* in the settlement.
- (b) This Rule does not apply to class action settlements subject to court approval.

**Rule 1.8.10 [3-120] Sexual Relations With Current Client**  
**(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) A lawyer shall not engage in sexual relations with a current client who is not the lawyer's spouse or registered domestic partner, unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.
- (b) For purposes of this Rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person\* for the purpose of sexual arousal, gratification, or abuse.
- (c) If a person\* other than the client alleges a violation of this Rule, no Notice of Disciplinary Charges may be filed by the State Bar against a lawyer under this Rule until the State Bar has attempted to obtain the client's statement regarding, and has considered, whether the client would be unduly burdened by further investigation or a charge.

**Comment**

[1] Although this Rule does not apply to a consensual sexual relationship that exists when a lawyer-client relationship commences, the lawyer nevertheless must comply with all other applicable rules. See, e.g., Rules 1.1, 1.7, and 2.1.

[2] When the client is an organization, this Rule applies to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. See Rule 1.13.

[3] Business and Professions Code § 6106.9, including the requirement that the complaint be verified, applies to charges under subdivision (a) of that section. This Rule and the statute impose different obligations.

**Rule 1.9 [3-310(E)] Duties To Former Clients**  
**(Commission's Proposed Rule Adopted on January 20, 2017 –**  
**Redline to Public Comment Draft Version)**

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person\* in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.\*
- (b) A lawyer shall not knowingly\* represent a person\* in the same or a substantially related matter in which a firm\* with which the lawyer formerly was associated had previously represented a client
  - (1) whose interests are materially adverse to that person; and
  - (2) about whom the lawyer had acquired information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;unless the former client gives informed written consent.\*
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm\* has formerly represented a client in a matter shall not thereafter:
  - (1) use information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known;\*
  - (2) reveal information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules or the State Bar Act permit with respect to a current client.

**Comment**

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client and (ii) a lawyer who has prosecuted an accused person\* could not represent the accused in a subsequent civil action against the government concerning the same matter. See also Business and Professions Code § 6131 and 18 U.S.C. § 207(a). These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

[2] For what constitutes a "matter" for purposes of this Rule, see Rule 1.7, Comment [2].

[3] Two matters are “the same or substantially related” for purposes of this Rule if they involve a substantial\* risk of a violation of one of the two duties to a former client described above in Comment [1]. For example, this will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior representation that is protected by Business and Professions Code § 6068(e) and Rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.

[4] Paragraph (b) addresses a lawyer’s duties to a client who has become a former client because the lawyer no longer is associated with the law firm\* that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm\* acquired no knowledge or information relating to a particular client of the firm,\* and that lawyer later joined another firm,\* neither the lawyer individually nor lawyers in the second firm\* would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on lawyers in a firm\* once a lawyer has terminated association with the firm.\*

[5] The fact that information can be discovered in a public record does not, by itself, render that information generally known\* under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[6] With regard to the effectiveness of an advance consent, see Rule 1.7, Comment [10]. With regard to imputation of conflicts to lawyers in a firm\* with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

**Rule 1.11 Special Conflicts of Interest for Former and Current Government  
Officials and Employees  
(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public official or employee of the government:
  - (1) is subject to Rule 1.9(c); and
  - (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public official or employee, unless the appropriate government agency gives its informed written consent\* to the representation. This paragraph shall not apply to matters governed by Rule 1.12(a).
- (b) When a lawyer is prohibited from representation under paragraph (a), no lawyer in a firm\* with which that lawyer is associated may knowingly\* undertake or continue representation in such a matter unless:
  - (1) the personally prohibited lawyer is timely screened\* from any participation in the matter and is apportioned no part of the fee therefrom; and
  - (2) written\* notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule
- (c) Except as law may otherwise expressly permit, a lawyer who was a public official or employee and, during that employment, acquired information that the lawyer knows\* is confidential government information about a person,\* may not represent a private client whose interests are adverse to that person\* in a matter in which the information could be used to the material disadvantage of that person.\* As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority, that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public, or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the personally prohibited lawyer is timely screened\* from any participation in the matter and is apportioned no part of the fee therefrom.
- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public official or employee:
  - (1) is subject to Rules 1.7 and 1.9; and
  - (2) shall not:
    - (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment,

unless the appropriate government agency gives its informed written consent;\* or

- (ii) negotiate for private employment with any person\* who is involved as a party, or as a lawyer for a party, or with a law firm\* for a party, in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

## **Comment**

[1] Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule.

[2] For what constitutes a “matter” for purposes of this Rule, see Rule 1.7, Comment [2].

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client. Both provisions apply when the former public official or employee of the government has personally and substantially participated in the matter. Personal participation includes both direct participation and the supervision of a subordinate’s participation. Substantial participation requires that the lawyer’s involvement be of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. Personal and substantial participation may occur when, for example, a lawyer participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter.

[4] By requiring a former government lawyer to comply with Rule 1.9(c), paragraph (a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. This provision applies regardless of whether the lawyer was working in a “legal” capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by paragraph (a)(1).

[5] Paragraph (c) operates only when the lawyer in question has actual knowledge of the information; it does not operate with respect to information that merely could be imputed to the lawyer.

[6] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. Because conflicts of interest are governed by paragraphs (a) and (b), the latter agency is required to screen the lawyer.



Whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13, Comment [6]. See also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70, 76-78 [209 Cal.Rptr. 159].

[7] Paragraphs (b) and (c) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[8] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[9] A lawyer serving as a public official or employee of the government may participate in a matter in which the lawyer participated substantially while in private practice or non-governmental employment only if: (i) the government agency gives its informed written consent\* as required by subparagraph (d)(2)(i); and (ii) the former client gives its informed written consent\* as required by Rule 1.9, to which the lawyer is subject by subparagraph (d)(1).

[10] This Rule is not intended to address whether in a particular matter: (i) a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency or (ii) the use of a timely screen will avoid that imputation. The imputation and screening rules for lawyers moving from private practice into government service under paragraph (d) are left to be addressed by case law and its development. See *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th at 847, 851-54 [43 Cal.Rptr.3d 776] and *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 26-27 [18 Cal.Rptr.3d 403]. Regarding the standards for recusals of prosecutors in criminal matters, see Penal Code § 1424; *Haraguchi v. Superior Court* (2008) 43 Cal. 4th 706, 711-20 [76 Cal.Rptr.3d 250]; and *Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 727-35 [76 Cal.Rptr.3d 264]. Concerning prohibitions against former prosecutors participating in matters in which they served or participated in as prosecutor, see, e.g., Business and Professions Code § 6131 and 18 U.S.C. § 207(a).

**Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral  
(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, judicial staff attorney or law clerk to such a person\* or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed written consent.\*
- (b) A lawyer shall not participate in discussions regarding prospective employment with any person\* who is involved as a party or as lawyer for a party, or with a law firm\* for a party, in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a judicial staff attorney or law clerk to a judge or other adjudicative officer may participate in discussions regarding prospective employment with a party, or with a lawyer or a law firm\* for a party, in a matter in which the staff attorney or clerk is participating substantially, but only with the approval of the court.
- (c) If a lawyer is prohibited from representation by paragraph (a), other lawyers in a firm\* with which that lawyer is associated may knowingly\* undertake or continue representation in the matter only if:
  - (1) the prohibition does not arise from the lawyer's service as a mediator or settlement judge;
  - (2) the prohibited lawyer is timely screened\* from any participation in the matter and is apportioned no part of the fee therefrom; and
  - (3) written\* notice is promptly given to the parties and any appropriate tribunal\* to enable them to ascertain compliance with the provisions of this Rule.
- (d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

**Comment**

[1] Paragraphs (a) and (b) apply when a former judge or other adjudicative officer, or a judicial staff attorney or law clerk to such a person,\* or an arbitrator, mediator or other third-party neutral, has personally and substantially participated in the matter. Personal participation includes both direct participation and the supervision of a subordinate's participation, as may occur in a chambers with several staff attorneys or law clerks. Substantial participation requires that the lawyer's involvement was of significance to the matter. Participation may be substantial even though it was not determinative of the outcome of a particular case or matter. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. Personal and substantial participation may occur when, for example, the lawyer

participated through decision, recommendation, or the rendering of advice on a particular case or matter. However, a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate, or acquire material confidential information. The fact that a former judge exercised administrative responsibility in a court also does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits, such as uncontested procedural duties typically performed by a presiding or supervising judge or justice. The term “adjudicative officer” includes such officials as judges pro tempore, referees and special masters.

[2] Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

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

**Rule 1.13 [3-600] Organization as Client**  
**(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.
- (b) If a lawyer representing an organization knows\* that a constituent is acting, intends to act or refuses to act in a matter related to the representation in a manner that the lawyer knows\* or reasonably should know\* is (i) a violation of a legal obligation to the organization or a violation of law reasonably\* imputable to the organization, and (ii) likely to result in substantial\* injury to the organization, the lawyer shall proceed as is reasonably\* necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes\* that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) In taking any action pursuant to paragraph (b), the lawyer shall not reveal information protected by Business and Professions Code § 6068(e).
- (d) If, despite the lawyer's actions in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or fails to act, in a manner that is a violation of a legal obligation to the organization or a violation of law reasonably\* imputable to the organization, and is likely to result in substantial\* injury to the organization, the lawyer shall continue to proceed as is reasonably\* necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.
- (e) A lawyer who reasonably believes\* that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), shall proceed as the lawyer reasonably believes\* necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
- (f) In dealing with an organization's constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows\* or reasonably should know\* that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its constituents, subject to the provisions of Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. If the organization's consent to the dual representation is required by any of these Rules, the consent

shall be given by an appropriate official, constituent, or body of the organization other than the individual who is to be represented, or by the shareholders.

## **Comment**

### *The Entity as the Client*

[1] This Rule applies to all forms of private, public and governmental organizations. See Comment [6]. An organizational client can only act through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. For purposes of this Rule, any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization.

[2] A lawyer ordinarily must accept decisions an organization's constituents make on behalf of the organization, even if the lawyer questions their utility or prudence. It is not within the lawyer's province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk. A lawyer, however, has a duty to inform the client of significant developments related to the representation under Business and Professions Code § 6068(m) and Rule 1.4. Even when a lawyer is not obligated to proceed in accordance with paragraph (b), the lawyer may refer to higher authority, including the organization's highest authority, matters that the lawyer reasonably believes\* are sufficiently important to refer in the best interest of the organization subject to Business and Professions Code § 6068(e) and Rule 1.6.

[3] Paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of that conduct. When a lawyer knows\* of the conduct, the lawyer's obligations under paragraph (b) are triggered when the lawyer knows\* or reasonably should know\* that the conduct is (i) a violation of a legal obligation to the organization, or a violation of law reasonably\* imputable to the organization, and (ii) likely to result in substantial\* injury to the organization.

[4] In determining how to proceed under paragraph (b), the lawyer should consider the seriousness of the violation and its potential consequences, the responsibility in the organization and the apparent motivation of the person\* involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, the lawyer may ask the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably\* conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the

lawyer has not communicated with the constituent. For the responsibility of a subordinate lawyer in representing an organization, see Rule 5.2.

[5] In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.

#### *Governmental Organizations*

[6] It is beyond the scope of this Rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency. Although in some circumstances the client may be a specific agency, it may also be a branch of government or the government as a whole. In a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. In addition, a governmental organization may establish internal organizational rules and procedures that identify an official, agency, organization, or other person\* to serve as the designated recipient of whistle-blower reports from the organization's lawyers, consistent with Business and Professions Code § 6068(e) and Rule 1.6. This Rule is not intended to limit that authority.

**Rule 1.14 Client with Diminished Capacity**  
**(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) Duties Owed Client with Diminished Capacity. When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably\* possible, maintain a normal lawyer-client relationship with the client.
- (b) Taking Protective Action on Behalf of a Client With Significantly Diminished Capacity.
  - (1) Except where the lawyer represents a minor, a client in a criminal matter, or a client who is the subject of a conservatorship proceeding or who has a guardian ad litem or other person\* legally entitled to act for the client, the lawyer may, but is not required to take protective action, provided the lawyer has obtained the client's consent as provided in paragraph (c) or (d), and the lawyer reasonably believes\* that:
    - (i) there is a significant risk that the client will suffer substantial\* physical, psychological, or financial harm unless protective action is taken,
    - (ii) the client has significantly diminished capacity such that the client is unable to understand and make adequately considered decisions regarding the potential harm, and
    - (iii) the client cannot adequately act in the client's own interest.
  - (2) Information relating to the client's diminished capacity is protected by Business and Professions Code § 6068(e)(1) and Rule 1.6. In taking protective action as authorized by this paragraph, the lawyer must:
    - (i) act in the client's best interest, and
    - (ii) disclose no more information than is reasonably\* necessary to protect the client from substantial\* physical, psychological, or financial harm, given the information known\* to the lawyer at the time of disclosure.
- (c) Obtaining Consent To Take Protective Action.
  - (1) Before taking protective action as authorized by paragraph (b), a lawyer must take all steps reasonably\* necessary to preserve client confidentiality and decision-making authority, which includes:
    - (i) explaining to the client the need to take protective action, and

- (ii) obtaining the client's consent to take the protective action.
- (2) In seeking the consent of a client to take protective action under paragraph (b), the lawyer may obtain the assistance of an appropriate person\* to assist the lawyer in communicating with the client. In obtaining such assistance, the lawyer must:
  - (i) act in the client's best interest;
  - (ii) disclose no more information than is reasonably\* necessary to protect the client from substantial\* physical, psychological, or financial harm, given the information known\* to the lawyer at the time of disclosure; and
  - (iii) take all reasonable\* steps to ensure that the information disclosed remains confidential.
- (d) Obtaining Advance Informed Written Consent\* to Take Protective Action. A lawyer may obtain a client's advance informed written consent\* to take protective action in the event the circumstances set forth in paragraphs (b)(1)(i) – (iii) should later occur. The advance consent must be in a separate writing\* signed by the client and must include the following written\* disclosures:
  - (1) the authorization to take protective action is valid only when the lawyer reasonably believes\* that the circumstances set forth in (b)(1)(i) – (iii) are present; and
  - (2) the client retains the right to revoke or modify the advance consent at any time.
- (e) Restrictions on Lawyer's Actions. This Rule does not authorize the lawyer to take:
  - (1) any action that is adverse to the client, including the filing of a conservatorship petition or other similar action;
  - (2) any action on behalf of a person\* other than the client that the lawyer would not be permitted to take under Rule 1.7 or 1.9; or
  - (3) any action that would violate the client's right to due process of law under the United States or California Constitutions, or the California Probate Code.
- (f) Definitions. For purposes of this Rule:
  - (1) "Protective action" means to take action to protect the client's interests by:



- (i) notifying an individual or organization that has the ability to take action to protect the client, or
  - (ii) seeking to have a guardian ad litem appointed.
- (g) Discipline. A lawyer who does not take protective action as permitted by paragraph (b) does not violate this Rule.

## **Comment**

[1] The purpose of this Rule is to allow a lawyer to act competently on behalf of a client with significantly diminished capacity, to further the client's goals in the representation, and to protect the client's interests.

[2] A client with significantly diminished capacity, such that the client cannot make adequately considered decisions regarding potential harm, may have the ability to understand, deliberate upon, express preferences concerning, and reach conclusions about matters affecting the client's own well-being, including the ability to provide consent. (See Prob. Code § 810.)

[3] In determining whether a client has significantly diminished capacity such that the client is unable to make adequately considered decisions, a lawyer should consider the factors in Probate Code §§ 811 and 812. A lawyer may also seek information or guidance from an appropriate diagnostician or other qualified medical service provider. In doing so, the lawyer may not reveal client confidential information without the client's authorization or except as otherwise permitted by these Rules. See Business and Professions Code § 6068(e)(2) and Rule 1.6(b).

[4] Where it is reasonably\* foreseeable that a client may suffer from significantly diminished capacity in the future such that the client will likely be unable to make adequately considered decisions, the lawyer may have an obligation to explain to the client the need to take measures to protect the client's interests, including using voluntary surrogate decision-making tools such as durable powers of attorney and seeking assistance from family members, support groups and professional services with the client's informed written consent.\* See Rule 1.4.

[5] In taking protective action as permitted by paragraph (b), a lawyer may not substitute his or her own judgment in deciding what is in the client's best interest but must abide by the client's expressed interests and decisions concerning the objectives of the representation. Paragraph (b) does not apply if the lawyer is unable to ascertain the client's expressed interests and objectives.

[6] In obtaining the assistance of another person\* such as a trained professional to assist in communicating with and furthering the interests of the client pursuant to paragraph (c), the lawyer must look to the client, and not the other person,\* for authorization to take protective measures on the client's behalf. See Evidence Code § 952. The lawyer must advise the person\* who assists the lawyer that the person\* is not

authorized to disclose information protected by Business and Professions Code § 6068(e)(1) and Rule 1.6 to any third person.\*

[7] Paragraph (b) does not apply in the case of a client who is (i) a minor, (ii) involved in a criminal matter, (iii) is the subject of a conservatorship; or (iv) has a guardian or other person\* legally entitled to act for the client. The rights of such persons\* are regulated under other statutory schemes. See Family Code § 3150; Penal Code § 1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions Code Division 5, Part 1, § 5000-5579; Probate Code, Division 4, Parts 1-8, § 1400-3803; and Code of Civil Procedure §§ 372-376.

**Rule 1.15 [4-100] Safekeeping Funds and Property of Clients and Other Persons  
(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) All funds received or held by a lawyer or law firm\* for the benefit of a client, or other person\* to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account" or words of similar import, maintained in the State of California, or, with written\* consent of the client, in any other jurisdiction where there is a substantial\* relationship between the client or the client's business and the other jurisdiction.
- (b) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided:
  - (1) the lawyer or law firm\* discloses to the client in writing\* (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed; and
  - (2) if the flat fee exceeds \$1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing\* signed by the client.
- (c) Funds belonging to the lawyer or the law firm\* shall not be deposited or otherwise commingled with funds held in a trust account except:
  - (1) funds reasonably\* sufficient to pay bank charges; and
  - (2) funds belonging in part to a client or other person\* and in part presently or potentially to the lawyer or the law firm,\* in which case the portion belonging to the lawyer or law firm\* must be withdrawn at the earliest reasonable\* time after the lawyer or law firm's interest in that portion becomes fixed. However, if a client or other person\* disputes the lawyer or law firm's right to receive a portion of trust funds, the disputed portion shall not be withdrawn until the dispute is finally resolved.
- (d) A lawyer shall:
  - (1) promptly notify a client or other person\* of the receipt of funds, securities, or other property in which the lawyer knows\* or reasonably should know\* the client or other person\* has an interest;
  - (2) identify and label securities and properties of a client or other person\* promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

- (3) maintain complete records of all funds, securities, and other property of a client or other person\* coming into the possession of the lawyer or law firm\*;
  - (4) promptly account in writing\* to the client or other person\* for whom the lawyer holds funds or property;
  - (5) preserve records of all funds and property held by a lawyer or law firm\* under this Rule for a period of no less than five years after final appropriate distribution of such funds or property;
  - (6) comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar; and
  - (7) promptly distribute, as requested by the client or other person,\* any undisputed funds or property in the possession of the lawyer or law firm\* that the client or other person\* is entitled to receive.
- (e) The Board of Trustees of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by lawyers and law firms\* in accordance with subparagraph (d)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

*Standards:*

Pursuant to this Rule, the Board of Trustees of the State Bar adopted the following standards, effective \_\_\_\_\_, as to what "records" shall be maintained by lawyers and law firms\* in accordance with subparagraph (d)(3).

- (1) A lawyer shall, from the date of receipt of funds of the client or other person\* through the period ending five years from the date of appropriate disbursement of such funds, maintain:
  - (a) a written\* ledger for each client or other person\* on whose behalf funds are held that sets forth:
    - (i) the name of such client or other person,
    - (ii) the date, amount and source of all funds received on behalf of such client or other person,
    - (iii) the date, amount, payee and purpose of each disbursement made on behalf of such client or other person,\* and
    - (iv) the current balance for such client or other person;
  - (b) a written\* journal for each bank account that sets forth:

- (i) the name of such account,
  - (ii) the date, amount and client affected by each debit and credit, and
  - (iii) the current balance in such account;
- (c) all bank statements and cancelled checks for each bank account; and
- (d) each monthly reconciliation (balancing) of (a), (b), and (c).
- (2) A lawyer shall, from the date of receipt of all securities and other properties held for the benefit of client or other person\* through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written\* journal that specifies:
  - (a) each item of security and property held;
  - (b) the person\* on whose behalf the security or property is held;
  - (c) the date of receipt of the security or property;
  - (d) the date of distribution of the security or property; and
  - (e) person\* to whom the security or property was distributed.

### **Comment**

[1] Whether a lawyer owes a contractual, statutory or other legal duty under paragraph (a) to hold funds on behalf of a person\* other than a client in situations where client funds are subject to a third-party lien will depend on the relationship between the lawyer and the third-party, whether the lawyer has assumed a contractual obligation to the third person\* and whether the lawyer has an independent obligation to honor the lien under a statute or other law. In certain circumstances, a lawyer may be civilly liable when the lawyer has notice of a lien and disburses funds in contravention of the lien. See *Kaiser Foundation Health Plan, Inc. v. Aguiluz* (1996) 47 Cal.App.4th 302 [54 Cal.Rptr.2d 665]. However, civil liability by itself does not establish a violation of this Rule. Compare *Johnstone v. State Bar of California* (1966) 64 Cal.2d 153, 155-156 [49 Cal.Rptr. 97] (“When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct.”) and *Crooks v. State Bar* (1970) 3 Cal.3d 346, 358 [90 Cal.Rptr. 600] (lawyer who agrees to act as escrow or stakeholder for a client and a third-party owes a duty to the nonclient with regard to held funds).

[2] As used in this Rule, “advances for fees” means a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client's behalf. With respect to the difference between a true retainer and a flat fee, which is one type of advance fee, see Rule 1.5(d) and (e). Subject to Rule

1.5, a lawyer or law firm\* may enter into an agreement that defines when or how an advance fee is earned and may be withdrawn from the client trust account.

[3] Absent written\* disclosure and the client's agreement in a writing\* signed by the client as provided in paragraph (b), a lawyer must deposit a flat fee paid in advance of legal services in the lawyer's trust account. Paragraph (b) does not apply to advance payment for costs and expenses. Paragraph (b) does not alter the lawyer's obligations under paragraph (d) or the lawyer's burden to establish that the fee has been earned.

**Rule 1.16 [3-700] Declining Or Terminating Representation**  
**(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
  - (1) the lawyer knows\* or reasonably should know\* that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;
  - (2) the lawyer knows\* or reasonably should know\* that the representation will result in violation of these Rules or of the State Bar Act;
  - (3) the lawyer's mental or physical condition renders it unreasonably difficult to carry out the representation effectively; or
  - (4) the client discharges the lawyer.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
  - (1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
  - (2) 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) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent;\*
  - (4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively;
  - (5) the client breaches a material term of an agreement with, or obligation, to the lawyer relating to the representation, and the lawyer has given the client a reasonable\* warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;
  - (6) the client knowingly\* and freely assents to termination of the representation;
  - (7) the inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal;

- (8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;
  - (9) a continuation of the representation is likely to result in a violation of these Rules or the State Bar Act; or
  - (10) the lawyer believes\* in good faith, in a proceeding pending before a tribunal,\* that the tribunal\* will find the existence of other good cause for withdrawal.
- (c) If permission for termination of a representation is required by the rules of a tribunal,\* a lawyer shall not terminate a representation before that tribunal\* without its permission.
- (d) A lawyer shall not terminate a representation until the lawyer has taken reasonable\* steps to avoid reasonably\* foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).
- (e) Upon the termination of a representation for any reason:
- (1) subject to any applicable protective order, non-disclosure agreement, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings,\* exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably\* necessary to the client's representation, whether the client has paid for them or not; and
  - (2) the lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

## Comment

[1] This Rule applies, without limitation, to a sale of a law practice under Rule 1.17. A lawyer can be subject to discipline for improperly threatening to terminate a representation. See *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837.

[2] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under Rule 1.7, but that conflict might not arise in other representations of the client.



[3] Withdrawal under paragraph (a)(1) is not mandated where a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, defends the proceeding by requiring that every element of the case be established. See Rule 3.1(b).

[4] Lawyers must comply with their obligations to their clients under Business and Professions Code § 6068(e) and Rule 1.6, and to the courts under Rule 3.3 when seeking permission to withdraw under paragraph (c). If a tribunal\* denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. See Business and Professions Code §§ 6068(b) and 6103. This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with applicable California Rules of Court concerning limited scope representation satisfies paragraph (c).

[5] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. See, e.g., Penal Code §§ 1054.2 and 1054.10.

[6] Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding.

**Rule 1.17 [2-300] Sale of a Law Practice**  
**(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

All or substantially\* all of the law practice of a lawyer, living or deceased, including goodwill, may be sold to another lawyer or law firm\* subject to all the following conditions:

- (a) Fees charged to clients shall not be increased solely by reason of the sale.
- (b) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code § 6068(e)(1), then;
  - (1) if the seller is deceased, or has a conservator or other person\* acting in a representative capacity, and no lawyer has been appointed to act for the seller pursuant to Business and Professions Code § 6180.5, then prior to the transfer;
    - (i) the purchaser shall cause a written\* notice to be given to each client whose matter is included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client materials and property, as required by Rule 1.16(e)(1); and that if no response is received to the notice within 90 days after it is sent, or if the client's rights would be prejudiced by a failure of the purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client, and
    - (ii) the purchaser shall obtain the written\* consent of the client. If reasonable\* efforts have been made to locate the client and no response to the paragraph (b)(1)(i) notice is received within 90 days, consent shall be presumed until otherwise notified by the client.
  - (2) in all other circumstances, not less than 90 days prior to the transfer;
    - (i) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code § 6180.5, shall cause a written\* notice to be given to each client whose matter is included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client materials and property, as required by Rule 1.16(e)(1); and that if no response is received to the notice within 90 days after it is sent, or if the client's rights would be prejudiced by a failure of the purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client, and

- (ii) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code § 6180.5, shall obtain the written\* consent of the client prior to the transfer. If reasonable\* efforts have been made to locate the client and no response to the paragraph (b)(2)(i) notice is received within 90 days, consent shall be presumed until otherwise notified by the client.
- (c) If substitution is required by the rules of a tribunal\* in which a matter is pending, all steps necessary to substitute a lawyer shall be taken.
- (d) The purchaser shall comply with the applicable requirements of Rules 1.7 and 1.9.
- (e) Confidential information shall not be disclosed to a nonlawyer in connection with a sale under this Rule.
- (f) This Rule does not apply to the admission to or retirement from a law firm,\* retirement plans and similar arrangements, or sale of tangible assets of a law practice.

### **Comment**

[1] The requirement that the sale be of “all or substantially\* all of the law practice of a lawyer” prohibits the sale of only a field or area of practice or the seller’s practice in a geographical area or in a particular jurisdiction. The prohibition against the sale of less than all or substantially\* all of a practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial\* fee-generating matters. The purchasers are required to undertake all client matters sold in the transaction, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

[2] Under paragraph (a), the purchaser must honor existing arrangements between the seller and the client as to fees and scope of work and the sale may not be financed by increasing fees charged for client matters transferred through the sale. However, fee increases or other changes to the fee arrangements might be justified by other factors, such as modifications of the purchaser’s responsibilities, the passage of time, or reasonable\* costs that were not addressed in the original agreement. Any such modifications must comply with Rules 1.4 and 1.5 and other relevant provisions of these Rules and the State Bar Act.

[3] Transfer of individual client matters, where permitted, is governed by Rule 1.5.1. Payment of a fee to a nonlawyer broker for arranging the sale or purchase of a law practice is governed by Rule 5.4(a).

**Rule 1.18 Duties To Prospective Client**  
**(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) A person\* who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity, is a prospective client.
- (b) Even when no lawyer-client relationship ensues, a lawyer who has communicated with a prospective client shall not use or reveal information protected by Business and Professions Code § 6068(e) and Rule 1.6 that the lawyer learned as a result of the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received from the prospective client information protected by Business and Professions Code § 6068(e) and Rule 1.6 that is material to the matter, except as provided in paragraph (d). If a lawyer is prohibited from representation under this paragraph, no lawyer in a firm\* with which that lawyer is associated may knowingly\* undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When the lawyer has received information that prohibits representation as provided in paragraph (c), representation of the affected client is permissible if:
  - (1) both the affected client and the prospective client have given informed written consent,\* or
  - (2) the lawyer who received the information took reasonable\* measures to avoid exposure to more information than was reasonably\* necessary to determine whether to represent the prospective client; and
    - (i) the prohibited lawyer is timely screened\* from any participation in the matter and is apportioned no part of the fee therefrom; and
    - (ii) written\* notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this Rule.

**Comment**

[1] As used in this Rule, a prospective client includes a person's authorized representative. A lawyer's discussions with a prospective client can be limited in time and depth and leave both the prospective client and the lawyer free, and sometimes required, to proceed no further. Although a prospective client's information is protected by Business and Professions Code § 6068(e) and Rule 1.6 the same as that of a client, in limited circumstances provided under paragraph (d), a law firm\* is permitted to accept or continue representation of a client with interests adverse to the prospective client.

This Rule is not intended to limit the application of Evidence Code § 951 (defining “client” within the meaning of the Evidence Code).

[2] Not all persons\* who communicate information to a lawyer are entitled to protection under this Rule. A person\* who by any means communicates information unilaterally to a lawyer, without reasonable\* expectation that the lawyer is willing to discuss the possibility of forming a lawyer-client relationship or provide legal advice is not a “prospective client” within the meaning of paragraph (a). In addition, a person\* who discloses information to a lawyer after the lawyer has stated his or her unwillingness or inability to consult with the person,\* (*People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456]), or who communicates information to a lawyer without a good faith intention to seek legal advice or representation, is not a prospective client within the meaning of paragraph (a).

[3] In order to avoid acquiring information from a prospective client that would prohibit representation as provided in paragraph (c), a lawyer considering whether or not to undertake a new matter must limit the initial interview to only such information as reasonably\* appears necessary for that purpose.

[4] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers in a law firm\* as provided in Rule 1.10. However, under paragraph (d)(1), the consequences of imputation may be avoided if the informed written consent\* of both the prospective and affected clients is obtained. See Rule 1.0.1(e-1) (informed written consent\*). In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all prohibited lawyers are timely screened\* and written\* notice is promptly given to the prospective client. Paragraph (d)(2)(i) does not prohibit the screened\* lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is prohibited.

[5] Notice under paragraph (d)(2)(ii) must include a general description of the subject matter about which the lawyer was consulted, and the screening procedures employed.

**Rule 2.1 Advisor**  
**(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

**Comment**

[1] A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

[2] This Rule does not preclude a lawyer who renders advice from referring to considerations other than the law, such as moral, economic, social and political factors that may be relevant to the client's situation.

**Rule 3.1 [3-200] Meritorious Claims and Contentions**  
**(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) A lawyer shall not:
  - (1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or
  - (2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.
- (b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, may nevertheless defend the proceeding by requiring that every element of the case be established.

**Rule 3.3 [5-200] Candor Toward The Tribunal\***  
**(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) A lawyer shall not:
- (1) knowingly make a false statement of fact or law to a tribunal\* or fail to correct a false statement of material fact or law previously made to the tribunal\* by the lawyer;
  - (2) fail to disclose to the tribunal\* legal authority in the controlling jurisdiction known\* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly misquote to a tribunal\* the language of a book, statute, decision or other authority; or
  - (3) offer evidence that the lawyer knows\* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know\* of its falsity, the lawyer shall take reasonable\* remedial measures, including, if necessary, disclosure to the tribunal\*, unless disclosure is prohibited by Business and Professions Code § 6068(e) and Rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes\* is false.
- (b) A lawyer who represents a client in a proceeding before a tribunal\* 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 Business and Professions Code § 6068(e) and Rule 1.6.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first.
- (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.

**Comment**

[1] This Rule governs the conduct of a lawyer in proceedings of a tribunal\*, including ancillary proceedings such as a deposition conducted pursuant to a tribunal's authority. See Rule 1.0.1(m) for the definition of "tribunal."

[2] The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal\* by the lawyer.



### *Legal Argument*

[3] Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal\* sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court.

[4] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows\* that a client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered and, if unsuccessful, must refuse to offer the false evidence. If a criminal defendant insists on testifying, and the lawyer knows\* that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable\* efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. See, e.g., *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33]. The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

### *Remedial Measures*

[5] Reasonable\* remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable\* lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal.\* See, e.g., Rules 1.2.1, 1.4(a)(4), 1.16(a), and 8.4; Business and Professions Code §§ 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for the lawyer's decision to seek permission from the tribunal\* to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to protect under Business and Professions Code § 6068(e) and Rule 1.6.

### *Duration of Obligation*

[6] A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. However, there may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).

[7] Paragraph (d) does not apply to ex parte communications that are not otherwise prohibited by law or the tribunal.

### *Withdrawal*

[8] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation. The lawyer may, however, be

required by Rule 1.16 to seek permission of the tribunal\* to withdraw if the lawyer's compliance with this Rule results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these Rules. A lawyer must comply with Business and Professions Code § 6068(e) and Rule 1.6 with respect to a request to withdraw that is premised on a client's misconduct.

[9] In addition to this Rule, lawyers remain bound by Business and Professions Code §§ 6068(d) and 6106.

**Rule 3.5 [5-300 5-320] Contact With Judges, Officials, Employees, and Jurors  
(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) Except as permitted by statute, an applicable code of judicial ethics or code of judicial conduct, or standards governing employees of a tribunal,\* a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal.\* This Rule does not prohibit a lawyer from contributing to the campaign fund of a judge or judicial officer running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (b) Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a ruling of a tribunal,\* or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:
  - (1) in open court; or
  - (2) with the consent of all other counsel in the matter; or
  - (3) in the presence of all other counsel in the matter; or
  - (4) in writing\* with a copy thereof furnished to all other counsel in the matter; or
  - (5) in ex parte matters.
- (c) As used in this Rule, “judge” and “judicial officer” shall also include (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; (iv) members of an administrative body acting in an adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons\* 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.
- (d) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows\* to be a member of the venire from which the jury will be selected for trial of that case.
- (e) During trial a lawyer connected with the case shall not communicate directly or indirectly with any juror.
- (f) During trial a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows\* is a juror in the case.
- (g) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if:
  - (1) the communication is prohibited by law or court order;

- (2) the juror has made known\* to the lawyer a desire not to communicate;
  - (3) the communication involves misrepresentation, coercion, or duress, or is intended to harass or embarrass the juror or to influence the juror's actions in future jury service.
- (h) A lawyer shall not directly or indirectly conduct an out of court investigation of a person\* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person\* in connection with present or future jury service.
- (i) All restrictions imposed by this Rule also apply to communications with, or investigations of, members of the family of a person\* who is either a member of a venire or a juror.
- (j) A lawyer shall reveal promptly to the court improper conduct by a person\* who is either a member of a venire or a juror, or by another toward a person\* who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.
- (k) This Rule does not prohibit a lawyer from communicating with persons\* who are members of a venire or jurors as a part of the official proceedings.
- (l) For purposes of this Rule, "juror" means any empaneled, discharged, or excused juror.

### **Comment**

[1] An applicable code of judicial ethics or code of judicial conduct under this Rule includes the California Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of a tribunal\* not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics for the Court Employees of California and 5 U.S.C. § 7353 (Gifts to Federal employees).

[2] For guidance on permissible communications with a juror in a criminal action after discharge of the jury, see Code of Civil Procedure § 206.

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

**Rule 3.9 Advocate in Nonadjudicative Proceedings**  
**(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

A lawyer representing a client before a legislative body or administrative agency in connection with a pending nonadjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

**Comment**

This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. This Rule also does not apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4. This Rule does not require a lawyer to disclose a client's identity.

**Rule 4.2 [2-100] Communication With a Represented Person**  
**(Commission's Proposed Rule Adopted on January 20, 2017 –**  
**Clean Version)**

- (a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person\* the lawyer knows\* to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.
- (b) In the case of a represented corporation, partnership, association, or other private or governmental organization, this Rule prohibits communications with:
  - (1) A current officer, director, partner,\*or managing agent of the organization; or
  - (2) A current employee, member, agent, or other constituent of the organization, if the subject of the communication is any act or omission of such person\* in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability.
- (c) This Rule shall not prohibit:
  - (1) communications with a public official, board, committee, or body; or
  - (2) communications otherwise authorized by law or a court order.
- (d) For purposes of this Rule:
  - (1) “Managing agent” means an employee, member, agent, or other constituent of an organization with substantial\* discretionary authority over decisions that determine organizational policy.
  - (2) “Public official” means a public officer of the United States government, or of a state, county, city, town, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1).

**Comment**

[1] This Rule applies even though the represented person\* initiates or consents to the communication. A lawyer must immediately terminate communication with a person\* if, after commencing communication, the lawyer learns that the person\* is one with whom communication is not permitted by this Rule.

[2] “Subject of the representation,” “matter,” and “person” are not limited to a litigation context. This Rule applies to communications with any person,\* whether or not

a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[3] The prohibition against communicating “indirectly” with a person\* represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person\* through an intermediary such as an agent, investigator or the lawyer’s client. This Rule, however, does not prevent represented persons\* from communicating directly with one another with respect to the subject of the representation, nor does it prohibit a lawyer from advising a client concerning such a communication. A lawyer may also advise a client not to accept or engage in such communications. The Rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person\* in that matter.

[4] This Rule does not prohibit communications with a represented person\* concerning matters outside the representation. Similarly, a lawyer who knows\* that a person\* is being provided with limited scope representation is not prohibited from communicating with that person\* with respect to matters that are outside the scope of the limited representation. (See, e.g., Cal. Rules of Court, Rules 3.35 – 3.37; 5.425 (Limited Scope Representation).)

[5] This Rule does not prohibit communications initiated by a represented person\* seeking advice or representation from an independent lawyer of the person’s choice.

[6] If a current constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication is sufficient for purposes of this Rule.

[7] This Rule applies to all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations. When a lawyer communicates on behalf of a client with a governmental organization, or certain employees, members, agents, or other constituents of a governmental organization, however, special considerations exist as a result of the right to petition conferred by the First Amendment of the United States Constitution and Article I, § 3 of the California Constitution. Paragraph (c)(1) recognizes these special considerations by generally exempting from application of this Rule communications with public boards, committees, and bodies, and with public officials as defined in paragraph (d)(2) of this Rule. Communications with a governmental organization constituent who is not a public official, however, will remain subject to this Rule when the lawyer knows\* the governmental organization is represented in the matter and the communication with that constituent falls within paragraph (b)(2).

[8] Paragraph (c)(2) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person\* that would otherwise be subject to this Rule. Examples of such statutory schemes include those protecting the right of employees to organize and engage in collective bargaining, employee health and safety, and equal employment opportunity. The law also recognizes that

prosecutors and other government lawyers are authorized to contact represented persons,\* either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., *United States v. Carona* (9th Cir. 2011) 630 F.3d 917; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133.) The Rule is not intended to preclude communications with represented persons\* in the course of such legitimate investigative activities as authorized by law. This Rule also is not intended to preclude communications with represented persons\* in the course of legitimate investigative activities engaged in, directly or indirectly, by lawyers representing persons\* whom the government has accused of or is investigating for crimes, to the extent those investigative activities are authorized by law.

[9] A lawyer who communicates with a represented person\* pursuant to paragraph (c) is subject to other restrictions in communicating with the person. See, e.g. Business and Professions Code § 6106; *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1213 [7 Cal.Rptr.3d 119]; *In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798.



**Rule 4.3 Communicating with an Unrepresented Person**  
**(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) In communicating on behalf of a client with a person\* who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows\* or reasonably should know\* that the unrepresented person\* incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable\* efforts to correct the misunderstanding. If the lawyer knows\* or reasonably should know\* that the interests of the unrepresented person\* are in conflict with the interests of the client, the lawyer shall not give legal advice to that person,\* except that the lawyer may, but is not required to, advise the person\* to secure counsel.
- (b) In communicating on behalf of a client with a person\* who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows\* or reasonably should know\* the person\* may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

**Comment**

[1] This Rule is intended to protect unrepresented persons,\* whatever their interests, from being misled when communicating with a lawyer who is acting for a client.

[2] Paragraph (a) distinguishes between situations in which a lawyer knows\* or reasonably should know\* that the interests of an unrepresented person\* are in conflict with the interests of the lawyer's client and situations in which the lawyer does not. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any legal advice, apart from the advice to obtain counsel. A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person.\* So long as the lawyer discloses that the lawyer represents an adverse party and not the person,\* the lawyer may inform the person\* of the terms on which the lawyer's client will enter into the agreement or settle the matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document and the underlying legal obligations.

[3] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see Rule 8.4, Comment [5].

**Rule 4.4 Duties Concerning Inadvertently Transmitted Writings\***  
**(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

Where it is reasonably\* apparent to a lawyer who receives a writing\* relating to a lawyer's representation of a client that the writing\* was inadvertently sent or produced, and the lawyer knows\* or reasonably should know\* that the writing\* is privileged or subject to the work product doctrine, the lawyer shall:

- (a) refrain from examining the writing\* any more than is necessary to determine that it is privileged or subject to the work product doctrine, and
- (b) promptly notify the sender.

**Comment**

[1] If a lawyer determines this Rule applies to a transmitted writing,\* the lawyer should return the writing\* to the sender, seek to reach agreement with the sender regarding the disposition of the writing,\* or seek guidance from a tribunal.\* See *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758]. In providing notice required by this Rule, the lawyer shall comply with Rule 4.2.

[2] This Rule does not address the legal duties of a lawyer who receives a writing\* that the lawyer knows\* or reasonably should know\* may have been inappropriately disclosed by the sending person. See *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 [125 Cal.Rptr.3d 361].

**Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers**  
**(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) A lawyer who individually or together with other lawyers possesses managerial authority in a law firm,\* shall make reasonable\* efforts to ensure that the firm\* has in effect measures giving reasonable\* assurance that all lawyers in the firm\* comply with these Rules and the State Bar Act.
- (b) A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm,\* shall make reasonable\* efforts to ensure that the other lawyer complies with these Rules and the State Bar Act.
- (c) A lawyer shall be responsible for another lawyer's violation of these Rules and the State Bar Act if:
  - (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm\* in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm,\* and knows\* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable\* remedial action.

**Comment**

*Paragraph (a) – Duties Of Managerial Lawyers To Reasonably\* Assure Compliance with the Rules.*

[1] Paragraph (a) requires lawyers with managerial authority within a law firm\* to make reasonable\* efforts to establish internal policies and procedures designed, for example, to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[2] Whether particular measures or efforts satisfy the requirements of paragraph (a) might depend upon the law firm's structure and the nature of its practice, including the size of the law firm,\* whether it has more than one office location or practices in more than one jurisdiction, or whether the firm or its partners\* engage in any ancillary business.

[3] A partner,\* shareholder or other lawyer in a law firm\* who has intermediate managerial responsibilities satisfies paragraph (a) if the law firm\* has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. For example, the managing lawyer of an office of a multi-office law firm\* would not necessarily be required to promulgate firm-wide policies intended to reasonably\* assure

that the law firm's lawyers comply with the Rules or State Bar Act. However, a lawyer remains responsible to take corrective steps if the lawyer knows\* or reasonably should know\* that the delegated body or person\* is not providing or implementing measures as required by this Rule.

[4] Paragraph (a) also requires managerial lawyers to make reasonable\* efforts to assure that other lawyers in an agency or department comply with these Rules and the State Bar Act. This Rule contemplates, for example, the creation and implementation of reasonable\* guidelines relating to the assignment of cases and the distribution of workload among lawyers in a public sector legal agency or other legal department. See, e.g., State Bar of California, Guidelines on Indigent Defense Services Delivery Systems (2006).

*Paragraph (b) – Duties of Supervisory Lawyers*

[5] Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact.

*Paragraph (c) – Responsibility for Another's Lawyer's Violation*

[6] A lawyer will not be in violation of paragraph (c)(1) if the lawyer's decision to ratify a course of conduct is a reasonable\* resolution of an arguable question of professional responsibility.

[7] The appropriateness of remedial action under paragraph (c)(2) would depend on the nature and seriousness of the misconduct and the nature and immediacy of its harm. A managerial or supervisory lawyer must intervene to prevent avoidable consequences of misconduct if the lawyer knows\* that the misconduct occurred.

[8] A supervisory lawyer violates paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly\* directing or ratifying the conduct, or where feasible, failing to take reasonable\* remedial action.

[9] Paragraphs (a), (b), and (c) create independent bases for discipline. This Rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm.\* Apart from paragraph (c) of this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner,\* associate, or subordinate lawyer. The question of whether a lawyer can be liable civilly or criminally for another lawyer's conduct is beyond the scope of these Rules.

**Rule 5.3.1 [1-311] Employment of Disbarred,  
Suspended, Resigned, or Involuntarily Inactive Lawyer  
(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) For purposes of this Rule:
  - (1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;
  - (2) "Member" means a member of the State Bar of California.
  - (3) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code §§ 6007, 6203(d)(1), or California Rule of Court 9.31(d).
  - (4) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.
  - (5) "Ineligible person" means a member whose current status with the State Bar of California is disbarred, suspended, resigned, or involuntarily inactive.
- (b) A lawyer shall not employ, associate in practice with, or assist a person\* the lawyer knows\* or reasonably should know\* is an ineligible person to perform the following on behalf of the lawyer's client:
  - (1) Render legal consultation or advice to the client;
  - (2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;
  - (3) Appear as a representative of the client at a deposition or other discovery matter;
  - (4) Negotiate or transact any matter for or on behalf of the client with third parties;
  - (5) Receive, disburse or otherwise handle the client's funds; or
  - (6) Engage in activities that constitute the practice of law.
- (c) A lawyer may employ, associate in practice with, or assist an ineligible person to perform research, drafting or clerical activities, including but not limited to:

- (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;
  - (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or
  - (3) Accompanying an active lawyer in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active lawyer who will appear as the representative of the client.
- (d) Prior to or at the time of employing, associating in practice with, or assisting a person\* the lawyer knows\* or reasonably should know\* is an ineligible person, the lawyer shall serve upon the State Bar written\* notice of the employment, including a full description of such person's current bar status. The written\* notice shall also list the activities prohibited in paragraph (b) and state that the ineligible person will not perform such activities. The lawyer shall serve similar written\* notice upon each client on whose specific matter such person\* will work, prior to or at the time of employing, associating with, or assisting such person\* to work on the client's specific matter. The lawyer shall obtain proof of service of the client's written\* notice and shall retain such proof and a true and correct copy of the client's written\* notice for two years following termination of the lawyer's employment by the client.
- (e) A lawyer may, without client or State Bar notification, employ, associate in practice with, or assist an ineligible person whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.
- (f) When the lawyer no longer employs, associates in practice with, or assists the ineligible person, the lawyer shall promptly serve upon the State Bar written\* notice of the termination.

### **Comment**

If the client is an organization, the lawyer shall serve the notice required by paragraph (d) on its highest authorized officer, employee, or constituent overseeing the particular engagement. (See Rule 1.13.)

**Rule 5.6 [1-500] Restrictions on a Lawyer's Right to Practice  
(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) Unless authorized by law, a lawyer shall not participate in offering or making:
  - (1) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that: concerns benefits upon retirement, or
  - (2) an agreement that imposes a restriction on a lawyer's right to practice in connection with a settlement of a client controversy, or otherwise.
- (b) A lawyer shall not participate in offering or making an agreement which precludes the reporting of a violation of these rules.
- (c) This Rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

**Comment**

[1] Concerning the application of paragraph (a)(1), see Business and Professions Code § 16602; *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].

[2] Paragraph (a)(2) prohibits a lawyer from offering or agreeing not to represent other persons\* in connection with settling a claim on behalf of a client.

[3] This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

**Rule 7.1 [1-400] Communications Concerning A Lawyer's Services**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

- (a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.
- (b) The Board of Trustees of the State Bar may formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these Rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code §§ 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

**Comment**

[1] This Rule governs all communications of any type whatsoever about the lawyer or the lawyer's services, including advertising permitted by Rule 7.2. A communication includes any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm\* directed to any person.\*

[2] A communication that contains an express guarantee or warranty of the result of a particular representation is a false or misleading communication under this Rule. See also, Business and Professions Code § 6157.2(a).

[3] This Rule prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if it is presented in a manner that creates a substantial\* likelihood that it will lead a reasonable\* person\* to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable\* factual foundation. Any communication that states or implies "no fee without recovery" is also misleading unless the communication also expressly discloses whether or not the client will be liable for costs.

[4] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer, may be misleading if presented so as to lead a reasonable\* person\* to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable\* person\* to conclude that the comparison can be



substantiated. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations.

[5] This Rule prohibits a lawyer from making a communication that states or implies that the lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in that language or the communication also states in the language of the communication the employment title of the person\* who speaks such language.

[6] Rules 7.1 through 7.5 are not the sole basis for regulating communications concerning a lawyer's services. See, e.g., Business and Professions Code §§ 6150 – 6159.2 and 17000 et. seq. Other state or federal laws may also apply.

**Rule 8.1 [1-200] False Statement Regarding Application  
for Admission to Practice Law  
(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) An applicant for admission to practice law shall not, in connection with that person's own application for admission, make a statement of material fact that the lawyer knows\* to be false, or make such a statement with reckless disregard as to its truth or falsity.
- (b) A lawyer shall not, in connection with another person's application for admission to practice law, make a statement of material fact that the lawyer knows\* to be false.
- (c) An applicant for admission to practice law, or a lawyer in connection with an application for admission, shall not fail to disclose a fact necessary to correct a statement known by the applicant or the lawyer to have created a material misapprehension in the matter, except that this Rule does not authorize disclosure of information protected by Business and Professions Code § 6068(e) and Rule 1.6.
- (d) As used in this Rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; and any similar process relating to admission or certification to practice law in California or elsewhere.

**Comment**

[1] A person\* who makes a false statement in connection with that person's own application for admission to practice law may be subject to discipline under this Rule after that person\* has been admitted. See, e.g., *In re Gossage* (2000) 23 Cal.4th 1080 [99 Cal.Rptr.2d 130].

[2] A lawyer's duties with respect to a *pro hac vice* application or other application to a court for admission to practice law are governed by Rule 3.3.

[3] A lawyer representing an applicant for admission to practice law is governed by the rules applicable to the lawyer-client relationship, including Business and Professions Code § 6068(e)(1) and Rule 1.6. A lawyer representing a lawyer who is the subject of a disciplinary proceeding is not governed by this Rule but is subject to the requirements of Rule 3.3.

**Rule 8.4 [1-120] Misconduct**  
**(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

It is professional misconduct for a lawyer to:

- (a) violate these Rules or the State Bar Act, knowingly\* assist, solicit or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud,\* deceit or reckless or intentional misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules, the State Bar Act, or other law; or
- (f) knowingly\* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this Rule, “judge” and “judicial officer” have the same meaning as in Rule 3.5(c).

**Comment**

[1] A violation of this Rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

[2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code §§ 6101 et seq., or if the criminal act constitutes “other misconduct warranting discipline” as defined by California Supreme Court case law. See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].

[4] A lawyer may be disciplined under Business and Professions Code § 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules and the State Bar Act.

[6] This Rule does not prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution.

**Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation  
(Commission's Proposed Rule Adopted on January 20, 2017 – Clean Version)**

- (a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:
  - (1) unlawfully harass or unlawfully discriminate against persons\* on the basis of any protected characteristic; or
  - (2) unlawfully retaliate against persons.
- (b) In relation to a law firm's operations, a lawyer shall not:
  - (1) on the basis of any protected characteristic,
    - (i) unlawfully discriminate or knowingly\* permit unlawful discrimination;
    - (ii) unlawfully harass or knowingly\* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person\* providing services pursuant to a contract; or
    - (iii) unlawfully refuse to hire or employ a person,\* or refuse to select a person\* for a training program leading to employment, or bar or discharge a person\* from employment or from a training program leading to employment, or discriminate against a person\* in compensation or in terms, conditions, or privileges of employment; or
  - (2) unlawfully retaliate against persons.
- (c) For purposes of this rule:
  - (1) "protected characteristic" means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;
  - (2) "knowingly permit" means to fail to advocate corrective action where the lawyer knows\* of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);
  - (3) "unlawfully" and "unlawful" shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and

- (4) “retaliate” means to take adverse action against a person\* because that person\* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by paragraphs (a)(1) or (b)(1) of this Rule.
- (d) A lawyer who is the subject of a State Bar investigation or State Bar Court proceeding alleging a violation of this Rule shall promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding.
- (e) Upon being issued a notice of a disciplinary charge under this Rule, a lawyer shall:
  - (1) if the notice is of a disciplinary charge under paragraph (a) of this Rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review Section; or
  - (2) if the notice is of a disciplinary charge under paragraph (b) of this Rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.
- (f) This Rule shall not preclude a lawyer from:
  - (1) representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;
  - (2) declining or withdrawing from a representation as required or permitted by Rule 1.16; or
  - (3) providing advice and engaging in advocacy as otherwise required or permitted by these Rules and the State Bar Act.

## **Comment**

[1] Conduct that violates this Rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). In relation to a law firm’s operations, this Rule imposes on all law firm\* lawyers the responsibility to advocate corrective action to address known\* harassing or discriminatory conduct by the firm\* or any of its other lawyers or nonlawyer personnel. Law firm\* management and supervisory lawyers retain their separate responsibility under Rules 5.1 and 5.3. Neither this Rule nor Rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this Rule any responsibility to advocate corrective action.

[2] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Canon 3B(6) of the Code of Judicial Ethics providing, in part, that: “A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others.”) A lawyer does not violate paragraph (a) by referring to any particular status or group when the reference is relevant to factual or legal issues or arguments in the representation. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] A lawyer does not violate this Rule by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations. A lawyer also does not violate this Rule by otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law.

[4] This Rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution.

[5] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows\* of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer’s relationship to the lawyer or law firm\* implementing that policy or practice. For example, a law firm\* non-management and non-supervisory lawyer who becomes aware that the law firm\* is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm\* management lawyer who would have responsibility under Rule 5.1 or 5.3 to take reasonable\* remedial action upon becoming aware of a violation of this Rule.

[6] Paragraph (d) ensures that the State Bar and the State Bar Court will be provided with information regarding related proceedings that may be relevant in determining whether a State Bar investigation or a State Bar Court proceeding relating to a violation of this Rule should be abated.

[7] Paragraph (e) recognizes the public policy served by enforcement of laws and regulations prohibiting unlawful discrimination, by ensuring that the state and federal agencies with primary responsibility for coordinating the enforcement of those laws and regulations is provided with notice of any allegation of unlawful discrimination, harassment, or retaliation by a lawyer that the State Bar finds has sufficient merit to warrant issuance of a notice of a disciplinary charge.

[8] This Rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.

[9] A disciplinary investigation or proceeding for conduct coming within this Rule may also be initiated and maintained if such conduct warrants discipline under California Business and Professions Code §§ 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.