

**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.

**Commission Member Dissent, Submitted by Daniel Eaton,
on the Recommended Adoption of Proposed Rule 1.0**

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

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

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

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

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

By adding this Comment, the Commission also deviated from an additional aspect of Paragraph 5 of the Charter which directs us to use Comments "sparingly" to "elucidate"

the rule to which it is appended. This comment does not do that. Instead, it introduces a distinct concept altogether untethered to its Rule.

The proponents of this Comment admirably acknowledged that this Comment deviates from paragraphs 2 and 5 of the Charter. For me, that was enough to warrant its exclusion. The argument for including the Comment anyway that carried the day was that pro bono service ought to be mentioned somewhere in the disciplinary rules in order to concentrate the profession's collective mind on addressing the unmet need of a substantial underserved population. I am not convinced the approach the Commission took was sound.

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

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

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

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

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

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

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

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

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

This is a specific, enforceable way to induce more lawyers to provide substantial pro bono service to the economically less advantaged.¹ As one commentator put it after reviewing the demonstrated increase in pro bono service that resulted from Florida's mandatory reporting system, "a mandatory reporting system is the most efficient and effective policy to begin the process of narrowing the gap between demand for free legal aid and its availability." L. Boyle, "Meeting the Demands of the Indigent Population: The Choice Between Mandatory and Voluntary Pro Bono Requirements," 20 Geo. J. Legal Ethics 415 (2007). And such a Rule also would accord with each aspect of this Commission's Charter in a way that Comment 5 does not.

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

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

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

**Commission's Response to Dissent Submitted by Daniel Eaton
on the Recommended Adoption of Proposed Rule 1.0**

The Commission disagrees and believes Rule 1.0 is the functional equivalent of a preamble to the Rules and therefore is consistent with the Commission's Charter. The Commission acknowledges that raising the profile of a lawyer's pro bono responsibility in this new Comment does not create a duty enforceable by lawyer discipline. At the same time, the Comment also is mindful of the fact that Comment [5] will not promote the unfair discipline of lawyers using vague or unenforceable standards. As such, the Comment is appropriate for inclusion in Rule 1.0 which defines in a general sense the scope of the Rules and a lawyer's professional obligations. The Comment simply signals that the provision of pro bono services, while not mandated, is an important

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

aspect of a lawyer's responsibilities as an officer of the court and the legal system. Its inclusion in Rule 1.0 does not depart from the Commission's overall mission to propose disciplinary standards, as opposed to purely aspirational objectives. Moreover, the Comment [5] is consistent the State Bar's pro bono resolution which has been in place for nearly 20 years. The Commission also disagrees that the proper approach would be to require the mandatory reporting of pro bono hours (as required in Florida). Promulgation of a mandatory pro bono reporting requirement would entail the commitment of additional State Bar resources in terms of monitoring and audits to insure compliance, as is currently required under the MCLE program. This would require resource and budgetary commitments to finance such a program that are beyond the purview of the Commission.

Rule 1.0.1 [1-100(B)] Terminology
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

- (a) “Belief” or “believes” means that the person involved actually supposes the fact in question to be true. A person’s belief may be inferred from circumstances.
- (b) [Reserved]
- (c) “Firm” or “law firm” means a law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.
- (d) “Fraud” or “fraudulent” means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.
- (e) “Informed consent” means a person’s agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.
- (e-1) “Informed written consent” means that the disclosures and the consent required by paragraph (e) must be in writing.
- (f) “Knowingly,” “known,” or “knows” means actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.
- (g) “Partner” means a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
- (g-1) “Person” means a natural person or an organization.
- (h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.
- (i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
- (j) “Reasonably should know” when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.
- (k) “Screened” means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm that are adequate under the circumstances (i) to protect information that the isolated lawyer is

obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and nonlawyer personnel communicating with the lawyer with respect to the matter.

- (l) “Substantial” when used in reference to degree or extent means a material matter of clear and weighty importance.
- (m) “Tribunal” means: (i) a court, an arbitrator, an administrative law judge, or an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.
- (n) “Writing” or “written” has the meaning stated in Evidence Code § 250. A “signed” writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person with the intent to sign the writing.

Comment

Firm or Law Firm**

[1] Practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a law firm.* However, if they present themselves to the public in a way that suggests that they are a law firm* or conduct themselves as a law firm,* they may be regarded as a law firm* for purposes of these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm,* as is the fact that they have mutual access to information concerning the clients they serve.

[2] The term “of counsel” implies that the lawyer so designated has a relationship with the law firm,* other than as a partner* or associate, or officer or shareholder, that is close, personal, continuous, and regular. Whether a lawyer who is denominated as “of counsel” or by a similar term should be deemed a member of a law firm* for purposes of these Rules will also depend on the specific facts. Compare *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816] with *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].

*Fraud**

[3] When the terms “fraud”* or “fraudulent”* are used in these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform because requiring the proof of those elements of fraud* would impede the purpose of certain rules to prevent fraud* or avoid a lawyer assisting in the perpetration of a fraud,* or otherwise frustrate the imposition of discipline on lawyers who engage in fraudulent* conduct. The term “fraud”* or “fraudulent”* when used in these Rules does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information.

Informed Consent and Informed Written Consent**

[4] The communication necessary to obtain informed consent* or informed written consent* will vary according to the rule involved and the circumstances giving rise to the need to obtain consent.

*Screened**

[5] The purpose of screening is to assure the affected client, former client, or prospective client that confidential information known* by the personally prohibited lawyer is neither disclosed to other law firm* lawyers or nonlawyer personnel nor used to the detriment of the person* to whom the duty of confidentiality is owed. The personally prohibited lawyer shall acknowledge the obligation not to communicate with any of the other lawyers and nonlawyer personnel in the law firm* with respect to the matter. Similarly, other lawyers and nonlawyer personnel in the law firm* who are working on the matter promptly shall be informed that the screening is in place and that they may not communicate with the personally prohibited lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected law firm* personnel of the presence of the screening, it may be appropriate for the law firm* to undertake such procedures as a written* undertaking by the personally prohibited lawyer to avoid any communication with other law firm* personnel and any contact with any law firm* files or other materials relating to the matter, written* notice and instructions to all other law firm* personnel forbidding any communication with the personally prohibited lawyer relating to the matter, denial of access by that lawyer to law firm* files or other materials relating to the matter, and periodic reminders of the screen to the personally prohibited lawyer and all other law firm* personnel.

[6] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm* knows* or reasonably should know* that there is a need for screening.

**Commission Member Dissent, Submitted by Robert Kehr,
on the Recommended Adoption of Proposed Rule 1.0.1(m)**

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

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

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

Here is the first Commission's definition:

"Tribunal" means: (i) a court, an arbitrator, or an administrative law judge acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

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

"Tribunal" means: (i) a court, an arbitrator, an administrative law judge, *or an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved*; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court. (italics added)

The term "tribunal" is used in nine other Rules. The extreme time limitations under which we are operating make it impossible for me to discuss the foreseeable consequences of this expanded definition in all nine Rules. Instead I will restrict myself

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

to a few observations that I hope will show the scope and depth of the error in the proposed expanded definition:

First, there is no definition of “administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved”. There likely will be future conflicts about when the expanded definition would apply, but the language appears broad enough to include every federal, state, and local administrative agency that has the authority to grant or deny licenses, permits, or approvals of any sort. The Federal Register lists 440 federal administrative agencies.² These include the obvious, such as the IRS and the SEC. It also includes the less generally known, such as the Comptroller of the Currency³ and Federal Motor Carrier Safety Administration.⁴ It goes without saying that none of us could begin to understand the full significance of the “tribunal”, such as whether one or more of the proposed Rules would conflict with the requirements or practices of those administrative agencies or with the statutory schemes that created them. The problem is multiplied many times over by adding California state and local administrative agencies and agencies outside California with which California lawyers deal. Because we do not know, and the Commission made no attempt to consider, these application issues, I believe that the expanded definition of “tribunal” is an aspirational statement that is inappropriate in California, with its robust and professional disciplinary system. It also is inappropriate because our Rules of Professional Conduct routinely are used in civil litigation as standard of conduct, and the expanded definition therefore poses an indefinitely broad threat to California lawyers. We would be flying blind in attempting to tell lawyers, and what no doubt are thousands of administrative agencies, how to deal with one another. As an example, proposed Rule 3.4(d) prohibits payment to a witness dependent on the outcome of the testimony, but is this improper with experts testifying on regulatory matters? Proposed Rule 3.5 provides another example. This proposal, titled “Contact With Judges, Officials, Employees, and Jurors”, for the most part applies to courts and their equivalents as shown by the paragraph (b) prohibitions regarding communications with a “judge or judicial officer”. However, its paragraph (a) prohibits gifts to any “employee of a tribunal”. This likely would conflict with administrative regulations governing dealings between its employees and

Second, there are Rules that are perfectly understandable if applied to courts or their equivalent, but whose application makes little sense if applied to administrative agencies. One example is in Rule 3.3. It is based largely on current rule 5-200 (“Trial Conduct”) – a rule that, based on its title and content, is perfectly well understood as

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

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

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

applying to a lawyer's dealings with courts.⁵ That clarity would be lost with the proposed expanded definition. For example, proposed Rule 3.3(d) states in full:

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

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

Third, there are Rules that contain “tribunal” only in a portion of the Rule, but the presence of that term with its expanded application to administrative agencies would permit the argument that other portions of the Rule apply in administrative proceedings. Rule 3.4 is an example. The defined term is used in its proposed paragraphs (e) and (f). Does that mean that proposed paragraph (a) (saying that a lawyer may not “unlawfully obstruct another party’s access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.”) should be understood as applying to administrative agencies? Perhaps, and if so, what is “evidence” in the workings of different administrative agencies (the term has a technical and well-understood meaning only in court proceedings), and by what measure could obstruction be “unlawful”? Similarly, does the reference to trials in proposed paragraph (g) (saying that a lawyer shall not “(g) in trial, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused.”) apply in an administrative proceedings? We no longer can be certain that a “trial” is something that happens in a court room or its equivalent. Would labeling them as “trials” in this context lead to argument that other trial requirements would apply?

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

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

The proposed expanded definition would limit the ability of lawyers to engage in the sort of robust advocacy now common in administrative proceedings and, perhaps even more important, will make lawyers the target of their client's adversaries. Lawyers who advocate for a client in an administrative hearing regarding, say, the grant or denial of a coal lease, a permit for off-shore drilling, the licensing of a nuclear power plant or the grant or denial of a building permit within the coastal zone regulated by the Coastal Commission, will be accused by the client's opponents of having violated proposed Rule 3.3(a) by (shall not "knowingly make a false statement of fact or law to a tribunal"). It is one thing for a lawyer's statement of facts to be challenged, as now happens. It would be quite a different thing for the lawyer to be accused of professional misconduct – a charge that, even if we think it baseless, would wrongly injure the client's interests by injuring the lawyer's reputation and ability to advocate for the client.⁷ The disciplinary argument would be fodder for an argument about the credibility of the lawyer/advocate that would carry weight in some jurisdictions. It also is predicable that this will lead disciplinary complaints for tactical reasons and to additional burden on the disciplinary system.⁸

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

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

⁸ Although not mentioned in the proposed Rules 3.3 or 3.4, there of course is a First Amendment aspect to governmental petitioning. Even assuming that eventually would prevent the imposition of professional discipline, it would do nothing to save the lawyer and client from

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

**Commission’s Response to Dissent Submitted by Robert Kehr
on the Recommended Adoption of Proposed Rule 1.0.1(m)**

The dissent objects to the inclusion of “an administrative body acting in an adjudicative capacity” in the definition of “tribunal” contained in proposed rule 1.01(m). According to the dissent, this inclusion creates “aspirational” rules that violate the Commission’s Charter, represents a “radical” change in the law, and intrudes “on the rule-making authority and the customs and practices of administrative agencies.” But as a threshold matter, the dissent overlooks the fact that ABA Model Rule 1.0(m) contains an even broader definition of tribunal:

“Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or *a legislative body, administrative agency or other body acting in an adjudicative capacity*. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter. (Emphasis added.)

Thus, the ABA Model Rule definition of tribunal encompasses not only an administrative body acting in an adjudicative capacity, it also encompasses “[a] legislative body” or any “other body acting in an adjudicative capacity.”

Forty-four jurisdictions, including the District of Columbia, have either adopted verbatim the ABA Model Rule definition of tribunal or a modified version of that definition that includes both an administrative and a legislative body acting in an adjudicative capacity.⁹ Thus, in adopting the definition of tribunal proposed by the Commission, California would *not* be “flying blind” as asserted by the dissent. In fact, the experience of these 44 jurisdictions is instructive here. The Commission is aware of nothing – and the dissent has cited nothing – to suggest that any of these jurisdictions has

reputational damage or the client from the risk of diluted advocacy due to the lawyer’s instinct for self-preservation.

⁹ The following jurisdictions have adopted a definition of tribunal that includes both an administrative body and a legislative body acting in an adjudicative capacity: Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. The remaining six jurisdictions (Alabama, Alaska, Florida, Michigan, Minnesota, and Virginia) have not adopted a definition of tribunal.

experienced the parade of horrors identified by the dissent, much less any difficulty in applying their rules of professional conduct to lawyers when they appear before administrative bodies acting in an adjudicative capacity. This alone refutes the arguments made by the dissent.

In any event, there are compelling reasons why the Commission has recommended joining the 44 other jurisdictions that expressly apply their rules of professional conduct to lawyers when they appear before administrative bodies acting in an adjudicative capacity. Contrary to the dissent's assertion, these bodies do depend in whole or in part on the lawyers appearing before them and the parties they represent to provide relevant facts. Further, lawyers appearing before these bodies in a representational capacity are acting in their professional capacity as lawyers. More fundamentally, most people, including the adjudicators, the parties, and the general public, presume that any lawyer appearing in an adjudicatory proceeding conducted by an administrative body is acting in his/her legal capacity and is therefore adhering to his/her ethical obligations. As such, the large number of federal, state, and local agencies identified by the dissent actually supports the Commission's recommendation to include those agencies in the definition of tribunal. Excepting lawyers from their ethical obligations in the many adjudicatory proceedings conducted by these agencies even though those lawyers are acting in their legal capacity simply makes no sense.

Allowing this exception would also make no sense because the term tribunal already includes administrative law judges (ALJs) and arbitrators. The dissent does not dispute that the proposed Rules should apply to lawyers appearing before an ALJ. Yet, the dissent apparently objects to the application of those same rules to lawyers appearing before the administrative body that reviews that ALJ's decision. (See, e.g., *California Teachers Assn. v. Public Employment Relations Bd.* (2009) 169 Cal.App.4th 1068, 1076 ["When a party files a statement of exceptions to an ALJ's proposed decision, the [Public Employment Relations] Board review the record *de novo*, and is empowered to reweigh the evidence and draw its own factual conclusions"]; *Governing Bd. of the Alum Rock Union Elem. School Dist. v. Superior Court* (1985) 167 Cal.App.3d 1158, 1162 [ALJ decision rejected by governing board of school district].) Requiring lawyers to adhere to their ethical obligations when appearing before an ALJ while relieving them of those same obligations when they appear before an administrative body that is reviewing the ALJ's decision defies common sense.

The same is true with respect to arbitrations. As a general rule, arbitral decisions are subject to far less judicial review than adjudicatory decisions by an administrative body. (Compare *Moncharsh v. Heily & Blasé* (1992) 3 Cal.4th 1, 11 ["it is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law] with *Strumsky v. San Diego Employees Retirement Assn.* (1974) 11 Cal.3d 28, 44-45 ["if the order or decision of the agency substantially affects a fundamental vested right, the court . . . must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence. If, on the other hand, the order or decision does not substantially affect a fundamental vested right, the trial court's inquiry will be limited to a determination of whether or not the findings are supported by substantial evidence in light of the whole record"].) Moreover,

arbitrators may not be “strictly bound by evidence, law, or judicial oversight.” (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 832.) As a result, arbitral decisions in California do not have nonmutual collateral estoppel effect. (*Ibid.*) By contrast, adjudications by administrative bodies are accorded due process protections (*Horn v. County of Ventura* (1979) 24 Cal.3d 609, 612), and may have nonmutual collateral estoppel effect (*People v. Sims* (1982) 32 Cal.3d 468, 483; *B&B Hardware, Inc. v. Hargis Indus. Inc.* (2015) 135 S.Ct. 1293, 1303 “[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose” (internal quotations omitted)).) To require lawyers to adhere to their ethical obligations in an arbitration but not in an adjudicatory proceeding before an administrative body – even though the arbitration is far less formal, provides far less due process protections, and has far less impact than the administrative adjudication – further defies common sense.

The speculative concerns identified by the dissent, even if they were not belied by the actual experience of the 44 jurisdictions that have adopted a broader definition of tribunal, do not support a contrary conclusion.

First, the dissent suggests that the application of the proposed rules to adjudicatory proceedings before administrative bodies may “conflict with the requirements or practices of those” bodies “or with the statutory schemes that created them.” But the two examples cited by the dissent demonstrate otherwise. Proposed rules 3.5(a) and (b) both make clear that they do not prohibit any conduct that is permitted by the rules or regulations of an administrative agency. Moreover, the prohibition of gifts to “employees of a tribunal” merely mirrors existing restrictions imposed on those employees by the Political Reform Act and other ethics statutes and regulations. Likewise, it is hard to see how the prohibition against compensating witnesses on a contingency fee basis will create great confusion or unduly penalize lawyers appearing before an administrative body, even if the body allows for such arrangements.

Second, the dissent’s concern about the applicability of some of the proposed rules that use the term tribunal to administrative agencies does not appear problematic upon closer scrutiny. The dissent cites proposed rule 3.3 as a potential source of confusion. But that rule largely prohibits lawyers from deceiving a tribunal – a principle that should be readily applicable in adjudicatory proceedings before an administrative body. Similarly, the dissent’s concerns about proposed rule 3.3(d) appear to be overblown. First, that rule only applies to proceedings – and not to every ex parte communication with the administrative body. Second, lawyers can comply with their ethical obligation under proposed rule 3.3(d) by providing notice of the ex parte proceeding to any known opposing party. Upon doing so, the lawyer need not inform the body of any “material facts,” much less file “trial-like declarations.” Thus, any resulting expense or delay would likely be minimal at best.

Third, the dissent’s concerns about confusion over the applicability of rules that do not contain the term tribunal also appear overblown. As to proposed rule 3.4(a), there is unlikely to be confusion over what constitutes “evidence” in an adjudicatory proceeding

before an administrative agency because that agency's decision is likely subject to judicial review. Thus, there will be statutes, rules, or case law, similar to the statutes, rules or case law that governs court proceedings, that identify what "evidence" the agency may consider in rendering its adjudicatory decision. Likewise, identifying the equivalent of a "trial" for purposes of proposed rule 3.4(g) should pose little difficulty. Indeed, the ABA Model Rule provides guidance: an administrative body "acts in an adjudicative capacity when a neutral official, *after the presentation of evidence or legal argument by a party or parties*, will render a binding legal judgment directly affecting a party's interests in a particular matter." (Emphasis added.)

Finally, the dissent's concerns about the impact of the proposed rules on matters before administrative agencies "that involve intense policy differences and personal and political passions" are equally applicable to many court proceedings. One can hardly deny that recent court litigation over the constitutionality of same-sex marriage or President Trump's travel ban involves intense personal and political differences and passions. The application of the proposed rules did not limit the ability of lawyers to engage in robust advocacy in those court cases. And it should not do so in adjudicatory proceedings before an administrative agency.

The inclusion of administrative bodies acting in an adjudicative capacity in the definition of tribunal is not aspirational or radical; it's already been done with no apparent ill effects in 44 jurisdictions. More importantly, the inclusion fulfills the Commission's Charter by promoting "confidence in the legal profession and the administration of justice," ensuring "adequate protection to the public," and promoting "a national standard with respect to professional responsibility issues."

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.

**Commission Member Dissent, Submitted by Robert Kehr,
on the Recommended Adoption of Proposed Rule 1.3**

OCTC has explained in its detailed objection to proposed Rule 1.3 why creating a stand-alone diligence Rule, separating diligence from the duty of competence where it now and always has been, will cause needless problems for it. See, e.g., *Budd v. Nixen*, 6 Cal. 3d 195, 200 (1971) (treating diligence as part of the standard of care). I believe that this proposed Rule suffers from defects that go beyond OCTC's concerns.

Current rule 3-110 sets a standard for the quality of a lawyer's representation of a client. The rule 3-110 focus is on client harm because competence is not an abstraction (that is why a lawyer can meet the competence standard by obtaining sufficient learning to do a job properly, even if the lawyer lacks needed skill when accepting an engagement).

Placing diligence in a separate Rule will lead to claims that a lawyer has violated the Rule by delaying a client's work even in the absence of client harm. In fact, the delay might have been at the client's request. An opposing party, to whom the lawyer owes no fiduciary duties, could threaten disciplinary action to try to motivate the lawyer and could claim that it was injured by delay. Any such threat or claim would conflict with the duty of undivided loyalty owed only to the client.

In Commission discussions, my concern was answered by saying that delay in general would be covered by proposed Rule 3.2,¹ so proposed Rule 1.3 deals with client harm. This is not clear. Proposed Rule 3.2 by its terms deals only with litigation, and proposed Rule 1.3 says it applies "in representing a client." That easily is read as a temporal limitation rather than a reference to client injury.

Two drafting points: *First*, it is not clear what is meant by "unduly delay" in proposed paragraph (b) (it presumably means something other than client injury or else there would be no need to separate diligence from the competence Rule, but is it something more than feel-good language?). *Second*, current rule 3-110 permits discipline for lack of competence that is intentional, reckless or repeated, and proposed Rule 1.1 follows this, only adding a standard of gross negligence because that phrase has been used in disciplinary cases (and is taken to mean the same as "reckless". A single act of simple negligence does not suggest the lawyer is unfit to practice law and therefore never has served as the basis for professional discipline. Proposed Rule 1.3 repeats the standard of intentional, reckless, with gross negligence or repeated. Does this mean that two acts of negligence might satisfy either the Rule 1.1 standard, but the lawyer might not be subject to discipline if one is a lack of diligence coming under Rule 1.3?

Current rule 3-110 is not broken with respect to the need for diligence and does not need fixing. Proposed Rule 1.3 expresses a best practices concept. The application of the current rule is the subject of countless existing authorities and is free from doubt.

¹ Rule 3.2 ("Delay of Litigation") states: "In representing a client, a lawyer shall not use means that have no substantial* purpose other than to delay or prolong the proceeding or to cause needless expense."

I respectfully dissent from proposed Rule 1.3 and would leave diligence in Rule 1.1.

**Commission's Response to Dissent Submitted by Robert Kehr on the
Recommended Adoption of Proposed Rule 1.3**

The Commission believes there are compelling reasons for having a separate rule on the duty of diligence. Both the Model Rules and the Restatement Third The Law Governing Lawyers (ALI 2000) as well as text books, ethics opinions and other resources consistently refer to the lawyer's duty of competence and diligence separately. See, e.g., Model Rule 1.7(b)(1); Restatement Third Law Governing Lawyers §16(2). Rule 1.3 is also consistent with the Commission's other proposed rules that refer to competence and diligence separately. See, e.g., proposed Rule 1.7(b)(1).

Every jurisdiction, except California and Texas, has adopted Model Rule 1.3 or has a variant of the rule that treats the duty of diligence separate and distinct from the duty of competence. Texas addresses diligence as a separate duty in its competence rule. Having a separate rule on the duty to act with reasonable diligence is consistent with the national standard and will enhance public protection and provide greater uniformity and understanding.

Rule 1.3 underscores that lawyers have a professional responsibility to be both competent and to act with commitment and dedication to the interests of the client. The law provides that it is not enough to possess the capability to perform legal services with competence; a lawyer must employ these abilities diligently and not let the client's matter languish. See, e.g., Restatement Third Law Governing Lawyers §16, Comment d.

The dissenter is incorrect that diligence has always been subsumed with competence. California previously treated diligence in a separate paragraph (2) in former Rule 6-101 (1975-1983). Allowing the rules to continue to conflate competence and diligence would serve only to confuse lawyers about these separate and distinct obligations and result in less public protection. Proposed Rule 1.3 is consistent California case law. See Vapnek, et. al. California Practice Guide: Professional Responsibility (The Rutter Group. 2015) ¶¶. 6:92 ff.

The dissenter contends that the proposed Rule creates a standard for discipline that conflicts with the duty of undivided loyalty to the client. This has not been an issue, however, with ABA Model Rule 1.3 and the many states that have adopted it. Moreover, the language of the proposed Rule is not correctly read as creating any duty that would conflict with an attorney's duty of loyalty to the client. Paragraph (b) ties the neglect, disregard, or undue delay that would violate the Rule to "commitment and dedication to the interests of the client." Only where undue delay intrudes on commitment and dedication to client interests (which may occur even where there is no direct harm to the client's interests and the delay causes only needless anxiety to the client) would Rule 1.3 subject the attorney to discipline.

The problems the dissenter perceives in having a separate rule defining the lawyer's duty of diligence have simply not materialized in the 35 years Rule 1.3 has been in existence. It has not been shown, for example, that Rule 1.3 results in claims of delay by opposing counsel or creates confusion between the duty not to neglect the client's matter with the duty to reasonably expedite litigation. (See proposed Rule 3.2).

Having a separate rule on the duty of diligence provides needed public protection: "Perhaps no professional shortcoming is more widely resented than procrastination Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness." Model Rule 1.3, Comment [3].

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.

**Commission Member Dissent, Submitted by Robert Kehr,
on the Recommended Adoption of Proposed Rule 1.7**

This message states my dissent from proposed Rule 1.7(b) and (c), with the request that it be included with the Commission's submission to the Board of Trustees, and if needed then to the Supreme Court.

The Commission's Charter directs us to "...ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives." Proposed Rule 1.7(b) presents a serious violation of those directions.

Rule 1.7 addresses current-client conflicts. Its analog in our current Rules is rule 3-310. Rules 3-310(A) (definitions), (D) (aggregate settlements), (E) (certain confidentiality issues), and (F) (fee payments on behalf of a client) are located in other proposed Rules and are not pertinent here. Proposed Rule 1.7(b) is intended to embody the conflicts now stated in rules 3-310(B) (conflicts resulting from a lawyer's relationships and personal interests) and (C)(1) and (2) (potential and actual conflicts resulting from a lawyer's representation of multiple clients in a single matter – joint representations).¹

Here are the exact words of the proposal:

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.

This statement expresses a non-controversial view – surely no lawyer should represent a client without the client's informed approval when there is a significant risk that the lawyer's other duties or relationships, or the lawyer's personal interests, might interfere with the lawyer's full performance of all duties owed to the client. Because a lawyer's duties include loyalty – meaning, among other things, preserving a client's trust in the lawyer because this is essential to the proper functioning of the lawyer–client relationship - disclosure to and approval from the client are indispensable.² I should add that the disclosure and consent process also serves to remind the lawyer of where the lawyer's duties lie.

¹ A lawyer's representation of two or more clients in the same matter properly is called a "joint representation". See, e.g., *Roush v. Seagate Technology, LLC*, 150 Cal. App.4th 210, 225 (1970).

² As suggested by my earlier reference to the duty of loyalty, the quality of a lawyer's work is a civil standard. A client who later discovers that its lawyer did not reveal, for example, that the lawyer had been cross-examining the lawyer's next door neighbor, cousin or client in another matter, will lose trust in the lawyer and the legal system, and the conflict rules should be designed to avoid that result. See *Hernandez v. Paicius*, 109 Cal. App.4th 452, 463-468 (2003), disapproved on other grounds in *People v. Freeman*, 47 Cal.4th 993, 1006 (2010).

The single proposed paragraph (b) sentence therefore is a correct, even elegant, statement of what each lawyer should do. The problem with this formulation is that it does not identify the relationship conflicts or personal interest conflicts pinpointed in current rule 3-310(B)(1) – (4) and only hints at the joint-representation conflicts now covered by rule 3-310(C)(1) and (2). Proposed paragraph (b) therefore can be criticized as an aspirational standard, and it is, but I think of it more as being an undifferentiated amalgam of a multiple distinct elements.

I know those elements because my many years of activity in the legal ethics field have left me with a mental roadmap of the rule 3-310 checklist. For others who do not carry that checklist, and I mean by this virtually every California lawyer, the meaning of paragraph (b) would require study of the proposed Rule 1.7 Comments. A diligent and able lawyer might be able to locate in those Comments all of the elements of the current rule. I say “might” because I am skeptical that many lawyers would be able to reverse engineer rules 3-310(B) and (C) by reading the proposed Comments and because it is my opinion that these proposed Comments are not complete. What I think much more likely is that many lawyers will not trouble to read the Comments, and instead will understand “significant risk” and “materially limited” as giving them the freedom to judge their own ability to do a good job. Lawyers have any number of reasons to convince themselves there is no conflict of interest: including the financial benefits of a representation, the excitement of a particular project, reputational benefits within a firm as being known as a client developer, and the opportunity to be a client’s savior at a time of client stress and risk. As a consequence, many lawyers will prove themselves effective salesmen in convincing themselves to go forward without providing the disclosure that now would be required under rule 3-310.³

The material limitation standard, because it will be a temptation to many lawyers, would result in a dilution of client protection. Another result would be that lawyers will be blindsided and will get into disciplinary and civil hot water. Neither result is desirable, nor will be the further injury to the reputation of lawyers and the legal system.

The proposed Rule contains direct proof of my concern that the application of proposed paragraph (b) is indefinite and unpredictable. Proposed paragraph (c) states:

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) [there is a conflict under what amounts to current rule 3-310(B)(4)]”

³ One commenter suggested to me that this is like the so-called “good deal” exception to the securities laws. Some securities promoters will think they don’t have to comply with the securities laws because the deal is so good that nothing could go wrong.

Here is one example of what this means: Current rule 3-310(B)(1) requires a lawyer to make a “disclosure”⁴ to the client when the lawyer has a personal or other relationship with a party or witness in the same matter. There are no exceptions. Disclosure always is required in this situation. Proposed paragraph (b) waters down the current rule by requiring disclosure only when the lawyer’s relationship to a party or witness rises to the level of posing a “significant risk” of the lawyer’s representation being “materially limited”. So in addition to the lack of clarity that results from the blending of elements of the current rule, the resulting standard will not always reach as far as the current rule.⁵

There appear to be three main arguments in favor of proposed Rule 1.7(b). *First*, it is argued that California’s current check-list approach is incomplete while the Model Rule approach borrowed in proposed Rule 1.7 is complete. Assuming there something of potential importance has been omitted from our current check list (although that is hard to imagine), and assuming it could not be added to the check list, there would be a resulting trade-off between logical completeness and, on the other hand, the loss of check-list clarity and the more and more rigid disclosure requirements of rule 3-310(B). *Second*, it is argued that national uniformity is important. Assuming national uniformity were important (and ignoring that no jurisdiction has adopted the Model Rules intact and that Rule 1.7 is one with many local variations),⁶ it is my opinion that the Model Rule approach is essentially flawed and that, as California has done with some other Rules, the Model Rule approach should be rejected. *Third*, it is argued that all law students are taught and tested on the Model Rules and understand Model Rule 1.7. It has been my experience, as one who frequently fields inquiries from lawyers, that there is no topic on which lawyers are less prepared or more confused than the correct way to analyze conflicts of interest. This is true without regard to where or when they attended law school, and generally is true even with lawyers the best and most conscientious lawyers. Conflicts analysis often is obscure, and the Rules should not make it more so.

I so far have explained my principal objection to Rule 1.7, but I have these additional comments:

- Current rule 3-310(B) requires disclosure but proposed paragraph (b) would heighten the requirement to one of informed written consent. I do not object strongly to that change but want to point out that the increased requirement easily could be applied to current rule 3-310(B) if the current check-list format were retained.

⁴ This term now is defined in rule 3-310(A)(1) and will become part of the definition of “informed consent” under proposed Rule 1.0.1(e). I have used the current terminology in this Dissent because I think it makes it easier to picture the two steps in which the lawyer provides information and explanation and the client then provides its consent.

⁵ And because proposed paragraph (c)(1) would require a “disclosure” when there is no material limitation, it is not apparent what explanation the lawyer would provide of what is not a conflict under paragraph (b).

⁶ Compare, for example, Rule 1.7 in Washington D.C., New York, and Texas (the last of these numbered as Rule 1.06).

- I agree with proposed paragraph (a), but its meaning cannot be fully understood with an explanation of “direct adversity”.⁷ The proposed Comment does not adequately explain the concept and I fear will lead to wide-spread misunderstanding. The directions to remove practice guidance from the Comments led the second Commission to remove important explanation of the meaning of “direct adversity”.
- Part of the attempted explanation of “direct adversity” in Comment [1], referring to joint representations, talks of when “a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict”. This is conceptually wrong. A lawyer does not have a conflict because the clients have conflicts. A lawyer properly can jointly represent business competitors if the subject of the representation excludes any matter on which the lawyer might be called on to provide advice or representation that favors one client over the other. Even the most vigorous competitors can have common interests, and a lawyer can represent them with a sensible limitation on the scope of the representation. Any discussion of conflicts between clients is misleading when speaking of a lawyer’s conflict of interest. A lawyer has a potential conflict of interest if the lawyer might be required to choose between conflicting duties or to reconcile conflicting interests; a lawyer has an actual conflict of interest when required to choose between conflicting duties or to reconcile conflicting interests. “A potential conflict is a reasonable set of circumstances which could impair a lawyer’s ability to fulfill his or her professional obligations to each client in the proposed engagement.” *Havasu Lakeshore Investments, LLC v. Fleming*, 217 Cal. App.4th 770, 779 (2013).
- Proposed paragraph (c)(2) is taken from current rule 3-320. The current rule requires “notice” to the client (a standard lower than “disclosure”) if the lawyer has one of certain personal relationships with another Party’s lawyer. Proposed paragraph (c)(2) would make three material changes in the current provision. The first would be to heighten the notice requirement to one of formal “disclosure”. I don’t see the need for that change because I don’t think it requires any explanation for a client to understand the significance of, for example, an opposing lawyer being the spouse of the first client. However, this not my major concern. The proposal also would expand the scope to include “disclosure” of intimate relationships between any firm lawyer and an opposing lawyer, not just the first lawyer’s own personal relationships. And the first lawyer’s conduct would be measured by the “reasonably should know” standard, defined in proposed Rule 1.0.1(j) as meaning “...that a lawyer of reasonable prudence and competence would ascertain the matter in question.” This would an obligation to investigate on firm lawyers no matter how large and geographically dispersed the firm, and including governmental offices. This likely would conflict with privacy

⁷ There is no corollary in our current rules because an oversight in the writing of the 1989 Rules left it out, and a later effort in 1996-97 to correct the oversight was unsuccessful. Proposed paragraph (b) also encompasses current rule 3-310(C)(3).

rights and is unsupportable. There is no evidence of any deficiency in current rule 3-320.

For these reasons, I respectfully dissent from proposed Rule 1.7(b) and (c). I see this proposed Rule as a prime example of the dangers inherent in materially changing California law with its substantial body of case and other authority on the meaning and application of our current rule.

**Commission Member Dissent, Submitted by Raul Martinez,
on the Recommended Adoption of Proposed Rule 1.7**

The Commission's inclusion of Paragraph (c) will dilute the obligations under Paragraph (b) and introduce a subjective test. Paragraph (c) requires written disclosure to the client, but not written consent, with respect to legal, business, financial or personal relationships that the lawyer or another lawyer in the lawyer's firm has with a party or witness in a matter. Thus, under Paragraph (c), the lawyer must make an initial determination as to whether the significant risk of a material limitation on the lawyer's responsibilities mentioned in Paragraph (b) "is not present." Paragraph (c) effectively invites the lawyer to make a subjective determination as to whether a given relationship involves a significant risk of materially limiting the lawyer's responsibilities to the client. The Rule provides little guidance to a lawyer seeking to ascertain whether the "conflict" requires informed written consent under Paragraph (b) or written disclosure under Paragraph (c). The end result will be that many lawyers will "default" to Paragraph (c), not Paragraph (b). This problem is compounded by the overarching requirement in Paragraph (d)(1) that the lawyer "reasonably believes" he or she can provide competent representation to each client. Although the "reasonable belief" standard as defined in Rule 1.0.1(i) is intended to import an objective test (i.e., that "the circumstances are such that the belief is reasonable"), in practice, lawyers will see it as a purely subjective one. The Rule would be better written and confusion can be avoided by simply deleting Paragraph (c). Alternatively, Paragraph (c) could be revised and re-drafted as a standalone rule, untethered to the material limitation concept, as is current Rule 3-320.

Paragraph (c) does not set forth a clear and enforceable disciplinary standard. The dividing line between circumstances covered by Paragraphs (b) and (c) is unclear. The disciplinary standard of a "significant risk" of "material limitation" of the lawyer's representation of a client is by itself a difficult concept to grasp and apply. This standard becomes unworkable under Paragraph (c) when a lawyer is called upon to make a current determination that a "significant risk" under Paragraph (b) "is not present."

Paragraph (c)(2) would require implementation of cumbersome, if not impossible, conflict check systems for law firms. Paragraph (c)(2) imposes a "reasonably should know" standard on a lawyer to determine whether another lawyer in the lawyer's law firm has a spousal, parental, sibling, cohabitational, or attorney-client relationship with a lawyer in the matter the lawyer is involved in. The "reasonably should know" standard contained in Paragraph (c)(2) would require the lawyer, and in turn, the lawyer's law

firm, to conduct a reasonable investigation (i.e., a conflicts check) to determine if other lawyers in the firm have one of the requisite relationships. As defined by Rule 1.0.1(j), the phrase "Reasonably should know" means that a lawyer "of reasonable prudence and competence *would ascertain* the matter in question." Rule 5.1 would impose on a law firm a concomitant obligation to undertake reasonable efforts to insure lawyers comply with their ethical obligations--in other words, implement a conflict check system that would reveal these relationships. Law firms are not equipped (nor should they be) to conduct the type of conflict check system that would be required to comply with this Paragraph. Compliance with this aspect of the Rule would be burdensome, confusing and potentially invasive on the privacy rights of lawyers.

Paragraph (c) is overly broad in that it would require disclosure of de minimis relationships that do not impact the lawyer's obligations. Because it reaches relationships that do not present a significant risk of materially limiting the lawyer's responsibilities to a client, Paragraph (c) is not a true conflict of interest rule. Paragraph (c)(1) requires written disclosure to the client of a host of business, financial, professional, or personal relationships with a party or witness in a matter that would not affect the lawyer's representation of the client. Similarly, Paragraph (c)(2) would require disclosure of relationships involving other lawyer's in the firm that would have no impact on the lawyer's obligations to the client. Yet both Paragraphs can provide a basis for discipline even in situations where client loyalty is in no way impaired. (See *People v. Bonin* (1989) 47 Cal.3d 808, 835 ["Conflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests."].) Paragraph (c) would result in discipline of lawyers in situations where there is no actual or potential client harm. Worse yet, it would discipline lawyers for making the wrong call in deciding whether Paragraph (c), rather than Paragraph (b), applies to any given circumstances and where it is later determined that written disclosure rather than informed written consent was mandated.

Example (ii) in Comment [1] is overly broad and contradicts the black letter of the Rule since representation of a client's adversary in unrelated litigation is not "direct adversity." Turning to the comments, Comment [1] cites as an example of a "directly adverse conflict under Paragraph (a)" the situation where: "(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." This example, which is derived from current Rule 3-310(C)(3), describes a *material limitation* conflict under Paragraph (b), not a directly adverse conflict under Paragraph (a). The representation of a client's adversary in an unrelated matter is not directly adverse to the client in the first matter where the second client is not a party to the first matter. Comment [6] of ABA Model Rule 1.7 more accurately describes direct adversity by explaining that "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." Example (ii) goes beyond this important principle. Rather than explaining the black letter of the Rule, Example (ii) expands on it.

**Commission's Response to Dissents Submitted by Robert Kehr & Raul Martinez,
on the Recommended Adoption of Proposed Rule 1.7**

Proposed Rule 1.7(a):

Kehr Dissent. The Kehr dissent agrees with proposed paragraph (a), but argues that the proposed Comment does not adequately explain the concept of “direct adversity.” As the dissent notes, the Commission’s Charter directed it to limit the number and length of its comments. With this directive in mind, the Commission believes that proposed Comment [1] provides sufficient guidance on “direct adversity.” The Kehr dissent argues that example (i) in Comment [1] does not describe an instance of direct adversity. The Commission disagrees. Example (i) refers to the situation not where two clients’ interests in unrelated matters conflict, but where there is a conflict between the interests of two clients in the same matter in which the lawyer is representing both. Under these circumstances, the lawyer necessarily will be forced to choose between conflicting duties or to reconcile conflicting interests in the matter in which the lawyer is representing both clients. This is a direct adversity conflict, as is recognized in current Rule 3-310(C)(2).

Martinez Dissent. With respect to proposed Comment [1], the Martinez dissent argues that example (ii) does not illustrate direct adversity. The Commission disagrees. Example (ii) is derived from current Rule 3-310(C)(3) and addresses the situation where, for example, Client A, represented by lawyer, sues Defendant B in Matter 1, and Defendant B then retains the same lawyer to defend against Plaintiff C in unrelated Matter 2. This results in direct adversity in Matter 1, where it did not exist before lawyer’s retention by B in Matter 2. After B’s retention of lawyer, both sides in Matter 1 (A and B) are now clients of the lawyer, albeit in unrelated matters. This is an example of direct adversity, as is recognized in current Rule 3-310(C)(3) and by the California Supreme Court in its 2002 amendment to current Rule 3-310, when it added Discussion paragraph 9 to make clear that, “Notwithstanding *State Farm*, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer’s interest is only as an indemnity provider *and not as a direct party to the action.*” (emphasis added). See also ABA Model Rule 1.7, Comment [6] (in discussing direct adversity, stating that “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.”)

Proposed Rule 1.7(b):

The Commission agrees with the Kehr dissent that paragraph (b) of the proposed Rule “expresses a non-controversial view” in precluding a lawyer from representing a client without the client’s informed written consent where there is a significant risk that the lawyer’s other duties, relationships, or personal interests will materially “interfere with the lawyer’s full performance of all duties owed to the client.” The Commission also agrees with the dissent that paragraph (b) is a “correct, even elegant, statement of what each lawyer should do” to further this view. Further, the Commission agrees with the dissent that, except for those few lawyers with “many years of activity in the legal ethics

field,” virtually every other California lawyer does not have “a mental roadmap of the current Rule 3-310 checklist.” As a result, the overwhelming majority of California lawyers are ill-equipped to think about and identify the conflicts enumerated in that checklist on a day-to-day basis. It is for all these reasons that the Commission recommends a shift from the current checklist approach to proposed paragraph (b), which sets forth a straightforward statement of the general rule that is consistent with that applied in virtually every jurisdiction in the country, and in doing so increases public protection by: (a) putting lawyers on notice in plain terms of when they will need to engage in further inquiry to determine if representation may run afoul of the Rule and (b) encouraging lawyers to make the necessary disclosures to obtain the client’s informed written consent if there is any uncertainty.

The Kehr dissent argues that paragraph (b) will decrease client protection because lawyers may “understand ‘significant risk’ and ‘materially limited’ as giving them the freedom to judge their own ability to do a good job.” This is not how the ABA Model Rule has been interpreted or applied. Moreover, paragraph (b) is no different in this regard than current Rules 3-310(B)(2) and (B)(3), both of which apply only upon a determination of a substantial effect on the representation or the relationship that triggers the duty to disclose. Like the “substantial effect” standard of the current Rule, the “significant risk” and “materially limited” standards of proposed paragraph (b) do not require a lawyer’s actual knowledge. By not requiring actual knowledge, they appropriately further client protection, and the preservation of client trust, by encouraging lawyers to err on the side of disclosure to obtain the client’s informed written consent.

The Kehr dissent also argues that proposed Rule 1.7 “contains direct proof” that “application of proposed paragraph (b) is indefinite and unpredictable,” the purported proof being paragraph (c) of the proposed Rule. In characterizing paragraph (c) as proof of paragraph (b)’s unpredictability, however, the dissent misapprehends the relationship between paragraphs (b) and (c) and the way in which they carry forward certain provisions of current Rule 3-310 to maintain heightened client protection. The dissent argues: (1) current Rule 3-310(B)(1) always requires disclosure when a lawyer has a personal or other relationship with a party or witness in the same matter; (2) paragraph (b) “waters down” the current rule by requiring disclosure only when the relationship rises to the level of posing a “significant risk” of representation being “materially limited”; and (3) therefore, “in addition to the lack of clarity that results from the blending of elements of the current rule, the resulting standard will not always reach as far as the current rule.” Paragraphs (b) and (c), however, impose distinct obligations. Paragraph (c), like current Rule 3-310(B)(1), requires *disclosure* of the relationship without regard to whether there is a “substantial risk” that the representation will be “materially limited.” Contrary to the dissent’s position, paragraph (c) carries forward the same level of client protection provided by the current Rule. Paragraph (b), on the other hand, requires informed written consent when a relationship, responsibilities owed a third person, or the lawyer’s own interests pose a “significant risk” that the representation will be “materially limited.” The heightened consent requirement provides greater client protection than the current rule, which merely requires “written disclosure,”

even where the relationship, whether prior (current Rule 3-310(B)(2)) or current (current Rules 3-310(B)(1) or (3)) is such that it presents a significant risk of a material limitation on the representation. Accordingly, the Commission believes there is no lack of clarity or decreased level of client protection.

Proposed Rule 1.7(c)

Paragraph (c) articulates a clear and enforceable disciplinary standard. The Martinez dissent argues that paragraph (c) does not set forth a clear and enforceable disciplinary standard because it applies only where the lawyer makes a determination that a “significant risk” of “material limitation” under paragraph (b) is not present. The Commission disagrees. Paragraph (c) imposes disclosure obligations under well-defined circumstances, that is, whenever a relationship of the type listed is present. Paragraph (c) carries forward the situations addressed in current Rules 3-310(B)(1) and 3-320, which have been in place for decades and have not posed the alleged problems cited by the dissent. Paragraph (b) adds a heightened level of protection by requiring not just disclosure of the relationship, but “informed written consent,” when a relationship of the type listed is present and the relationship poses a “significant risk” of “material limitation.” In the absence of such a risk, paragraph (c) requires disclosure; where such a risk is present, paragraph (b) requires informed written consent. In combination, paragraphs (b) and (c) articulate clear and enforceable disciplinary standards that enhance client protection.

Paragraph (c) does not dilute paragraph (b)’s obligations. The Martinez dissent also argues that paragraph (c) dilutes the obligations under paragraph (b) by encouraging lawyers to “make a subjective determination as to whether a given relationship involves a significant risk of materially limiting the lawyer’s responsibilities to the client.” The Commission disagrees for two reasons.

First, as discussed above, paragraph (b) does not require actual knowledge with respect to the significant risk of material limitation, and so does not apply a subjective test. The Martinez dissent argues that the inclusion of paragraph (d), which provides an overarching bar to representation if the lawyer does not “reasonably believe” that he or she can provide competent and diligent representation, will lead lawyers to believe that this is a “purely subjective” determination. As the Martinez dissent recognizes, however, the “reasonably believe” test in paragraph (d) is explicitly defined by proposed Rule 1.0.1(i) to be an objective standard. Moreover, proposed paragraphs (b), (c), and (d) all make clear that the requirements of paragraph (d) apply *in addition to* (and not as a replacement for) the standards set out in paragraphs (b) and (c). See also proposed Comment [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).”

Second, as discussed above, the dissent’s “dilution” argument misapprehends the relationship between paragraphs (b) and (c). If a listed relationship is present, paragraph (c) will require at a minimum written disclosure. If the relationship poses a

significant risk of material limitation, paragraph (b) would require compliance with the more rigorous standard that California has employed for decades in its conflicts rules, informed written consent. Because a lawyer would bear the risk of discipline if the lawyer incorrectly assesses whether a particular set of facts creates a significant risk that a representation will be materially limited and chooses (c), an uncertain lawyer will appropriately err on the side of greater client protection, that is, on seeking informed written consent to ensure compliance with paragraph (b). This informed written consent will also satisfy paragraph (c) because obtaining informed written consent necessarily provides written disclosure. See proposed Rule 1.0.1(e) and (e-1) (definitions of “informed consent” and “informed written consent,” respectively).

Paragraph (c) is not overly broad. The Martinez dissent also argues that paragraph (c) is “overly broad in that it would require disclosure of *de minimis* relationships that do not impact the lawyer’s obligations.” The relationships covered by paragraph (c), however, are those covered by current Rules 3-310(B)(1) and 3-320, which similarly impose disclosure requirements without regard to the effect on the lawyer’s obligations. Paragraph (c) simply carries forward the same policy determination as reflected in the current Rules of Professional Conduct that these relationships are of a type that they should be made known to the client, even if there is not a significant risk they will affect representation. The Commission does not believe there is a valid reason for rejecting this determination to the detriment of client protection.

Paragraph (c)(2) would not require a law firm to implement a cumbersome conflicts check system. The Martinez dissent argues that paragraph (c)(2) would “require implementation of cumbersome, if not impossible, conflict check systems for law firms.” The Kehr dissent makes a similar argument, and contends in partial support that paragraph (c)(2) “would expand the scope [of current Rule 3-320] to include disclosure of intimate relationships between any firm lawyer and an opposing lawyer, not just the first lawyer’s own personal relationships.” These arguments misread paragraph (c)(2), which, with the exception of *client* relationships, limits the relationships that must be disclosed to those of the lawyer herself, just as in current Rule 3-320. Paragraph (c)(2) requires written disclosure of the relationship, where a lawyer knows or reasonably should know that another party’s lawyer is (1) a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, or has an intimate personal relationship with the lawyer or (2) a client of the lawyer or another lawyer in the lawyer’s firm. Thus, the only extension of paragraph (c)(2) to firm lawyers is with respect to lawyer-client relationships, which should be readily revealed by the most basic of conflicts checks systems. The result is that paragraph (c)(2) should not require the implementation of any additional “cumbersome” conflict check systems because the other listed relationships apply only when personal to the lawyer, just as in current Rule 3-320. The “reasonably should know” standard effectively requires, therefore, only that the lawyer engage in reasonable inquiries to ascertain who the opposing lawyer is, and whether that lawyer has one of the listed relationships with the lawyer herself. The Commission believes this is not unduly burdensome and appropriately furthers client protection.

**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.

**Commission Member Dissent, Submitted by Robert Kehr,
on the Recommended Adoption of Proposed Rule 1.8.1(a)**

This message states my dissent from proposed Rule 1.8.1(a), with the request that it be included with the Commission's submission to the Board of Trustees, and if needed then to the Supreme Court.

Current rule 3-300(A) states, as one of the conditions to a lawyer entering into a transaction with or acquiring a pecuniary interest adverse to a client, that the terms of the transaction or acquisition "are fully disclosed and transmitted in writing to the client". The use of the passive voice recognizes that the source of the writing makes no difference as long as the client has the writing before the transaction or acquisition. The passive voice has been part of California's Rules since the original 1975 ancestor of the current rule (then, rule 5-101) and, so far as I know, the passive voice is used in the corresponding Rule in every U.S. jurisdiction.

During the October 2016 Commission meeting, the passive voice was restated in the active voice. Unfortunately, it was not until the revised Rule went out for public comment and there was time to study it that anyone caught the resulting substantive change. We were alerted to the problem by a public comment letter filed by the L.A. County Bar Assoc. The L.A. letter objects to this change, correctly pointing out that some lawyer-client deals are created by the client, and that the client might know more about the deal than does the lawyer. That letter also says that the source of the information does not provide any additional client protection, which certainly is correct. Here are some examples of lawyer-client transactions that are created by the client:

- Publicly traded corporations commonly offer stock options, ESOP, or other securities-based benefits to employees, including legal staff, and modify outstanding ownership rights.
- Many real estate development and real estate syndication companies routinely have granted limited partnership interests or LLC membership interests in its projects to its key employees, including legal staff.
- On occasion a wealthy individual or family hires a lawyer on terms that include minority interests in particular business assets.

In each of the three preceding examples, the lawyer might have nothing to do with the choice, structuring or expression of the transaction, and the lawyer might not be competent to explain the transaction, and the client might have been independently represented.

To take the first of the listed examples, the in-house lawyer would be subject to disciplinary risks (and potentially to civil risks) for not having responded to the corporation's stock option notice with a return notice saying: "Here is a copy of all the materials you provided to me." Even worse, the individual lawyer might not have a fully copy of all deal documents (some public security, ESOP, and other transactions might

include related documents not provided to individual participants), so the lawyer might find it impossible to comply with the new requirement.

The use of the passive voice tacitly creates an affirmative obligation for the lawyer: the lawyer must make certain the client has the full terms in writing because otherwise the lawyer is subject to professional discipline and to the risk that failure to comply with the rule will have civil consequences. The proposed use of the active voice does not alter this but only imposes a new and unnecessary requirement as to the source of the writing.

The L.A. letter says that our current rule is not broken and needs no repair. I agree.¹ Shifting the disclosure obligation to the lawyer will cause needless confusion, in some situations make the lawyer and the Bar look silly by requiring meaningless gestures, and provide no client protection benefit. Because the new requirement would be counter-intuitive and contrary to established California and outside authority, some lawyers will be sandbagged.

For these reasons, I respectfully dissent from proposed Rule 1.8.1(a).

**Commission's Response to Dissent Submitted by Robert Kehr
on the Recommended Adoption of Proposed Rule 1.8.1(a)**

Current Rule 3-300(A) prohibits a lawyer from entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client unless the "transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client." The Commission's Proposed Rule 1.8.1(a) provides that a lawyer may not enter into such a transaction unless "the transaction or acquisition and its terms are fair and reasonable to the client and *the lawyer fully discloses and transmits in writing* the lawyer's role in the transaction or acquisition in a manner that should reasonably have been understood by the client." (Emphasis added)

Our colleague Robert Kehr has no objection to the requirement that a lawyer disclose the lawyer's role in any transaction to the client. Instead, he dissents to the Commission changing the passive voice to the active voice as it concerns disclosure and transmission of the terms to the client. Mr. Kehr believes that imposing a duty on the lawyer to disclose in writing the terms of a transaction that the client has originated creates a trap for the unwary because, in such circumstances, the client will have more information about the transaction than the lawyer.

The Commission does not agree that the proposed revision creates the disciplinary trap that Mr. Kehr seems to think it does. The "Guidelines for Drafting and Editing Court

¹ The Commission's schedule made it difficult to correct the problem although I believe that all three members of the Rule 1.8.1 drafting team agreed with the L.A. letter.

Rules” prefers the use of the active voice over the passive voice. Beyond having the virtues of making the rule clearer, the use of the active voice in this Proposed Rule has what the Commission considers the virtue of squarely placing the primary responsibility on the lawyer for disclosing the terms of a deal in which the client and lawyer both have a financial stake. That is where the responsibility should be, whether the investment originates with the lawyer, the client, or a third party.

Where the deal comes fully-formed from the client, that disclosure obligation will be simple enough, satisfied as easily as a link to the terms of the transaction with the required disclosure of the attorney’s (perhaps non-existent) role in the transaction. There is no obligation on the face of the proposed rule that the lawyer “explain the transaction” to the client in such cases, as the dissent suggests. There should be no ambiguity, however, about who has the responsibility for making sure the lawyer and client literally are on the same page with respect to a transaction in which each has a financial stake. Although there may be some instances as identified in the dissent where a sophisticated business client originates the transaction and proposes the terms, it is just as, if not more, likely that the proposal will originate with the lawyer and be offered to a client who lacks the same sophistication in business matters. The Commission believes that it is appropriate for the rule to signal to the profession’s members that it is their responsibility to ensure that all clients understand the terms and the lawyer’s role so that the client’s consent is truly informed. The proposed rule makes the locus of that responsibility clear.

As a matter of style and as a matter of a lawyer’s duty to a client in a context fraught with the possibility of conflict between the two, the choice the Commission made to use the active voice was sound.

**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.

**Commission Member Dissent, Submitted by Robert Kehr,
on the Recommended Adoption of Proposed Rule 1.8.5**

Proposed Rule 1.8.5 states the general prohibition on a lawyer bidding for clients by promising benefits to a potential client other than the benefit of the quality of the lawyer's services and the price at which they will be provided. I don't disagree with that policy, which is in current rule 4-210. I dissent for the single reason that the proposed Rule, in proposed paragraph (b)(2), makes compliance with "Rules 1.7(b), 1.7(c), and 1.8.1" a condition to a lawyer making a loan to the lawyer's client.

Proposed paragraph (b)(2) continues the current exception to the general prohibition on a lawyer providing benefits to a client that permits a lawyer's post-retention agreement to lend money to the client based on the client's written promise to repay the loan. It is my view that a lawyer's loan transaction with a client is a "business transaction" within the meaning of current rule 3-300 and proposed Rule 1.8.1, and I therefore believe that the proposed reference to Rule 1.8.1 in paragraph (b)(2) is both correct and helpful.

However, proposed Rule 1.8.5(b)(2) would add to the Rule 1.8.1 reference a reference to proposed Rules 1.7(b) and (c), and this is the reason for my dissent. My dissent to paragraph (b)(2) overlaps to an extent with my separate dissent to proposed Rules 1.7(b) and (c), but I will minimize my dissent to those proposals.

Let me first get out of the way a small drafting error. Any reference to Rules 1.7(b) and (c) is incorrect because there is no situation in which both would apply. The correct statement would be "17(b) or (c), as applicable". I will assume that proposed Rule 1.8.5(b)(2) uses "or" rather than "and".

Current rule 3-310(B) contains four subparagraphs, all of which now have been blended into – and I would say "hidden" – in proposed Rules 1.7(b) and (c). The only part of current rule 3-310(B) that has any conceivable connection to a lawyer's loan to a client is subparagraph (4). It includes within a lawyer's "disclosure" requirement the situation in which the lawyer "has or had a legal, business, financial, or professional interest *in the subject matter of the representation.*" (emphasis added).¹

The Commission's discussion on the rule 3-310(B)(4) reference was to the effect that the existence of a creditor – debtor relationship between lawyer and client could have an effect on the representation as might occur if there were any unwanted change in the lawyer's position as a debtor, such as might occur if the client were to default on the loan or the lawyer were to sense that possibility. This of course is correct, but the logic

¹ Rule 3-310(A)(1) states in full: "'Disclosure' means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;" Proposed Rule 1.0.1(e) implicitly contains a requirement of "disclosure": "Informed consent" means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct."

of this view would require lawyers to make rule 3-310(B) disclosures to their clients whenever any relationship between a lawyer and client might change and, in changing, affect the lawyer-client relationship. This would mean that rule 3-310(B)(4) would require a “disclosure” whenever a lawyer has a “legal, business, financial, or professional” relationship with the client. This would include the representation of family members, neighbors, acquaintances from clubs and other social situations, social relationships based on common connections (the client was referred to the lawyer by their common accountant or dentist), and so on. To take one of many possible examples, imagine a lawyer who represents her brother-in-law in a matter. In that situation, the Commission’s logic is that the lawyer’s “disclosure” would have to warn the brother-in-law about the possible hazard to the lawyer-client relationship if the new client were to divorce the lawyer’s sister.

That “disclosure” would be plain silly. It would trivialize the important role that a “disclosure” has under the conflict rules by requiring the lawyer to say things that are perfectly obvious. It would be a waste of effort by the lawyer, would make the lawyer appear foolish to the client and thereby potentially interfere with the client’s willingness to rely on the lawyer’s advice, and would be a trap for unwary lawyers without any client protection benefit. Given the frequency with which many lawyers represent their family members and social and acquaintances, this is not a small matter.

Most important, the use of rule 3-310(B)(4) in these situations would be possible only by reading out of the current rule that the lawyer’s interest be “*in the subject matter of the representation.*” One example of what is included within this Rule is a lawyer who is asked to sue a company in which the lawyer has invested. There, the disclosure would include “the relevant circumstances” (lawyer has an investment in the target defendant) and the “reasonably foreseeable adverse consequences” (that investment amounts to roughly \$X, which the client might consider to be large enough to compromise the lawyer’s zeal in the representation).

It should be perfectly obvious to the hypothetical brother-in-law/client that his relationship with his lawyer would be affected if he were to divorce his lawyer’s sister, so no explanation should be needed. But disclosures currently required under rule 3-310(B)(4) are of facts that might not be known to the client (the lawyer’s interest in or relationship with others), and the consequences of that interest or relationship (the client’s confidence that the lawyer performance of her duties of loyalty, confidentiality, and competence would not be affected). Thus, a Rule 1.8.5 reference to the rule 3-310(B) could be seen as altering the meaning of what now is rule 3-310(B). This would lead to “disclosures” under proposed Rule 1.7(c) that have no client benefit and make the lawyer and the legal system appear foolish.

I would remove from Rule 1.8.5 the reference to Rule 1.7 but otherwise would adopt Rule 1.8.5 as drafted by the Commission. I believe that, as is true under current rule 4-210, satisfaction of the business transaction rule provides ample protection to the client. Any Rule 1.7 reference in Rule 1.8.5 would provide no material client benefit, would

imply a gap in the current for which there is no evidence, and would create Rule 1.7 issues even if that Rule were corrected.²

**Commission's Response to Dissent Submitted by Robert Kehr
on the Recommended Adoption of Proposed Rule 1.8.5**

Proposed Rule 1.8.5, which carries forward the substance of current Rule 4-210, addresses payment of personal or business expenses of a client. The Commission and the dissent agreed as to the language of the rule with one exception. The dissent objects to the inclusion of references to Rule 1.7 in paragraph (b) of the proposed rule. The dissent believes that the language of proposed Rule 1.8.5 (b)(2) requires that the lawyer give the disclosures required by Rule 1.7 in any situation that comes within the scope of Rule 1.8.5(b)(2). The reference to Rule 1.7 is the same, in different words, as the reference to Rule 3-310 in the current Rule 4-210. The only differences are to refer to Rule "1.7," the number in the proposed Rules that corresponds to rule 3-310 in the current Rules, and the placement of the reference in the text of the rule rather than a comment to conform to the principles of the Commission's Charter.

Proposed Rule 1.8.5 (a) prohibits a lawyer from paying the personal or business expenses of a prospective or existing client. Paragraph (b) lays out a series of exceptions to the rule. In relevant part, paragraph (b) provides:

(b) Notwithstanding paragraph (a), a lawyer may:

* * *

- (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 that the lawyer complies with Rules 1.7(b), 1.7(c) and 1.8.1* before making the loan or agreeing to so." [emphasis added.]

Proposed Rules 1.7(b) and 1.7(c) require either "informed written consent" of the client or "written disclosure" to the client to allow representation where there is a possible conflict of interest between current clients. The lawyer's duty to obtain the client's consent or make disclosure is required only where the circumstances spelled out in Rule 1.7 are met. Since Rule 1.8.5 cannot change Rule 1.7, the only reasonable reading of Rule 1.8.5 (b)(2) is that *only if the circumstances that trigger the application of Rule 1.7 are present* will the disclosures or consent be required. If those circumstances are not present, then no action by the lawyer is required to comply with Rule 1.7. The references in paragraph (b)(2) to Rules 1.7(b), 1.7(c), and 1.8.1 are

² Although I see consistency with the other states' Model Rule variations as being the least important of our rule-drafting goals, I should add that Model Rule 1.8(e) has nothing that corresponds to proposed Rule 1.8.5(b)(2) and therefore no reference to Model Rule 1.7.

intended to remind the lawyer to ensure the requirements of those rules are satisfied if they apply. In the cases cited by the dissent, the terms of Rule 1.7 would not apply, so the lawyer would not need to comply with the proposed Rule 1.7(b) or (c).

During its deliberations, the Commission discussed the concerns of the dissent and concluded, with only the one negative vote of the dissent, that the proposed language does not create the concerns expressed by the dissent.

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.

**Commission Member Dissent, Submitted by James Ham,
on the Recommended Adoption of Proposed Rule 1.8.10**

I dissent. While I agree that sexual relations with a client is usually unwise, and that sexual relations involving a quid quo pro, coercion, intimidation or undue influence, or under circumstances where the lawyer's competence is impaired, should subject a lawyer to discipline, I do not support the proposed expansion of the rule to prohibit all sexual relations, under any circumstances, under penalty of discipline.

Without question, some attorney-client relationships involve vulnerable clients and unequal bargaining positions. The existing rule protects the public against attorney misconduct in those cases by making it cause for discipline to engage in sexual relations in exchange for legal services, or under circumstances involving coercion, intimidation, or undue influence.

The proposed rule, however, bans all sexual relations, regardless of circumstance. I agree with the views expressed by members of the public, as well as the Los Angeles County Bar Association opposing this rule, and note the lack of consensus among the members of COPRAC concerning the wisdom of the proposed total ban. The existing rule articulates a proper balance that protects the public against unethical lawyer conduct, while respecting the rights of citizens to be free from overly intrusive and overbroad regulation of private affairs between consenting adults.

There is no empirical or even reliable anecdotal evidence that a complete ban on sexual relations is needed to protect the public or regulate the legal profession effectively. If, under the existing rule, the evidence is insufficient to support attorney discipline, the answer is not to pass a rule dispensing with proof of coercion, undue influence, quid pro quo or lack of competence, and imposing discipline based merely upon the fact that sexual relations occurred. Proponents of a complete ban cannot articulate why a lawyer should be disciplined for sexual relations with a mature, intelligent, consenting adult, in the absence of any *quid pro quo*, coercion, intimidation or undue influence. Nor can the proponents establish that the existing rule presents evidentiary burdens that are unjustified and which cannot be met by complaining witnesses.

The paradigm that all attorney-client relationships involve unequal bargaining power does not apply in many legal relationships and therefore cannot supply the rationale for this rule. Likewise, any attempt to analogize the legal professional to medical professionals or to psychologists is not persuasive because the range of relationships between legal professionals and clients is vastly different, as is the nature of the work performed. A complete ban would infringe personal rights in circumstances where there is no undue influence, coercion or risk to competent representation.

The proposed rule also vests entirely too much discretion in prosecutorial authorities, who may apply the complete ban rule against some, but not others, in an unfair, arbitrary or capricious manner.

**Commission's Response to Dissent Submitted by James Ham
on the Recommended Adoption of Proposed Rule 1.8.10**

The dissent of our colleague James Ham to Proposed Rule 1.8.10 consists of a vigorous defense of the current rule that addresses sex with clients, Rule 3-120. The existing rule permits attorneys to have sex with their clients unless: (1) the attorney conditions the representation of a client on submission to sexual demands; (2) the attorney uses "coercion, intimidation, or undue influence" to get the client to submit to sexual demands; or (3) continued sexual relations with the client will cause the attorney to violate the attorney's duty to the client to perform legal services competently. (Rule of Professional Conduct 3-120(B).)

Mr. Ham asserts that the current rule "articulates a proper balance that protects the public against unethical lawyer conduct, while respecting the rights of citizens to be free from overly intrusive and overbroad regulation of private affairs between consenting adults."

But the current rule is broken and the Commission has fixed those inadequacies by proposing a revised rule that, unlike the existing rule, complies with the mandate of this Commission's charter in every respect. As an initial matter, Mr. Ham is simply incorrect when he asserts that proposed Rule 1.8.10 would prohibit an attorney from having any sexual relations with clients "under any circumstances, under penalty of perjury." In fact, the proposed rule carries forward the exceptions in the current Rule for sexual relations between lawyers and their spouses and for sexual relations which predate the establishment of the lawyer-client relationship. (Compare Rule 3-120(C) with Proposed Rule 1.8.10(a).)

The dissent's main point appears to be that there is "no empirical or even reliable anecdotal evidence that a complete ban on sexual relations is needed to protect the public or regulate the legal profession effectively." Leaving aside the mischaracterization of the proposed rule as a "complete ban," the Commission believes that our dissenting colleague misperceives our charge.

The proposed revisions to the Rule fulfill each of the five principles of the Commission's Charter by: (1) promoting confidence in the legal profession and ensuring adequate protection to the public; (2) setting forth a clear and enforceable disciplinary standard; (3) eliminating an unnecessary difference between California's rule, on the one hand, and ABA Model Rule 1.8(j) and rules adopted by the majority (31) of the jurisdictions whose rules address this subject, on the other hand; (4) eliminating ambiguity and uncertainty in the current Rule in favor of a bright-line Rule; and (5) eliminating an unnecessary comment to the Rule.

The current Rule is defective in every one of these respects. Given the mandates of our Charter, it is inconceivable that the Commission would have adopted the existing Rule from scratch. It would have been equally inconceivable, therefore, for the Commission to have retained the current Rule as the dissent proposes.

The Commission has proposed replacing a rule that frames a lawyer's sex with clients as "permitted unless" with a rule that frames a lawyer's sex with clients as "prohibited unless." The Commission believes that strikes the appropriate balance between privacy concerns and the power dynamic of the lawyer-client relationship.

The State Bar of California has tried the existing rule for 25 years and it has not worked. There are virtually no instances in which discipline has been imposed under the existing Rule. Consequently, the Commission has proposed fixing it. That fulfills the charge of this Commission and will lead lawyers more appropriately to discharge their duties to their clients.

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.

**Commission Member Dissent, Submitted by Robert Kehr,
on the Recommended Adoption of Proposed Rule 1.18(d)(2)**

This message states my dissent from proposed Rule 1.18(d)(2), with the request that it be included with the Commission's submission to the Board of Trustees, and if needed then to the Supreme Court.

I generally support proposed Rule 1.18. It is consistent with Evid. C. § 951 and related case law, and I believe that placing in the Rules a lawyer's confidentiality duty to prospective clients will make the point more accessible to lawyers and enhance client protection. I nevertheless dissent from this proposal as to proposed paragraph (d)(2).

Proposed paragraph (c) generally prohibits a representation adverse to a person who provided material confidential information to a lawyer while seeking to hire the lawyer. As a general rule, when a lawyer has a conflict based on confidentiality or loyalty obligations, the prohibition applies to all firm lawyers (and this is stated correctly in the second sentence of proposed paragraph (c)).¹

Proposed paragraph (d)(2) would create an exception, permitting the personally prohibited lawyer's firm to accept the adverse representation by creating a non-consensual ethics screen designed to separate the personally prohibited lawyers from the balance of the firm. That paragraph has a threshold requirement that the personally prohibited lawyer "took reasonable* measures to avoid exposure to more information than was reasonably* necessary to determine whether to represent the prospective client"

Most Rule 1.18 situations will have no need for the proposed paragraph (d)(2) exception because it is common practice for lawyers to limit their initial communications with prospective clients to basic information needed to check for possible conflicts of interest. For example, if a prospective client calls a lawyer because "I've been sued by Mr. X", the lawyer can determine that the firm represents Mr. X, decline the engagement, and have no resulting conflict of interest because the lawyer obtained no confidential information.²

What, then, might be involved in a lawyer obtaining information beyond the identities of the parties or participants, but that would come within the standard of avoiding

¹ The imputed knowledge rule generally presumes that client confidential information obtained by one lawyer in a law firm is deemed to be possessed by all other lawyers in the firm. This presumption "is based on the common-sense notion that people who work in close quarters talk with each other, and sometimes about their work." *Elan Transdermal v. Cygnus Therapeutic Systems*, 809 F. Supp. 1383, 1390 (N.D. Cal. 1992); *Rosenfeld Construction Co. v. Superior Court*, 235 Cal. App.3d 566, 573 (1991); and *Chadwick v. Superior Court*, 106 Cal. App.3d 108, 116 (1980).

² One example of this self-discipline is that many law firm web sites permit a reader to email a firm lawyer but direct the reader to not disclose any confidential information.

“exposure to more information than was reasonably* necessary to determine whether to represent the prospective client”? Here are a few examples:

- A prospective client’s ability to pay fees and litigation costs often is important, and in that situation firms can insist on obtaining detailed financial information about the prospective client “to determine whether to represent the prospective client”. This could include asset and income information, business or employment prospects, and the availability of family members or others to assure payment of fees and costs.
- A lawyer sometimes wants to be certain that the client does not have unreasonable expectations about the representation and can be expected to handle settlement negotiations and other litigation aspects in a practical way. This would cause the lawyer to dig into the client’s motivations. To take one example, a lawsuit intended for strategic business purposes could make the prospective client rigid and cause the client to insist on litigation tactics with which the lawyer might not be comfortable.
- Some representations depend on the client’s credibility, particularly in litigation heavily dependent on disputed findings. A lawyer in that situation can be expected to draw out the prospective client to take the client’s measure as a witness. This also could involve inquiry about other potential witnesses and other sources of relevant information.

The lawyer in any of these situations might spend hours with the prospective client, and might learn private business, financial and personal information of the most sensitive sort, but still qualify for the paragraph (d)(2) exception because the lawyer avoided “exposure to more information than was reasonably* necessary to determine whether to represent the prospective client.” That prospective client then would be faced with an adversary armed with all that confidential information in what, as one commenter pointed out, amounts to side-switching – the clearest and most serious confidentiality violation.

Non-consensual side-switching is problematic. One reported California appellate opinion that permits it, *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776 (2010), presents a rare factual situation. It remains to be seen now the appellate courts will deal with non-consensual screening in varying factual settings. The fundamental problem with unconsented screening is that the prospective client cannot object to the screen and has no way to verify that the prospective client’s confidential information is not available to the lawyers representing the prospective client’s current adversary.

One of the goals of the standards governing lawyer conduct is to engender client trust in lawyers and in their advice. Appropriate legal advice guides clients in lawful conduct, which protects the clients’ interests, avoids injuries to others, prevents disputes, and reduces the burden on the courts. Quite obviously, a lawyer can supply full and reliable legal advice only if the client fully discloses all potentially relevant information to the lawyer, and a client will do that only if the client trusts the lawyer to not misuse the

client's information. A lawyer operating without a command of the facts will supply incomplete, misleading, and even incorrect advice to the client. Without that trust, clients will not fully disclose themselves, as a result will not receive full and reliable advice, and won't trust the advice they do receive. Appellate courts considering non-consensual screening will need to consider whether the practice interferes with these goals.

It also is important that proposed paragraph (d)(2) would create a rigid disciplinary standard that, for example, would apply to all firms without regard to size or organization. See *Filippi v. Elmont Union Free School Dist. Bd. of Educ.*, 722 F. Supp. 2d 295, 307-08 (E.D.N.Y. 2010) (screening rejected because firm had only six lawyers and citing other cases in which screening was rejected due to firm size, one being a fifteen-lawyer firm) and *Hitachi, Ltd. v. Tatung Co.*, 419 F. Supp. 2d 1158, 1165 (N.D. Cal. 2006) (where court determined ethics screen insufficient because the matter was being handled by one of six members of an intellectual property group in an office of a large firm and the tainted member was one of the six members in the same office). This proposed rigid system also would apply without regard to the sensitivity of the information obtained by the screened lawyer. See, e.g., *Energy Intelligence Grp., Inc. v. Cowen & Co., LLC*, 2016 U.S. Dist. LEXIS 92176, *11 (S.D.N.Y. 2016).

For these reasons, I respectfully dissent from proposed Rule 1.18(d)(2) and would leave the topic of non-consensual screening to development by the courts.

**Commission's Response to Dissent Submitted by Robert Kehr
on the Recommended Adoption of Proposed Rule 1.18(d)(2)**

Paragraph (d)(2) strikes a proper balance between the obligation to protect confidential information received from a prospective client and allowing clients access to other lawyers in the firm who have had no contact with the prospective client or exposure to the prospective client's information. The rules adopted in 36 states plus the District of Columbia as well Restatement Third the Law Governing Lawyers §15 (ALI 2000) permit ethical screening as a way of avoiding imputation when limited confidential information is imparted by a prospective client. The rule has been shown to enhance public protection by establishing clear and enforceable standards regarding the obligation to protect a prospective client's confidential information while permitting consumers access to legal services. California's experience with ethical screens in other contexts (e.g., experts, non-attorney employees, former judges, lawyers moving in and out of government service) has proven to be effective. See *Kirk v. First American Title Ins. Co.*(2010) 183 Cal. App. 4th 776, 803.

Paragraph (d)(2) allows imputation to be removed only if the prohibited lawyer limited the information learned to what was reasonably necessary to determine whether to represent the would-be client and the prohibited lawyer is timely screened from participation in the matter. Without the ability to remove imputation in this manner, prospective clients would have the same right as former clients to prevent other lawyers

in the firm from undertaking a subsequent adverse representation over their objection. The Commission believes that removing paragraph (d)(2) would be inconsistent with case law and would unreasonably restrict the right of clients to counsel of their choice.

The provisions of Rule 1.18 reflect the realities of modern practice. Lawyers and law firms are routinely contacted, electronically and otherwise, by prospective clients. Every consultation by a lawyer with a putative client should not expose law firms of various sizes and geographical locations to imputation of the prohibited lawyer's conflict. Under paragraph (d)(2) the lawyer consulting with the prospective client bears the burden of showing that the lawyer took "reasonable" (see Rule 1.0.1(h)) measures to limit the amount of information learned to that which was reasonably necessary to determine whether to accept the representation. Other lawyers in the firm seeking to undertake the subsequent adverse representation bear the burden of showing the timely imposition of adequate procedures to isolate the prohibited lawyer and protect the prospective client's confidential information. (see Rule 1.0.1(k)). Thus, the various scenarios posited by the dissenter may or may not permit the removal of imputation under paragraph (d)(2) depending on the circumstances in a particular case.

It is not correct that a prospective client would be forced to accept screening imposed unilaterally by a law firm and would have no way to verify that the prospective client's confidential information is adequately protected. The Commission believes it has addressed these concerns by modifying paragraph (d)(2)(ii) to impose the same written notice requirements that are required in proposed Rule 1.11(b)(2) and Rule 1.12(c)(2) in order to allow the prospective client to be able to ascertain compliance with the provisions of the rule.

The proposed rule does not create a risk of "side switching" as that concept has been articulated in case law. There is no prospect of side switching in the case of a prospective client because by definition no lawyer-client relationship ensues from the initial consultation and, therefore, the other lawyers in the firm are not changing sides in the same or a substantially related matter.

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.

Commission Members Dissent, Submitted by Danny Chou, George Cardona & Judge Dean Stout, on the Recommended Adoption of Proposed Rule 3.3

We believe that some of the duties stated in paragraphs (a) and (b) should continue until the conclusion of the proceeding even if the representation has been terminated before then. For example, a lawyer should not be able to shirk his/her duty to take reasonable remedial measure to correct a false statement made to the tribunal by withdrawing from the representation. But ABA Model Rule 3.3(c) – which extends *all* of the duties stated in paragraphs (a) and (b) until the conclusion of the proceeding and has been adopted by other jurisdictions – may, in some circumstances, place an undue burden on lawyers who no longer represent a party to the proceeding. A more nuanced approach that specifies which particular duties stated in paragraphs (a) and (b) – such as the duty stated in paragraph (a)(1) – continue until the conclusion of the proceeding should be adopted.

Commission's Response to Dissent Submitted by Danny Chou, George Cardona & Judge Dean Stout on the Recommended Adoption of Proposed Rule 3.3

The Commission does not believe that the duties under paragraphs (a) and (b) should be extended to the conclusion of the proceeding. From the former client's standpoint, doing so might interfere with the relationship with replacement counsel and with remedial measures (or planned remedial measures) unknown to the client's former lawyer. From the former lawyer's standpoint, it would impose an unfair and potentially burdensome obligation to monitor the proceedings after the representation of the client has ended. The variety of circumstances in which paragraphs (a) and (b) could come into play does not warrant imposing a continuous obligation on a lawyer to take corrective action in a proceeding in which a lawyer no longer is involved and about which, due to the privilege that applies to communications between the former client and replacement counsel, the former lawyer can have only imperfect and potentially misleading information. Moreover, a lawyer would be compelled to correct a false statement of fact or law or adverse legal authority previously cited to the court even if such a "mea culpa" would have no significance to the parties or to the court. The lawyer's actions may also be ill-advised and contrary to the advice given by the client's current lawyer. The Commission further believes that limiting the obligation to take corrective action to the conclusion of the proceeding or the representation, whichever occurs first, is a practical and workable time limit and consistent with the Commission's Charter to promulgate rules that are clear and enforceable.

The Commission disagrees with Mr. Tuft's interpretation of ABA Model Rule 3.3. That dissent suggests that the ABA Rule extends the remedial obligations of the Rule to the conclusion of the proceedings even in situations where the lawyer no longer represents the client. ABA Rule 3.3 merely states that the duties continue until the conclusion of the proceeding, but it is silent on whether these duties apply even after the lawyer has withdrawn or been terminated. ABA Rule 3.3 is therefore ambiguous on the issue, and no doubt this uncertainty over time will lead to different interpretations in the jurisdictions

that have adopted ABA Rule 3.3(c).¹ Fairly read, ABA Rule 3.3 is premised on situations where the lawyer still represents the client and the lawyer has not withdrawn or been terminated. Therefore, the Commission's approach to draw the line at the conclusion of the representation is not inconsistent with the ABA Rule and in fact eliminates the ambiguity in the ABA approach.

The dissent from Mr. Chou, et al. recommends a more nuanced approach, which would specify what specific duties under paragraphs (a) and (b) continue to the conclusion of the proceeding. The problem with this approach is that identifying which paragraph (a) and (b) duties should continue after the lawyer's termination or withdrawal is necessarily fact-specific, depends on the particular circumstances of breach of candor, and the current status of the proceeding. The Commission believes that a more nuanced approach would defeat the objective of having a bright-line Rule. The Chou dissent also does not explain how such a Rule would read or offer an alternative. It does not explain what aspects of paragraphs (b) and (c) should apply after termination and to the conclusion of the proceeding.

A Rule that attempts to encompass every ill sets an aspirational goal. The results necessarily will be indefinite, subject to varying interpretations, and deficient in providing guidance to lawyers in practice and to those who enforce the Rules.

¹ However, there is textual support for the conclusion that the ABA Rule applies only while the lawyer-client relationship continues because it refers to ABA Rule 1.6, which states the duty of confidentiality to current clients, but not to Rule 1.9 which expresses a lawyer's duties to former clients. Had the ABA Rule drafters intended that ABA Rule 3.3 would apply after the lawyer-client relationship ends, Rule 3.3(c) would have referred to Rule 1.9 as well. That is, the last clause of Rule 3.3(c) would have been drafted to say, for example: "... even if compliance requires disclosure of information otherwise protected by Rule 1.6 **or Rule 1.9**, as applicable."

Rule 3.8 [5-110] Special Responsibilities of a Prosecutor
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

The prosecutor in a criminal case shall:

- (a) not institute or continue to prosecute a charge that the prosecutor knows* is not supported by probable cause;
- (b) make reasonable* efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable* opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal* has approved the appearance of the accused in propria persona;
- (d) make timely disclosure to the defense of all evidence or information known* to the prosecutor that the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known* to the prosecutor that the prosecutor knows* or reasonably should know* mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) The information sought is not protected from disclosure by any applicable privilege or work product protection;
 - (2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) There is no other feasible alternative to obtain the information;
- (f) exercise reasonable* care to prevent persons* under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons* assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.
- (g) When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
 - (1) promptly disclose that evidence to an appropriate court or authority, and

- (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable* efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (h) When a prosecutor knows* of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.* This Rule is intended to achieve those results. All lawyers in government service remain bound by Rules 3.1 and 3.4.

[2] Paragraph (c) does not forbid the lawful questioning of an uncharged suspect who has knowingly* waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable* waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (d) include exculpatory and impeachment material relevant to guilt or punishment and are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. Although this Rule does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. A disclosure's timeliness will vary with the circumstances, and this Rule is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[4] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal* if disclosure of information to the defense could result in substantial* harm to an individual or to the public interest.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial* likelihood of prejudicing an adjudicatory proceeding. Paragraph (f) is

not intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See Rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (f) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a person* outside the prosecutor's jurisdiction was convicted of a crime that the person* did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable* efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See Rule 4.2.)

[8] Under paragraph (h), once the prosecutor knows* of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

**Commission Member Dissent, Submitted by George Cardona,
on the Recommended Adoption of Proposed Rule 3.8**

I agree with the Commission's decision to recommend adoption of a Rule 3.8, thereby bringing California into conformity with every other jurisdiction that already has in place some version of Rule 3.8 addressing the special responsibilities of prosecutors. I also agree with the Commission's decision to expedite consideration of Rule 3.8. There are two aspects of proposed Rule 3.8, however, that I do not believe can be justified. First, I agree with Daniel E. Eaton that proposed Rule 3.8(d) is aspirational, ambiguous, and beyond the scope of the Commission's mandate. I also believe that, as the First Rules Commission concluded, it poses an unnecessary risk of conflict with California's criminal discovery statutes. Second, I also believe that, without any empirical evidence demonstrating a sufficient need, proposed Rule 3.8(e) unduly limits the ability of prosecutors to investigate instances in which clients have used their lawyers to further criminal conduct. From these two portions of the proposed Rule I dissent.

a. Proposed Rule 3.8(d)

I agree with and join in Daniel E. Eaton's dissent to proposed Rule 3.8(d). I wish to provide additional comment on three points.

First, as Mr. Eaton notes, the uniformity supposedly furthered by adoption of the language of ABA Model Rule 3.8(d) is illusory. While most states have adopted the language of the ABA Model Rule (or something very close), interpretations of that language have varied. The Drafting Team's Report and Recommendation on Rule 3.8 cites three jurisdictions (District of Columbia, North Dakota, and U.S. District Court for the District of Nevada) that have held the Rule to require disclosures beyond Brady's materiality standard; four jurisdictions (Colorado, Wisconsin, Ohio, and Oklahoma) that have held it does not; and one jurisdiction (Louisiana) whose case interpreting the Rule has been cited by different courts both for the proposition that the Rule imposes disclosure obligations beyond Brady and for the proposition that it does not.¹ The Commission, in proposed Comment 3, sides with those jurisdictions that have concluded that the disclosure obligations under the Rule are broader than those imposed by Brady and its progeny. This cannot be said to further any meaningful national uniformity -- California simply joins the less than overwhelming number of jurisdictions that have taken this approach. Moreover, as in these other jurisdictions, proposed Rule 3.8(d) provides insufficient guidance as to the scope of the broader obligation imposed. Far from promoting uniformity, the text of proposed Rule 3.8(d) leaves open, undetermined, and subject to potentially differing determinations by various jurisdictions' disciplinary authorities what standard should be applied by prosecutors in determining whether disclosures not required under substantive law may nevertheless be required by the Rule.

¹ I note that the District of Columbia Rule has language markedly different from the ABA Model Rule, further undermining any claim of uniformity.

Second, the proposed language is problematic when considered against the backdrop of the discovery requirements imposed by California statutory law. Although Comment 3 reflects a wise choice not to leave the timing of disclosure required by the Rule free standing and ambiguous, the Comment does not provide the same clarity with the scope of the disclosures. Comment 3 ties the Rule's timing requirements to "statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions." The proposed alternative Rule 3.8(d) that was rejected by the Commission would have implemented a similar tie to statutory and constitutional standards, as interpreted by relevant case law, for defining what constitutes information that "tends to negate the guilt of the accused or mitigates the offense. . . ." This would have provided guidance based on an existing, and evolving, body of law well known to prosecutors, defense attorneys, and courts. Instead, we are left with no guidance as to the standard that California's disciplinary authorities will apply. Without a tie to substantive law, will prosecutors be disciplined for failing to disclose potential impeachment information even where such disclosure would not be required under Brady and its progeny? Absent a materiality limitation, must the prosecutor disclose all such impeachment information regardless of its triviality or admissibility? Is this the case even if the witness's testimony is of minimal significance, for example, a custodian of records? The Rule itself provides no guidance, leaving ambiguities that should not be present in a Rule intended to provide a basis for discipline, not simply state an aspirational goal.

The First Rules Commission proposed a Rule 3.8(d) that contained a tie to existing law identical to that contained in the alternative rejected by this Commission, requiring prosecutors to "comply with all statutory and constitutional obligations, as interpreted by relevant case law, to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense" As explained by the First Commission, its addition of the highlighted introductory clause was to clarify "that the requirement of a prosecutor's timely disclosure to the defense is circumscribed by the constitution and statutes, as interpreted and applied in relevant case law." This approach was based on the Commission's determination that ABA Model Rule 3.8(d) "was in conflict with California statutory law," in particular, "California statutory law that had been approved with the passage of Proposition 115 in 1991." This approach was a sound one both for this reason and because it provides prosecutors with specific guidance defining the standard to which they are accountable and emphasizes that those prosecutors who fail to adhere to the standard will be held professionally responsible.

The current Commission's proposed Rule 3.8(d) leaves open the potential for conflict with California statutory law. California Penal Code § 1054.1(e) requires the prosecution to disclose "[a]ny exculpatory evidence." The California Supreme Court has explained that this pretrial disclosure obligation is not limited to "just material exculpatory evidence," and that if, prior to trial, a defendant "can show he has a reasonable basis for believing a specific item of exculpatory evidence exists, he is entitled to receive that evidence without additionally having to show its materiality." Barnett v. Superior Court, 50 Cal.4th

890, 901, 114 Cal.Rptr.3d 576, 582-83 (2010).² For “exculpatory evidence,” therefore, proposed Rule 3.8(d) and the California statutes appear to align. What constitutes “exculpatory evidence” falling within the scope of this broad pretrial disclosure obligation, however, remains an open question.

For example, in People v. Lewis, 240 Cal.App.4th 257, 192 Cal.Rptr.3d 460, 468 (2015), the court recognized that “whether exculpatory evidence includes impeachment evidence may be unsettled.” (citing Kennedy v. Superior Court, 145 Cal.App. 4th 359, 378, 51 Cal.Rptr.3d 637 (2006).) If California courts ultimately conclude that impeachment evidence constitutes “exculpatory information” within the meaning of Penal Code § 1054.1(e), then the statutory pretrial disclosure obligation would necessarily align with any interpretation of the Commission’s proposed Rule 3.8(d). But if California courts conclude otherwise, and interpret the Constitution and/or California discovery statutes as requiring pretrial disclosure of impeachment evidence only when it is material, then the Commission’s proposed Rule 3.8(d) confronts disciplinary authorities with a choice: (a) interpret proposed Rule 3.8(d) as requiring prosecutors to disclose impeachment evidence regardless of materiality; or (b) interpret proposed Rule 3.8(d) to accord with the California Courts’ interpretation of the Constitution and California discovery statutes and not require prosecutors to disclose impeachment evidence unless material by concluding that evidence that “tends to negate the guilt of the accused” does not encompass immaterial impeachment evidence. The former would pose a direct conflict with the California criminal discovery statutes, which make clear that “no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States.” California Penal Code § 1054(e).³ The latter avoids this conflict, but does so by effectively implementing the very alternative to proposed Rule 3.8(d) that the Commission has rejected. We should recognize now that the latter is the correct choice, and not leave unnecessary uncertainty and potential for conflicts with Constitutional and statutory law for later resolution by disciplinary authorities.

² At the same time, the Court recognized the distinction between the statutory standard for pretrial disclosure and

the showing required to demonstrate, post-trial, a violation of the prosecutor’s duty to disclose exculpatory evidence: “The showing that defendants must make to establish a violation of the prosecution’s duty to disclose exculpatory evidence differs from the showing necessary merely to receive the evidence.... To prevail on a claim the prosecution violated this duty, defendants challenging a conviction ... have to show materiality, but they do not have to make that showing just to be entitled to receive the evidence before trial.” Id.

³ Similarly, California Penal Code § 1054.5(a) states that “[n]o order requiring discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties.”

Finally, a primary driver to the Commission's recommendation of proposed Rule 3.8(d) appears to have been a concern that anything less would not send a sufficiently strong message to prosecutors that they should err on the side of disclosure, and not rely on materiality as a basis for withholding exculpatory evidence. The United States Supreme Court has repeatedly emphasized this message, stating clearly its view that "the prudent prosecutor will resolve doubtful questions in favor of disclosure." United States v. Agurs, 427 U.S. 97, 108 (1976); see also Cone v. Bell, 556 U.S. 449, 470 n. 15 (2009) ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); Kyles v. Whitley, 514 U.S. 410, 439-40 (1995) ("This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. This is as it should be.") (quotation and citation omitted). As the Commission heard from many of the District Attorneys who spoke at the October 23 meeting in favor of the alternative rejected by the Commission, they have heard this message and adopted disclosure policies that go well beyond that required by the Constitution, and in some instances even beyond that required by California statutes. Similarly, the United States Department of Justice has adopted a policy that generally encourages prosecutors to view their disclosure obligations under the Constitution and controlling substantive law broadly, and in particular "requires disclosure by prosecutors of information beyond that which is 'material' to guilt as articulated in Kyles v. Whitley, 514 U.S. 419 (1995), and Strickler v. Greene, 527 U.S. 263, 280-91 (1999)." United States Attorneys' Manual § 9-5.001(C).⁴ As Mr. Eaton notes, it is simply wrong to say that adopting the alternative Rule 3.8(d) rejected by the Commission would do nothing to buttress this message. Adopting this alternative would still put in place a rule that singles out prosecutors with a clear statement that they may be subject to discipline for failing to comply with any of their Constitutional or statutory obligations to disclose evidence favorable to the defense. As Mr. Eaton notes, such a clear statement of the potential for discipline cannot help but focus prosecutors on the need to comply with all of their legal disclosure obligations.

b. Proposed Rule 3.8(e)

As recommended, proposed Rule 3.8(e) bars prosecutors from subpoenaing attorneys for information about a past or present client unless the prosecutors reasonably believes all three of the following: (1) the information sought is not protected from disclosure by any applicable privilege or work product protection; (2) the evidence sought is "essential" to successful completion of the prosecutor's investigation; and (3) there is no other "feasible" alternative to obtain the information. In recommending this Rule, the Commission diverged significantly from the current rules, which have no equivalent.

⁴ In footnote 16 on page 22 of the Drafting Team's Report and Recommendation, the drafting team states, "The United States Attorney's Manual of the Department of Justice has adopted as an internal policy for disclosure a standard comporting with the ABA's broad interpretation of 3.8(d)." It is true that, as referenced above, the United States Attorney's Manual has adopted an internal discovery policy that generally encourages prosecutors to view their disclosure obligations under the Constitution and controlling substantive law broadly. However, the policy is independent from, and does not mention, the ABA's interpretation of its Model Rule 3.8(d).

While the interest underlying this proposed Rule, protecting the attorney-client relationship from undue interference, supports adoption of a Rule 3.8(e), I believe the Commission's proposal strikes an inappropriate balance with the need to investigate criminal conduct furthered or concealed through the unknowing assistance of attorneys, a balance unjustified by any empirical evidence of overreaching by prosecutors in either California or any of the significant number of jurisdictions that, like California, have not yet adopted ABA Model Rule 3.8(e).

First, while the Commission's proposed Rule 3.8(e) is, with a variation only in subsection (1), the same as the ABA Model Rule, a significant number of jurisdictions have not adopted the ABA Model Rule. As set forth in the report and recommendation, while 33 jurisdictions have adopted ABA Model Rule 3.8(e) verbatim or in a slightly modified form, 17 jurisdictions (including California) have not. Among the 17 jurisdictions that have not adopted the Rule are some of the largest and most significant for criminal prosecutions in the country, including the District of Columbia, Florida, Michigan, New York, Pennsylvania, and Texas. Yet, to my knowledge, the Commission has been cited no empirical evidence demonstrating any significant problem with prosecutors issuing unjustified subpoenas to attorneys in California or any of these 17 jurisdictions in the absence of Model Rule 3.8(e).

Second, despite the absence of any empirical evidence suggesting the need for such a stringent limitation on prosecutors' use of attorney subpoenas, the Commission follows the ABA in imposing the most stringent limitation possible, one requiring that the information sought be "essential" to the investigation and that there be "no other feasible alternative" for obtaining that information. In my view, this tips too far in the opposite direction, unduly limiting prosecutors' ability to thoroughly investigate criminal conduct furthered or concealed through the unknowing assistance of attorneys. That such criminal conduct is not unusual is demonstrated by California Evidence Code Section 956, which provides that information is not subject to protection under the attorney-client privilege where "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud." Indeed, there have been cases in which attorneys have been used by their clients to make false representations to regulators, courts, and investors, and to assist in laundering money by moving it through attorney trust accounts. The public interest in enabling full and complete investigation of these crimes must be considered as a counterbalance to the public interest in protecting the attorney-client relationship. The First Rules Revision Commission struck the appropriate balance between these two interests in proposing a Rule 3.8(e) that made two relatively minor changes to ABA Model Rule 3.8(e). The First Commission modified subsection (2) by substituting "reasonably necessary" for "essential." As the First Commission explained, this strikes the appropriate balance while providing clearer guidance to prosecutors seeking to evaluate whether their conduct will comply with the Rule: "It is a difficult, if not impossible, task to decide *ex ante* what evidence will be 'essential' to a successful prosecution and therefore a permissible subject of a subpoena addressed to a lawyer. The standard of 'evidence reasonably necessary to the successful prosecution' is more readily applicable and creates less risk for a prosecutor attempting to evaluate evidence at the start, or in the midst, of an investigation or prosecution." The First Commission also modified subsection (3) by substituting

“reasonable” for “feasible,” explaining that this was “to invoke a frequently used standard that will provide clearer guidance for the prosecutor. If ‘feasible’ means only that the alternative is theoretically possible even if not reasonable, the standard is too low. If ‘feasible’ means that the alternative is reasonable, the more familiar term ‘reasonable’ should be used.” Again, the First Commission’s proposal struck the appropriate balance between competing public interests, while at the same time providing clearer guidance to prosecutors seeking to comply with the Rule.

Finally, as was raised during one of the Commission’s meetings, if there is uncertainty whether the First Commission’s or ABA’s balancing of interests is the correct one, this uncertainty should weigh in favor of taking the incremental step of moving from the current California rules (which impose no limitation on attorney subpoenas issued by prosecutors), to the less stringent limitation recommended by the First Commission. If under the First Commission’s recommended Rule there is no indication that prosecutors are abusing the issuance of subpoenas to attorneys, this would provide empirical evidence that the balance has been appropriately struck, empirical evidence that can be gathered without the potential for unduly chilling appropriate investigative steps posed by the ABA’s more stringent limitation.

For all these reasons, I dissent from the Commission’s recommendation of its proposed Rule 3.8(e).

Commission’s Response to Dissent Submitted by George Cardona on the Recommended Adoption of Proposed Rule 3.8

As noted above, the majority of the Commission believes that it is important to clarify that the standard for disclosure does not include prosecutors deciding the extent to which evidence that “tends to negate the guilt of the accused or mitigates the offense” is material to the case. Only Alternative #1 makes that clear. This dissent demonstrates exactly why it is necessary to set forth a clear standard for disclosure. Mr. Cardona poses questions of whether disclosure is required even if the prosecutor assumes that the evidence is trivial or of “minimal significance.” California law has answered that question; it requires the disclosure of any exculpatory evidence, even if prosecutors do not believe it is of significance. As became evident in stakeholder input at Commission meetings, prosecutors are not in the best position to determine what evidence is or is not important to the defense. Thus, a clear rule of disclosure will prevent prosecutors from making erroneous assessments of the exculpatory potential of evidence, as has occurred in the many cases brought to the Commission’s attention. Contrary to what the dissent suggests, Proposed Rule 3.8(d) provides very clear guidance. The only problem is that some prosecutors do not like the guidance it provides.

Furthermore, the Commission determined that adoption of Proposed Rule 3.8(d) does not violate Proposition 115. As noted, California law already requires disclosure of “any exculpatory evidence” and the California Supreme Court has held that a defendant is entitled to such evidence without having to show its materiality. *Barnett v. Superior*

Court, 50 Cal.4th 890, 901, 114 Cal.Rptr.3d 576, 582-83 (2010). See also *People v. Cordova*, ___ Cal. 4th ___, 194 Cal.Rptr.3d 40, 2015 WL 6446488, at *12 (2015). The dissent argues that a conflict *may* develop between a prosecutor's duties under the rule and under case law, but none exists at this time and there is no reason to believe that one will develop in the future.⁵ California is, therefore, free to adopt Proposed Rule 3.8(d), a rule that best protects the integrity of the criminal justice system.⁶

Finally, this dissent argues that Rule 3.8(d) is not needed because prosecutors have gotten the message and promise to abide by their disclosure obligations in the future. While we take in good faith the representations made by a handful of prosecutors who attended the meeting, we note that the problem with discovery violations has been ongoing and, in the eyes of some judges, has escalated significantly. The former Chief Judge of the United States Court of Appeals for the Ninth Circuit recently wrote of the "epidemic" of *Brady* violations. *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013). Several witnesses testified before our Commission regarding the ongoing problems with discovery from prosecutors. Surprisingly, even though fellow prosecutors admitted that they should not be determining materiality before making discovery disclosures, even as late as the Commission's last consideration of this proposal, the Los Angeles County District Attorney was still arguing that it is the prerogative of her prosecutors to make materiality determinations before providing discovery.

Proposed Rule 3.8(d) is not intended to punish prosecutors. It is a responsible measure to address preventable miscarriages of justice. Adopted across the nation, it has not been used as a tactical weapon to give the defense an advantage in criminal proceedings. Rather, it is an ethical standard that guides prosecutors in ensuring that defendants receive fair trials. It is time for California to adopt it.

**Commission Member Dissent, Submitted by Daniel Eaton,
on the Recommended Adoption of Proposed Rule 3.8(d)**

California needs a Rule 3.8 dealing with the special duties of prosecutors to disclose exculpatory evidence to the defense, but it needs to be the right Rule 3.8. The version of the rule the Commission adopted takes a wrong turn at a critical juncture that makes the adopted rule aspirational, ambiguous, and beyond the scope of our responsibility. I dissent.

⁵ In fact, there is no reason to believe that such a conflict will develop. Even before *Barnett*, *supra*, the California Supreme Court recognized in the case of *In re Steele*, 32 Cal.4th 682, 701-02 (2004), that exculpatory evidence under California's discovery statutes includes evidence that "weakens the strength of" prosecution evidence. As developed, California law equates "exculpatory" with evidence that impeaches prosecution witnesses or detracts from the strength of prosecution evidence.

⁶ The reference to the first Rules Revision Commission's work does not reflect that its work was completed before the *Barnett* and *Cordova* cases.

The Commission adopts Rule 3.8, Special Responsibilities of a Prosecutor, to impose a duty on a prosecutor who is subject to the jurisdiction of the California State Bar to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”

In adopting this version of this new California disciplinary rule of conduct, the Commission rejects alternative language (alternative two) that would subject a prosecutor within the jurisdiction of the California State Bar to discipline who does not “comply with all statutory and constitutional obligations, as interpreted by relevant case law, to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”

I believe the Commission made the wrong choice between these two alternatives.

I start by expressing the substantial areas in the adoption of this new rule with which I agree with the Commission majority. I agree that California should adopt a new disciplinary rule addressing a prosecutor’s obligation to disclose to the defense potentially exculpatory evidence. California is unique among American jurisdictions in not having such a rule. Adding a dimension of discipline to a prosecutor’s obligations in this area undoubtedly will “promote confidence in the legal profession and the administration of justice.” (Commission Charter, ¶ 1.) Adoption of such a rule will make it less likely that accused individuals will be subjected to punishment that could and should have been avoided by the timely release of information bearing on their culpability or, more precisely, their lack of culpability.

I also agree that this rule should be adopted on an expedited basis. To warrant expedited adoption, a new or revised rule must be “necessary to respond to an ongoing harm, such as harm to clients, the public, or to confidence in the administration of justice” and “where failure to promulgate the rule would result in the continuation of serious harm.” (RRC Memorandum of Working Group dated May 11, 2015.) The anecdotal and statistical reports in the Innocence Project’s several thoughtful letters to this Commission are alarming and amply justify the adoption of a new Rule 3.8 without delay.

But it should be the right rule 3.8. While my agreement with the Commission is broad, my disagreement with a critical aspect of the rule as adopted is profound. I believe that the Commission departs from most of the mandates of the Commission’s charter.

Directive two of the Charter admonishes us to “ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives.” Rule 3.8 as adopted is aspirational. One member of the Commission argued that the rule as adopted “is not aspirational.” That was flatly

contradicted by the speaker those who argued in favor of alternative one chose to lead off their presentation to the Commission on October 23, 2015, Dean Gerald Uelmen of the Santa Clara College of Law. In his remarks to the Commission, Dean Uelmen argued that the existing dictates of *Brady v. Maryland* (1963) 373 U.S. 83 and its progeny are inadequate to obtaining prosecutorial compliance with the duty to disclose. Dean Uelmen said that *Brady* does not address standards of professionalism “to which all members of the profession should *aspire*.” (Emphasis added.) Dean Uelmen added that a prosecutor’s “aspirations” should go beyond doing nothing that may result in the reversal of a conviction on appeal. Dean Uelmen observed that “the primary purpose” of the rule, as the Commission ultimately adopted it, “is aspirational.” Toward the end of his remarks, Dean Uelmen framed the question of whether to adopt the alternative the Commission chose as: “Do we want a very simple *aspirational* standard?” (Emphasis added.)

Dean Uelmen is right to characterize the rule as adopted as aspirational. But that is a critical reason why the Commission was wrong to adopt the rule in that form.

Directive Three of the Commission Charter instructs us to “help promote a national standard with respect to professional responsibility issues whenever possible.” The version of the Rule adopted by the Commission offends this mandate as well.

Yes, rule 3.8 has been adopted by jurisdictions throughout the nation, but the courts have interpreted that rule differently. The uniformity we supposedly further with the adoption of the rule in the chosen form is illusory. Wisconsin, for example, has determined that this language is “consistent [and coterminous] with the requirements of *Brady* and its progeny.” (*In re Riek* (2013) 350 Wis.2d 684, 696.) Wisconsin is not alone. (See *Disciplinary Counsel v. Kellogg-Martin* (2010) 124 Ohio St.3d 415; *In re Jordan* (La. 2005) 913 So.2d 775; and *in re Attorney C.* (Colo. 2002) 47 P.3d 1167.) Other jurisdictions, by contrast, have adopted a more expansive view of what is required under what the Commission has adopted by Rule 3.8. (See e.g., *In re Kline* (D.C. 2015) 113 A.3d 202.)

The version of the rule the Commission adopted not only fails to advance uniformity, it needlessly introduced ambiguity. Directive Four of the Commission’s Charter says: “The Commission’s work should facilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties.” The Commission explicitly chooses to reject adoption of a version of the rule that would reflect the existing legal mandates on California prosecutors. The Commission’s response to this assertion is that Rule 3.8 in the form the Commission adopted it has been subject to wide body of case law.

There are two responses to the Commission’s assertion. First, this extra-jurisdictional authority is not binding on California lawyers. Unlike the alternative adopted by the Commission, alternative two would import a body of law that *is* binding on California prosecutors and that is fully formed -- evolving, to be sure, but fully formed at any given moment. The proponents of the version of Rule 3.8 repeatedly pointed out that existing California law goes beyond the bare mandates of *Brady*. (See, e.g., letter dated October 8, 2015 of the California Public Defenders Association to the Commission at pp. 3 and 7, discussing *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901.) That, however, is a

reason for adopting alternative two, not rejecting it. Reliance on a definable body of law is preferable in a rule of *discipline* to reliance on the vicissitudes of an ever-shifting, often contradictory body of case law as it is emerging in other places with a rule with substantially the same language.

And that is the second reason why the rule as adopted by the Commission introduces new ambiguities into our rules of professional conduct rather than eliminating them. As set forth above, jurisdictions that have adopted the very language the Commission adopted have interpreted that language very differently. Well, a prosecutor may fairly ask, which is it? Am I subject to discipline only if I violate duties less than those California imposes (*Brady*), the same as those California imposes (*Barnette*), or undefinably more than California imposes (the case law of unspecified other jurisdictions)? It will take years of litigation through our overtaxed disciplinary system to answer these and other questions, litigation that will involve questions of whether discipline under this newly adopted rules contradicts a California prosecutor's obligations under California constitutional and statutory law. (See e.g., Art. 1, § 24 of the California Constitution, rights of criminal defendants no greater under the California constitution than under the U.S. Constitution.)

Why not just acknowledge that a uniform national standard under 3.8 is unattainable and adopt a rule 3.8 that incorporates recognized underlying California law? The only possible rationale is to rewrite the law of the administration of criminal justice through the rules of discipline. One member of the Commission who supported the version of the rule adopted by the Commission said that the new rule is not designed to "regulate the criminal discovery process." But how could it not? The unknown limits of the newly adopted rule will lead conscientious prosecutors to do things existing law does not require, or even allow, them to do. (See letter of California District Attorneys Association dated October 1, 2015 to the Commission.) That kind of law-making goes well beyond the authority of this Commission.

It is simply wrong to say that adopting Rule 3.8 with alternative two would do nothing of importance. Adding a disciplinary component to a prosecutor's legal obligations in this area would concentrate the mind of a prosecutor in a way that the absence of such a disciplinary rule would not. CPDA President Michael Ogul of Santa Clara County correctly conceded as much.

In short, alternative two of rule 3.8 advances the first provision of the Commission's mandate to "promote confidence in the legal profession and the administration of justice" without offending three others. By adopting a rule that: (1) is aspirational; (2) purports to reflect a national uniformity that doesn't exist; and (3) is ambiguous, the Commission decreases the odds that the new rule will be adopted at all and increases the odds that, if adopted, enforcement of the rule will be delayed. That ironically would mean that the action of the Commission in adopting the new rule in this form on an expedited basis would not boost confidence in the legal profession or improve the administration of justice after all. What a shame. What an avoidable shame.

I respectfully dissent.

**Commission's Response to Dissent Submitted by Daniel Eaton
on the Recommended Adoption of Proposed Rule 3.8(d)**

First, Proposed Rule 3.8(d) is not aspirational. In fact, it is an effort to provide a clear articulation of the standard that some of the testifying prosecutors claimed they already follow. A major reason to adopt Alternative #1 for Rule 3.8(d) is to get all prosecutors on the same page and ensure the uniformity in discovery practices that will safeguard the integrity of the criminal process. As was evident at the October 23, 2015 meeting, some District Attorneys' Offices claim that they disclose all evidence or information that would tend to negate the guilt of the accused or mitigate the offense, while others submitted letters arguing that they should be able to consider materiality in deciding what evidence to disclose. Under California law, prosecutors have a duty to disclose all exculpatory information, not just evidence they deem material.⁷ Alternative #1 does not "aspire" to have prosecutors fulfill their ethical duties.⁸ It plainly explains what that duty is.

For similar reasons, the Commission was not persuaded by the dissent's second argument that Alternative #1 to Rule 3.8(d) should not be adopted because a handful of jurisdictions have been flexible in defining a prosecutor's disclosure obligations. The Charter for this Commission plainly states that it should, among other things: (1) work to promote public confidence in the legal profession and the administration of justice, and ensure adequate protection to the public; (2) not set forth standards that are "purely" aspirational objectives; (3) focus on revisions that are necessary to eliminate differences between California's rules and the rules used by a preponderance of the states to help promote a national standard wherever possible; and (4) eliminate ambiguities and uncertainties.

Every other state in the nation, as well as the U.S. Department of Justice, has adopted the language of Alternative #1. No other jurisdiction has adopted the language of Alternative #2. This is for good reason. Alternative #2 sends prosecutors into the perpetual morass of trying to continually determine what so-called "relevant case law"

⁷ *People v. Cordova*, __ Cal. 4th __, 194 Cal.Rptr.3d 40, 2015 WL 6446488, *12 (Oct. 26, 2015) (California Penal Code § 1054.1, subdivision (e) "requires the prosecution to provide all exculpatory evidence, not just evidence that is material under *Brady* and its progeny"). See also *Barnett v. Superior Court*, 50 Cal.4th 890, 901 (2010) (discovery of exculpatory evidence not governed by materiality).

⁸ Mr. Eaton takes out of context Dean Gerald Uelmen's reference to "aspirational" standards. In context, Dean Uelmen was referring to his work as Executive Director of the 2008 California Commission on the Fair Administration of Justice. That Commission focused on prosecutors' widespread indifference to their discovery obligations and the need for more compliance. For years, Dean Uelmen, as well as other leaders of the California legal community, have sought to have prosecutors comply with their ethical and legal duties, including those involving discovery. As testified to at the Commission meetings, Public Defenders continue to face difficulty in getting prosecutors to comply with their discovery obligations. (Testimony of Michael Ogul, President of California Public Defenders Association).

might say about how, if at all, they should consider materiality in deciding whether to disclose potentially exculpatory information. Alternative #2 seeks to limit pretrial discovery to only material disclosures as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963). We rejected that standard, as has the California Supreme Court, because it is not a standard that was either designed or intended to govern a prosecutor's pretrial ethical duties for disclosing exculpatory information. To the contrary, it is a standard that governs whether a new trial should be granted after there has been a trial in which necessary disclosures were not made.

The meetings at which stakeholders attended revealed that prosecutors either do not understand, or have been ignoring, their responsibility to provide exculpatory information to the defense. Contrary to what the dissent suggests, we do not expect that years of litigation will be needed to resolve how prosecutors can meet their obligations under Rule 3.8(d). Unlike Alternative #2 that requires perpetual analysis and reference to new case law, Alternative #1 plainly states that if information "tends to negate the guilt of the accused" or "mitigate the offense," it must be disclosed. This is an easy standard to understand and apply, as evidenced by the experience of the vast majority of states that have adopted the rule.

Commission members agreed that the public has lost confidence in our criminal justice system. With case after case of discovery violations that have led to wrongful convictions, there is a pressing need for a rule that does not signal to prosecutors that they should do their own analysis of materiality and case law before deciding whether to turn over potentially exculpatory information. Instead, the rule proposed by the overwhelming majority of the Commission, Alternative #1, will promote public confidence; it will set forth a concrete, not merely aspirational, ethical standard; and it will bring California into line with the rest of the nation. It will also eliminate the ambiguities and uncertainties that have led District Attorney Offices in this state to express conflicting views, like those that surfaced at our meetings, about when they are required to disclose exculpatory information. In fact, written submissions to the Commission from the CDAA and from the Los Angeles County District Attorney both indicate that requiring turning over of information that does not meet the materiality test would be a major change in the law. The Supreme Court has held that the language of Alternative #1 is the current law of California as set forth in Penal Code § 1054.1(e) (requiring the disclosure of "any exculpatory evidence"), *Barnett v. Superior Court*, 50 Cal.4th 890, 901, 114 Cal.Rptr.3d 576, 582-83 (2010) and *People v. Cordova*, __ Cal.4th __, 194 Cal.Rptr.3d 40, 2015 WL 6446488, at *12 (2015) (decided 3 days after the Commission adopted Rule 3.8).

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.

**Commission Member Dissent, Submitted by Carol Langford,
on the Recommended Adoption of Proposed Rule 4.2**

This letter is to provide comments and lodge my dissent to some of the changes being made to old Rule 2-100.

First, I strongly agree that changing the word "party" to "person" is a good change, and long overdue. The State Bar Court should not have to reach for a B&P 6106 violation to punish conduct that should be prohibited by the Rule.

I disagree however, with Comment 2A (what is in the current draft called a "placeholder"). This Comment seems to say that actual knowledge is required before a lawyer can be prosecuted under the Rule. This language is not in the current Rule, and there has been no problem with that lack of inclusion so far (for many, many years). I also think that when we heard from Allen Blumenthal from the Office of Chief Trial Counsel that your language saying "The Rule applies where the lawyer has actual knowledge that the person..(..)" will almost completely impair their ability to prosecute a violation of the Rule, then we must take heed.

It is true that the case law says actual knowledge is needed. And it is true that it also says that knowledge may be inferred from the circumstances. However by saying "This Rule applies where the lawyer has actual knowledge..(..)" you are twisting the meaning in a way that implies that only actual knowledge is sufficient for a prosecution of the Rule. You are also inserting a mens rea element that is not applicable in the State Bar court. As Mr. Blumenthal explained, in the State Bar all a respondent has to do is to, for example, take money from the trust account and that will alone comprise the willfulness element needed to commit a State Bar offense. The State Bar does not look to actual knowledge and/or a Respondent's state of mind unless the discipline phase of the trial is over and the second phase of the trial - mitigation - is being heard.

Moreover, adding the Comment proposed could make it possible for a lawyer to contact a person in, for example, a domestic case when a quick online search would show she is represented. The same is true of a post-arraignment defendant. That completely circumvents the intent of the Rule. The State Bar Court in their case *The Matter of Dale*, wanted to stop exactly this type of over-reaching by lawyers. We should support our Court.

I believe the Comment to the Rule should state "This Rule applies when the member knows or reasonably should know that the person to be contacted is represented by another lawyer in the matter" if you are going to keep that Comment in.

Comment 3 is also problematic. I get that you want lawyers to be able to talk about things outside of the representation with someone represented by counsel since that is not what the Rule wants to sanction. However, the way your draft reads it would allow a DA to ask a defendant about other offenses that may be considered strikes. Or, a lawyer to ask a woman about a custody issue when she is only represented on the dissolution. Your language is far too broad, and there must be boundaries or the purpose of the Rule is thwarted.

I suggest the following language: "This Rule does not prohibit communications with a represented person concerning matters not reasonably related to the representation."

Now let's look at Comments 9 and 10 - particularly the first sentence of Comment 10 and the last sentence of Comment 9 regarding the availability of court orders and investigative activities respectively. Those Comments are a bold attempt to legislate through Rule Comments - something the Supreme Court has already told us they don't want us to do. I do not understand why you would ignore their plain admonishment. They are right in not wanting us - a Commission - to do that. I urge you to listen to them.

Last, I do not recall which Alternative was selected in our Proposed Rule, but if it is Alternative One that includes (ii) - admissions on the part of an organizational constituent - then that is good. Why wouldn't we want to protect organizations from being held to admissions when, for example, the constituent does not understand how statements can hurt him and the organization? And don't we want to protect people who have not been properly "Organizationally Mirandized" that what they say can hurt them, too?

Please consider these comments. I do know that others outside of the Commission will be closely watching this Rule and we might as well get it right - right now.

Commission's Response to Dissent Submitted by Carol Langford on the Recommended Adoption of Proposed Rule 4.2

Proposed Comment [2A], which the dissent disagrees with, was originally included in rule 4.2 as a placeholder in the event the Commission did not adopt a general terminology rule defining "know." Although Comment [2A] has been deleted, its concept is now included in proposed Rule 1.0.1(f).¹ Thus the same definition of "know" continues to apply to this rule, warranting a response to the dissent.

Including a requirement that the lawyer "know" the person is represented is intended to reflect current case law, which makes clear that the prohibitions imposed by the rule apply only when a lawyer actually knows that the person being contacted is represented. See, e.g., *Koo v. Rubio's Restaurants, Inc.*, 109 Cal. App. 4th 719, 732 (2003) ("Case law makes clear that Rule 2-100 is only a bar to ex parte contact if the lawyer seeking contact actually *knows* of the representation.") (emphasis in original); *Truitt v. Superior Court*, 59 Cal. App. 4th 1183, 1188 (1997) ("Rule 2-100 does not provide for constructive knowledge. It provides only for actual knowledge."); *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398, 1401-02 [58 Cal.Rptr.2d 178] ((proscription against contact does not apply merely because attorney "should have known" that person would be represented). The Commission does not believe it is "twisting" the rule by including a comment that clarifies the continuing applicability of this

¹ Proposed Rule 1.0.1(f) provides:

"Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

limitation on the rule's prohibitions that, as the cases note, is inherent in the rule's use of the word "knows." Nor does the Commission believe that this will impose on OCTC or the State Bar Court any limitation on misconduct prosecutions or findings that does not already exist. Under current law, to prosecute a lawyer for a violation of Rule 2-100 in State Bar Court would require OCTC to prove that the lawyer actually knew the person contacted was represented. For the reasons explained in *Jorgensen*, the Commission believes that this reflects an appropriate balancing of the need to protect represented persons, while not unduly limiting investigation of claims. The recognition in the proposed comment that actual knowledge may be inferred from the circumstances comports with well-established law, see, e.g., *Gomes v. Byrne*, 51 Cal.2d 418, 421 (1959) ("actual knowledge . . . may be inferred from the circumstances.") and prevents a lawyer from willfully avoiding knowledge of representation; depending on the facts, this might apply where a lawyer handling a filed case deliberately avoids checking the docket to see if a party to the matter is represented. And, as *Jorgensen* notes, there are a variety of ways for lawyers to ensure that opposing lawyers are put on notice that their clients are in fact represented.

Proposed Comment [4] (which the Commission believes is referenced as Comment 3 in the dissent) is also intended to reflect both the language of the rule and current case law, both of which make clear that contacts are prohibited only to the extent they are "about the subject of the representation." Limiting the rule's prohibitions to communications about the actual subject of the representation, as opposed to extending them also to communications about matters "reasonably related" to the actual subject of the representation, is also consistent with an appropriate balancing of the need not to unduly limit investigations of potential legal claims. An example provided in the dissent also makes clear the need to limit the rule to the subject of the representation. If a woman has elected to be represented only in connection with dissolution, and not on custody, extending the rule to prohibit contacts relating to custody as well as dissolution because the two are "reasonably related" would create an untenable situation – opposing counsel could not talk to the woman without going through the woman's lawyer, but that lawyer would not be in a position to deal with opposing counsel since the lawyer does not represent the woman in connection with custody. Finally, the Commission believes that Comment [4] appropriately addresses concerns of access to justice stakeholders that an overly broad application of the rule's prohibitions could discourage limited scope representation.

Proposed Comment [8] (which the Commission believes is referenced as Comment 9 in the dissent) discusses application of the "authorized by law" exception. The last sentence of this proposed comment does not reflect an "attempt to legislate through Rule Comments." To the contrary, this last sentence makes clear that the "authorized by law" exception will apply to legitimate investigative activities engaged in by lawyers representing those accused of crimes only "to the extent those investigative activities are authorized by law." This last sentence is included to assure criminal defense lawyers that the change from "party" to "person" is not intended to alter any current law authorizing investigative activities, or to preclude the development of future law authorizing such activities. Far from altering the rule's "authorized by law" exception,

this last sentence simply makes clear that interpretation of the “authorized by law” exception as it applies to criminal defense investigations is left to the courts.

The proposed Comment [10] referenced in the dissent was not adopted by the Commission and is not included in the current draft.

**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.)

**Commission Member Dissent, Submitted by Daniel Eaton,
on the Recommended Adoption of Proposed Rule 5.3.1**

I believe that Rule 1-311, dealing with the employment of disempowered attorneys by members of the Bar, should be dropped from the revised Rules of Professional Conduct. The one piece of the rule worth saving should be moved to Rule 1-300. Keeping the rule retains an unnecessary non-conformity with the professional rules in effect in the preponderance of the states. Lawyers who employ disempowered attorneys don't need it to know how such sidelined members of the Bar may be engaged. State Bar prosecutors don't need it to be able to pursue discipline for employing attorneys who assist disempowered practice attorneys in practicing law. And disempowered attorneys don't need a rule not even directed at them to know what they may and may not do while they are sidelined. I respectfully dissent in principle from the Commission's retention of 1-311.

"The Rules of Professional Conduct are intended not only to establish ethical standards of members of the bar, but also designed to protect the members of the public." (*Ames v. State Bar* (1973) 8 Cal.3d 910, 917, citations omitted, rejecting disciplined attorney's contention that consent of client or the fairness of an attorney-client transaction rendered professional conduct rule regulating such a transaction in operative.) The first principle of this Commission's Charter from the State Bar Board of Trustees captures that declaration: "The Commission's work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection of the public." (Commission Charter, Principle 1.)

Principle 3 of the Commission's Charter directs the analysis of whether a particular existing Rule should be revised and, if so, how: "The Commission should begin with the current Rules and focus on revisions that (a) are necessary to address changes in law and (b) eliminate, when and if appropriate, **unnecessary** differences between California's rules and the rules used by a preponderance of the states (in some cases in reliance on the American Bar Association's Model Rules) in order to promote a national standard with respect to professional responsibility issues **whenever possible**." (Emphasis added.)

Rule of Professional Conduct 1-311 is entitled "Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member." It was adopted by the California Supreme Court in 1996 over the dissent of Justice Joyce Kennard. The Rule has six subparts. Paragraph (A) defines the terms "employ," "involuntarily inactive member," and "resigned member." Paragraph (B), the core of the Rule, sets out six tasks the employing member of the Bar may not employ a disempowered attorney to do on behalf of the employing member's clients. Subparagraph 6 of this paragraph has the catchall prohibition on employing such an attorney to "[e]ngage in activities which constitute the practice of law." Paragraph (C) identifies three non-exhaustive types of "research, drafting or clerical activities" the employing attorney may employ a disempowered lawyer to do. Paragraph (D) requires the employing attorney to serve a written notice of the employment of the disbarred attorney on the State Bar, listing the prohibited

activities in paragraph (B) and confirming that the disempowered attorney is not being employed to perform any of those activities. Paragraph (D) also requires the employing attorney to serve a similar written notice on each client on whose matter the disempowered attorney will work before or at the time the disempowered attorney begins to work on the client's matter and further requires the employing attorney to retain that notice for two years with proof that it was served. Paragraph (E) expressly allows the employing attorney, without notifying clients or the Bar, to hire the disempowered attorney exclusively to do such support services as typing, catering, reception, and maintenance. Paragraph (F) requires the employing member to notify the Bar when the services of the disempowered attorney are terminated.

The substance of Rule 1-311 is not found in the ABA Model Rules and is not found in the professional rules of 46 other states. The continued presence of Rule 1-311 in the California Rules of Professional Conduct is an unnecessary non-conformity with the rules used by the preponderance of the states. The essence of the Rule would remain in Business and Professions Code § 6133: "Any attorney or any law firm, partnership, corporation, or association employing an attorney who has resigned, or who is under actual suspension from the practice of law, or is disbarred, shall not permit that attorney to practice law or so advertise or hold himself or herself out as practicing law and shall supervise him or her in any other assigned duties. A willful violation of this section constitutes a cause for discipline." This provision was enacted in 1988. It captures all of paragraph (B) of the existing rule. Indeed, by requiring the employing attorney to supervise the disempowered attorney in the latter's assigned duties, § 6133 appropriately goes beyond what is required by Rule 1-311. It is not clear that the continued presence of this Rule, with a limited exception addressed below, adds anything to the ability of the State Bar to prosecute those who would employ a disempowered attorney to practice law. And yet there it is.

Paragraph (B) is not necessary to tell the disempowered attorney and an attorney who would employ him what he may do. It is useful to repeat that Rule 1-311 is not directed at the disempowered attorney at all, only to the attorney who would employ him or her. Even without this Rule, the law is clear for both employer and employee that a disempowered attorney may not in any way, shape, or form practice law or be employed to do so. Period. Subparagraphs 1-5 of Paragraph (B) add nothing to subparagraph 6, which in turn adds nothing to Rule 1-300. Subparts 1-5 may confuse the practitioner seeking guidance, who may understandably assume that the activities listed in those subparts comprise some special category of activities that are not quite the practice of law prohibited by subpart 6. What it means to "practice law" has been ably handled by the courts, including the State Bar Review Department. (See e.g., *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 128 (collecting cases); *Farnham v. State Bar* (1976) 17 Cal.3d 605; *Estate of Condon v. McHenry* (1998) 65 Cal.App.4th 1138, 1142-1143.) That is where those looking for guidance on this question, both the disempowered attorney and the one who would employ him or her, should turn, not the Rules of Professional Conduct.

It may be argued that Paragraphs (C) and (E) are still important because they guide the employing attorney in assigning the disempowered attorney appropriate tasks and thereby encourage the rehabilitation of the disempowered attorney. There are at least two responses to that argument.

First, it should be self-evident that not all roads to vocational redemption for the disempowered lawyer lead through a law office. For one thing, seven states prohibit suspended or disbarred lawyers from engaging in any law-related activities, a bar that presumably does not preclude those lawyers' rehabilitation through other means. There are other ways for a disempowered lawyer to carry the heavy burden of demonstrating the "exemplary" behavior "over a meaningful period of time" required for reinstatement. (*In re Gossage* (2000) 23 Cal.4th 1080, 1097.) That is why any defense of this Rule on the ground that its elimination would make the disempowered lawyer altogether unemployable makes no sense. The omission of these provisions would not even make the disempowered lawyer less employable since anyone at all may perform the tasks that are listed in Paragraphs (C) and (E), and there is nothing in the Rules that says that a disempowered lawyer may not be employed by an active lawyer at all.

Second, a disciplinary rule, the violation of which may lead to punishment of the employing attorney, is an odd place to set out a purported rehabilitating mechanism that gives no positive incentive to the employing attorney to help the wayward, sidelined attorney. In any event are the Rules of Professional Conduct, given their purpose, really the place to advance even such a noble end?

All of that said, I would not discard Rule 1-311 in its entirety. The requirement that the employing attorney provide contemporaneous written notice to clients on whose matters the disempowered is being engaged to work serves the purpose of these Rules to protect the public, especially the public consisting of clients. The same could be said I suppose of a rule requiring written notice to a client of anyone convicted of criminal fraud to work on their matters. I would transfer this part of the Rule to Rule 1-300 (A), addressing the unauthorized practice of law.

Rule 1-300 (A) reads: "A member shall not aid any person or entity in the unauthorized practice of law." One of three other states that have such a rule, Colorado, places the substance of the current Rule 1-311 under its rule prohibiting an attorney to assist others in the unauthorized practice of law. (See, Colorado Rule 5.5.) Rule 5.5 also is the ABA Rule addressing the unauthorized practice of law. Annotations under Rule 5.5. as it has been adopted in other states deal with the same kind of conduct as addressed in Rule 1-311. See e.g., *Ky. Bar Ass'n v. Unnamed Attorney* (Ky. 2006) 191 S.W.3d 640 (Lawyer disciplined for employing suspended lawyer and telling clients that employee was not practicing law for "health" and other reasons.) I would make the client notification provision of Rule 1-311 new Paragraph (B) of Rule 1-300 and make what is now Paragraph 1-300(B) a new Paragraph 1-300(C).

But that is the only part of Rule 1-311 that I would keep. The Commission learned from the Office of Chief Trial Counsel that lawyers who have employed disempowered

attorneys have filed over 1,000 written notices of having done so with the State Bar under this Rule. Impressive, but what ethical purpose does that really serve? Violation of the written notice provision gives the Bar an additional ground to punish a lawyer who has assisted a disempowered attorney in the practice of law. But the employing attorney is subject to discipline for that under Rule 1-300 anyway. And what of the lawyer who employs a disempowered attorney to perform non-legal tasks without serving the written notice with the Bar? In that case, violation of the notice furnishes a unique ground to seek discipline of the unwary employing lawyer. In my view, the provision requiring written notice to the Bar gives rise to what is essentially either redundant discipline or it is a trap for the unwary. Either way, it should go.

Yes, we start with the Rules as they exist, but our mandate goes beyond that. I regret that we have missed a rare opportunity to eliminate an unnecessary non-conformity with the rules prevailing in the vast majority of the states. I respectfully dissent.

**Commission's Response to Dissent Submitted by Daniel Eaton
on the Recommended Adoption of Proposed Rule 5.3.1**

Proposed Rule 5.3.1 retains, without substantive change, the provisions of current rule 3-111. The dissent argues that this rule should be dropped from the rules, rather than being continued.

Rule 3-111 was adopted by the Supreme Court in 1996. The Court reconsidered the rule in 2008, revising it, but retaining it in the Rules. As noted by the dissent, the charge of the Commission is to "begin with the current Rules..." Rule 3-111 has provided guidance both to the employing attorney and to the ineligible person (a member whose current status with the State Bar of California is disbarred, suspended, resigned, or involuntarily inactive) as to how to comply, and transparency to clients. It also provides an opportunity for the ineligible person to work in a law office to assist their rehabilitation and potential reinstatement. These benefits are continued in the proposed rule

The Commission concluded that retaining this rule was useful to protect the public and to provide guidance for attorneys employing ineligible persons, and should be retained.

**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.

**Commission Member Dissent, Submitted by Robert Kehr,
on the Recommended Adoption of Proposed Rule 8.4.1**

This message states my dissent from proposed Rule 8.4.1(d), with the request that it be included with the Commission's submission to the Board of Trustees, and if needed then to the Supreme Court.

Current rule 2-400 prohibits lawyers from unlawfully discriminating in hiring and other employment actions or in accepting or terminating the representation of a client. Its paragraph (C) prohibits any investigation or discipline under the rule until there has been a final judgment by another tribunal. Apparently due to paragraph (C), there apparently has been no reported discipline imposed for violation of this rule. The lack of reported discipline is the essential criticism by the proponents of an expanded anti-discrimination rule.

The result is proposed 8.4.1, a proposal with universally-supported aims. The reason for my dissent is the practical consequences of proposed paragraph (d), which would grant to the Bar the initial authority to investigate and prosecute allegations of discriminatory conduct by lawyers. As explained by Jayne Kim, then Chief Trial Counsel, in her letter dated September 2, 2015, to the Commission on this (I am quoting from the drafting team's report):

As written, the [current] rule prohibits discriminatory conduct while allowing the criminal and civil courts, with their expertise, to maintain initial responsibility for addressing the unlawful conduct. Many of these cases are handled by government agencies that are specifically authorized and funded to investigate and prosecute such conduct. These agencies have a high level of expertise in these areas. Additionally, the current rule discourages frivolous complaints of discrimination against attorneys while protecting the public from serious complaints of discrimination.

Ms. Kim's letter questions OCTC's expertise, and its ability to handle the volume of complaints that could be expected. The State Bar Court also wrote about this to the Commission. In a letter dated November 2, 2015 from Colin P. Wong, Chief Administrative Officer (again, I am quoting from the drafting team's report), the State Bar Court made an observation that echoes the Jayne Kim letter:

We believe that the deletion of [current] subsection (c) could allow the initiation of discipline charges based on alleged discriminatory conduct to be filed in the State Bar Court in the first instance, thereby bypassing other government agencies that are specifically authorized to investigate and prosecute such conduct.

I will return later to the question of expertise, but I first want to identify the equally important issue of due process. Mr. Wong's letter also described how the State Bar Court's procedures differ from those of the civil courts. There are three particular aspects of these differences that have due process implications: *First*, there is only

limited discovery in the State Bar Court, which generally is permitted only on Court order. See Rules of Proc. of State Bar, Rule 5.65 and: Rule 5.61(a) (no discovery subpoenas without prior Court order); Rule 5.61(c) (depositions allowed only on court order); and Rule 5.66(A)(additional discovery only upon motion and showing of good cause). *Second*, State Bar Court proceedings are not conducted according to the Evidence Code. Any relevant evidence *must* be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions. See Rule 5.104(C). This means, among other things, that hearsay evidence may be used for the purpose of supplementing or explaining other evidence. See Rule 5.104(D). *Third*, there are no jury trials in the State Bar Court. Following his discussion of the differences between State Bar Court and civil standards and procedures, Mr. Wong stated:

As described above, the unique nature of the State Bar Court and its own Rules of Procedure differ significantly from Superior Court civil proceedings. The State Bar Court respectfully requests that these differences be evaluated by the Commission when determining whether the proposed amendments to rule 2-400 should be adopted.

As their positions required, Ms. Kim and Mr. Wong dutifully said in their letters that OCTC and the State Bar Court would deal with any Rule issued by the Supreme Court, but their concerns about the practical consequences should be evident.

By comparison with civil litigation, State Bar proceedings are simplified and expedited. The logic of this can be understood in the context of the usual subjects of discipline. These include such things as: trust fund misappropriation and the comingling of trust and non-trust funds; failure to report receipt of trust funds; failure to refund unearned fees; failure to obey court orders; failure to report sanctions to the State Bar; client abandonment; failure to report significant developments to a client; reciprocal discipline after discipline in another jurisdiction; conviction of a crime; failure to comply with terms of disciplinary probation; and practicing while under suspension.

To a significant degree, the factual bases for possible discipline in situations of this sort are within the personal knowledge of the lawyer, demonstrated by the lawyer's own files and financial records, and shown by the records of a civil or criminal court or the disciplinary records of another jurisdiction. No doubt there are instances in which a respondent lawyer would like to have a greater discovery opportunity, but for the most part that would seem unnecessary.

Compare the relatively narrow scope of possible professional discipline with the expanse and complexity of the many state and federal statutory and regulatory prohibitions on discrimination. In particular, consider the unpredictability of where discrimination laws might lead. As an example, here is a link to a magazine article that asks whether websites must make ADA accommodations. See link:

I have no opinion on the ADA issue and no knowledge of the area of law, but this is an indication of just how unpredictable the reach and application of anti-discrimination laws might be as creative minds search for new solutions to old problems, or perceive new ones. It also shows how important it would be for a litigant in a claim of that sort to take advantage of civil litigation discovery standards and the rules of evidence. For another example, see *Weber v. Eash*, 2015 U.S. Dist. LEXIS 168367 (E.D. Wash. 2015) (client unsuccessfully sued her lawyer and others, alleging that she had an allergic reaction to something in the courthouse but nevertheless was forced to return to the courthouse without reasonable accommodation having been made).

Claims of these kinds are not appropriate for the simplified procedures of the State Bar Court. It also should be apparent that they are beyond the knowledge and experience of the Office of Chief Trial Counsel and the State Bar Court. They also can be expected to be beyond the knowledge of those lawyers who defend State Bar prosecutions, which in turn would require a respondent lawyer to hire a second law firm that has expertise in the legal issues raised.

Returning to the due process and expertise issues, here are examples of the sort of claims with which OCTC can be expected to be faced:

- A lawyer claims to have been discriminated against in compensation, in the kind of assignments given to the lawyer, or in promotion or being offered a partnership. Under State Bar Court procedures, this claim could be supported by hearsay testimony (perhaps from dozens of witnesses) and other forms of evidence that has not been tested through depositions or other forms of discovery. Because of the absence of discovery, the accused lawyer will not have a fair opportunity to identify key factual issues and obtain rebutting evidence. I don't believe that OCTC, the State Bar Court, or lawyers who represent accused lawyers have the expertise to investigate or analyze a claim of this sort.
- One of the protected classes under the Unruh Act, Civ. C. § 51(b), as amended this past year by SB 600, is "primary language". This, for example, would prevent a criminal lawyer from hiring a native speaker despite a good-faith belief that a native speaker's language facility would be crucial to gaining foreign born clients' trust and confidence, to obtaining from these clients all of the information needed to provide effective defenses, and to obtain that information with all of the nuances only available to a native speaker. Much the same would be true of immigration lawyers and others who represent foreign-born clients.

¹ As another example, I noticed a January 4, 2017 Daily Journal article discussing the difficulty of proving intent under the Unruh Civil Rights Act.

- It is easy to imagine a client defending a discrimination claim to want to have a member of the same protected group as part of the defense team. The client's lawyer would have to refuse this client request, and that would interfere with the client's trust in the lawyer and the legal system. The same prohibition would apply to a corporation's general counsel, who might in good faith believe that a minority lawyer or law firm would be the best choice for defending discrimination claims but who apparently would be prohibited from acting on that opinion or recommending to the corporation that it act on that opinion.
- New California Labor Code § 1197.5, effective January 1, 2016, addresses pay distinctions based on employees' sex. There are aspects of this new statute that are pertinent to proposed Rule 8.4.1. *First*, it contains a two or three-year statute of limitations on claims for recovery of wages (the longer one for willful violations) and a one-year statute of limitations on claims for discrimination or retaliation against an employee who attempts to obtain the benefits of the statute. The limitations period for lawyer discipline is five years. See Rule 5.21(A). Statutes of limitation are vital to the administration of the law. Among other things, they prevent courts and defendants from having to deal with matters for which evidence has become unavailable and prevent a claimant from sitting on rights and causing surprise to a defendant. See, e.g., Tyler T. Ochoa and Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L.J. 453 (1997). This is a due process issue and would impose a greater burden on OCTC and the State Bar Court than does the statute, and it is a particular concern because of the factual complexity inherent in disparate wage claims. The § 1197.5 limitations period is only one example. It appears there also is a two-year statute of limitations for wage claims under the Americans with Disabilities Act, 42 USCS § 2000e-5(e)(3)(B) (I did not attempt to find my way through the numbing complexities of that statutory scheme). *Second*, the use of the lawyer discipline limitations period would conflict with the state and federal legislatures' determinations by effectively increasing the limitations period. Each of the innumerable other anti-discrimination statutes and ordinances has a limitations period, legislatively determined as appropriate in its context. *Third*, § 1197.5(c) states in full: "The Division of Labor Standards Enforcement shall administer and enforce this section. Acceptance of payment in full made by an employer and approved by the division shall constitute a waiver on the part of the employee of the employee's cause of action under subdivision (g)." This means that the threat of professional discipline for a violation of this statute would give OCTC an enforcement role in place of the administrative agency chosen by the legislature, would give that authority to an agency that lacks the necessary expertise, would allow a claimant to threaten a lawyer even after the Division of Labor Standards Enforcement (DLSE) or a court has determined there is no right of action and, where the DLSE and a court have determined there is a valid claim, would permit the claimant to use the threat of professional discipline to attempt to obtain a greater recovery. *Fourth*, the determination of wage disparities requires wide-ranging investigation for which OCTC lacks the necessary resources. I am concerned not just about the number of complaints and investigations but also their complexity. How, I wonder, would OCTC

respond to a single complaint that a 1,000-lawyer law firm with, say, 1,000 non-lawyer employees, discriminates unlawfully in staff compensation (leaving aside the choice of law issues if the law firm has offices and employees in multiple states and multiple countries).

- Cal. Gov. C. § 12926(d) defines an “Employer” for purposes of the FEHA as including: “... any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows: ‘Employer’ does not include a religious association or corporation not organized for private profit.” The proposed Rule therefore would conflict with the legislature’s determinations in failing to recognize that FEHA does not apply to any lawyer who does not regularly employ at least five persons. It arguably would apply to a nonprofit religious institution’s legal department, and that result would conflict with FEHA and expose the religious institution to risk and cost not imposed by the legislature.

Those in favor of giving original jurisdiction over discrimination claims to the State Bar and the State Bar Court correctly point out that not all claims of discrimination result in civil proceedings. However, this is not entirely a bad thing. Except when a plaintiff appears in *pro per*, as happened in *Weber v. Eash* (referred to above), a civil action will be filed only when it appears possible to prove and collect sufficient damages to support the cost of litigation. The reason is that no anti-discrimination law of which I am aware provides for minimum damages. The consequence of this legislative policy decision is that many possible discrimination claims are filtered out, no doubt including some with merit, but having the effect of protecting the courts from a flood of litigation. Giving original jurisdiction to the State Bar would save the possibly injured person (or his or her lawyer) from shouldering the cost of pursuing the claim, shifting that burden to the State Bar because it is responsible for investigation and prosecution, and eliminating the filtering process.

Because the claimant will have no expense in making a claim, it is predictable that the Bar will receive a large number of claims, and that they will include:

- claims that have no legal or no factual merit,
- claims that are trivial,
- claims brought for strategic purposes in order to use the disciplinary system as a proving ground for new theories, and
- claims brought for tactical reasons for use as leverage in disputes with lawyers over fees, malpractice, or other matters.

Multiple newspaper stories have reported that the disciplinary system is underfunded and that the State Bar is taking steps to attempt to free up funds to support this essential Bar function. I think it is important in considering the foreseeable burden on the disciplinary system to know that one of the proponents of this expanded rule has

stated in a Commission meeting that a lawyer should be subject to professional discipline for a single use of an offensive expression in referring to a member of a protected class and also has said (in reference to a man's dealings with a woman) that leering and flirtatious behavior should be disciplinable.² This of course goes far beyond any nondiscrimination statute and would create the threat of professional discipline for any *faux pas*. Surely there is a difference between bad manners or even rude behavior and the sort of conduct that calls into question a lawyer's fitness to practice.³ This consequence is encouraged by the proposed paragraph (c)(3) definition of "unlawfully" and "unlawful", which is to be determined "by reference to applicable state and federal statutes and decisions". This means that it would not be necessary for all of the elements of the civil standard to be present, leaving an indefinite standard for discipline.⁴ The tightening of (c)(3) would not resolve the problem but only reduce it to a degree.⁵

Given the predictable burden on the system and the other concerns expressed in this Dissent, it is important to consider other ways to address the subject of discrimination. The Commission already has taken one important step, which is its approval of Rules 5.1 and 5.3. These Rules will impose on law firm managers and supervisors the duty to help assure compliance with the Rules of Professional Conduct and the State Bar Act, and among other things that would bring firm management into the role of seeing that the firm and its lawyer comply with all anti-discrimination laws. Another possible step would be an increased and specific MCLE requirement, a topic not within the Commission's brief.

² There also was a comment at a Commission meeting about the lack of minority representation in the ranks of law firm partners. I believe from these comments that the effect of the proposed new Rule is being oversold and that, if OCTC and the State Bar Court were to adopt practices to discriminate among complaints in order to preserve their own ability to function, they will be condemned for failing to solve all problems and the State Bar's reputation will be injured further.

³ "We have said on a number of occasions that the purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of the attorney to continue in that capacity to the end that the public, the courts and the legal profession itself will be protected." *In re Creamer*, 14 Cal.3d 524 (1975).

⁴ The "by reference to" language is in current rule 2-400, but its expansiveness has the effect of an alert to lawyers, given that lawyers are not disciplined under the current rule. The same language in proposed Rule 8.4.1 would open the doors to disciplinary claims, investigations, and prosecutions.

⁵ On December 2, 2016, The Disciplinary Board of the Supreme Court of Pennsylvania issued a proposed anti-discrimination rule for public comment (its Rules of Professional Conduct having no Rule on the topic). It contains language similar to current rule 2-400(C) requiring prior adjudication elsewhere, and explained this based on the burdens that otherwise would be imposed on the disciplinary system. I am not aware that Pennsylvania has issued any new Rule. <http://www.padisciplinaryboard.org/attorneys/newsletter/> Note that Pennsylvania expressed its concerns although its proposed Rule would require a violation of law and not merely conduct judged by reference to law.

I do have one suggestion for broadening paragraph (D) of current rule 2-400. This is to permit investigation and discipline of a lawyer who has been sanctioned by a court for discriminatory conduct. See, e.g., *Claypole v. County of Monterey*, 2016 U.S. Dist. LEXIS 4389 (N.D. Cal. 2016) (lawyer sanctioned for making sexist remarks) and *Cruz-Aponte v. Caribbean Petroleum Corp.*, 2015 U.S. Dist. LEXIS 109646 (D.P.R. 2015) (to the same effect). There might be other ways of tempering the current version of the rule.

The court's opinion in *Cruz-Aponte v. Caribbean Petroleum Corp.* says what I expect all of us think:

Discriminatory conduct on the part of an attorney is "palpably adverse to the goals of justice and the legal profession." (citation omitted) When an attorney engages in discriminatory behavior, it reflects not only on the attorney's lack of professionalism, but also tarnishes the image of the entire legal profession and disgraces our system of justice. *Id.* at *38

Nevertheless, granting original jurisdiction to the State Bar to investigate and prosecute alleged discriminatory words and conduct, and giving the State Bar Court original jurisdiction to hear these claims, would be acting mainly from the heart. The disciplinary system should be permitted to deal with the range of matters that is within the expertise of State Bar investigators and prosecutors, the State Bar Court and defense lawyers, and it should not be forced to use their limited time and resources for other purposes. The topics now covered by the disciplinary system are fundamental to the protection of clients and to the operation of the legal system and the profession.

The proposed Rule also raises significant First Amendment issues. The drafting of the Rule arguably would permit discipline for hateful words, and in fact at least two voices were raised during the Commission's deliberations in support of that result. The Commission made an effort to temper the Rule through proposed Comment [4], stating: "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." This quite obviously creates a tension in the Rule that will lead to attempts to use the Rule in unpredictable ways, will lead to unpredictable results, and will cause the additional burden on all involved in becoming constitutional scholars. The variety of possible constitutional viewpoints can be seen for example, in Carla D. Pratt, *Should Klansman Be Lawyers?: Racism as an Ethical Barrier to the Legal*, 30 Fla. St. U.L. Rev. 857 (2003).⁶ A LEXIS search shows that the Pratt article has been cited in many subsequent articles published in the intervening fourteen years, suggesting the diversity of opinions and complexity of issues involved.

⁶ Prof. Pratt takes the position that a white supremacist should not be granted Bar admission, but this is contrary to the views of some other commentators. The Pratt article focuses on that narrow subject. 30 Fla. St. U.L. Rev. at 861, n. 17. Her references to contrary First Amendment views can be found, e.g., at 862, n. 19. The constitutional issues are subtle and nuanced.

Proposed Rule 8.4.1 raises another and distinct issue. Congress and the California legislature have created administrative agencies to interpret and enforce anti-discrimination laws. Giving the State Bar original jurisdiction over employment discrimination claims would seem to conflict with the legislative policy by creating the possibility of non-uniform standards and by denying the regulatory agencies (EEOC and DEFH) the raw information it would have if complaints were filed with them. An independent forum for complaints against lawyers might create a judicial conflict with the legislatively mandated investigatory, dispute resolution (mediation), prosecutorial, and other functions of the administrative agencies. I don't have the expertise to clarify this conflict issue, but that of course is part of the problem. I don't know, and the Commission to the best of my recollection didn't dig into the possible conflict.⁷

Proposed Rule 8.4.1 has a number of drafting problems. Some already have been mentioned. It also has been pointed out that the Rule might be read as unclear about whether, for example, an in-house lawyer can advise and assist a defendant client employer in pre-litigation investigations of claims of unlawful discrimination, harassment or retaliation. Proposed Comment [2] states in part states: "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." It is not certain that this language clarifies the broader issue.

Drafting issues such as this one, and as another example the question of whether it might be possible to draft a Rule that would provide for effective OCTC interaction with the EEOC and DEFH, I consider secondary. There is fundamental issue of whether we should have a Rule that could be seen as a cure-all for discrimination by lawyers, and whether we want to burden the disciplinary system with a radically expanded scope of responsibility. The information available to me is that the system will not stand the burden, that the State Bar as a result will be seen as having failed in its mission, and that any end run around the federal and California statutory schemes will cause judicial – legislative conflict.

For these reasons, I respectfully dissent from proposed Rule 8.4.1.

⁷ It has been suggested that State Bar report be required to report unlawful discrimination, harassment, or retaliation to the DEFH or EEOC even if the complainant does not wish to do so. If the procedural trigger for reporting were OCTC's issuance of, or decision to issue, a notice of disciplinary charges, the lawyer's confidentiality would be protected under Bus. & Prof. Code sec. 6086.1(b). There are at least three problems with this. *First*, OCTC would be left with all the burdens of investigation, and in a field outside its experience. *Second*, the Commission has no authority to create OCTC rules of procedure. *Third*, if there were an internal State Bar rule requiring referral to the applicable administrative agency at some point along the continuum, that rule would be relatively unknown and would leave the State Bar as the target of criticism for failing to solve the problems proponents of Rule 8.4.1 tout that it would solve.

**Commission's Response to Dissent Submitted by Robert Kehr
on the Recommended Adoption of Proposed Rule 1.8.5**

Proposed Rule 8.4.1 would make a number of changes to current Rule 2-400, including expanding its scope: beyond management or operation of a law firm to also encompass unlawful discrimination or harassment in representing a client, or in terminating or refusing to accept the representation of a client; to cover protected categories other than those specifically listed in the current Rule; and to encompass unlawful retaliation. The Kehr dissent does not take issue with these changes.⁸

The change to which the Kehr dissent objects is the proposed elimination of the current Rule's paragraph (C), which precludes the State Bar from initiating any disciplinary investigation or proceeding under the Rule unless and until the conduct at issue has been "found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law." Rule 2-400, Discussion paragraph 1. No other current Rule has a similar provision requiring that civil or administrative relief be obtained before the State Bar can exercise disciplinary authority. The elimination of paragraph (C), therefore, would provide the State Bar with respect to the anti-discrimination rule the same initial authority to investigate and prosecute violations that it currently has with respect to every other rule.

The Kehr dissent objects to the State Bar having original jurisdiction over allegations of discrimination and harassment because of its "practical consequences." In support, the Kehr dissent cites: (1) the relative lack of expertise on the part of OCTC and the State Bar Court in handling complaints of discrimination; (2) the additional resources needed by OCTC and the State Bar Court to "handle the volume of complaints that could be expected"; and (3) the differences between the State Bar Court's procedures and those of civil courts, including more limited discovery, the inapplicability of the rules of evidence, and the absence of jury trials. The Kehr dissent asserts that discrimination claims are "not appropriate for the simplified procedures of the State Bar Court" and "beyond the knowledge and experience of [OCTC] and the State Bar Court." The Kehr dissent concludes: "The disciplinary system should be permitted to deal with the range of matters that is within the expertise of State Bar investigators and prosecutors, the State Bar Court and defense lawyers, and it should not be forced to use their limited time and resources for other purposes. The topics now covered by the disciplinary system are fundamental to the protection of clients and to the operation of the legal system and the profession."

⁸ The Kehr dissent does argue that the proposed Rule "raises significant First Amendment issues." As the dissent notes, however, proposed Comment [4] explicitly excludes from the Rule's application "conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution." In addition, the proposed Rule applies only to "unlawful" discrimination, harassment, or retaliation, with "unlawful" defined by reference to applicable state and federal statutes and decisions. See proposed Rule 8.4.1(C)(3). As a result, First Amendment protected activities are excluded from the proposed Rule's scope.

The Commission's difference with the Kehr dissent rests on the Commission's view that, like the other topics now covered by the disciplinary system, preventing discrimination and harassment is also fundamental to the protection of clients and the public, and the operation of the legal system and profession. This same view underlies the ABA's recent adoption of a broad anti-discrimination provision in ABA Model Rule 8.4(g). And this same view leads the Commission to believe that the anti-discrimination rule should not be singled out for different treatment, and effectively diminished, by being the sole rule over which OCTC and the State Bar Court are denied original jurisdiction.

The practical concerns raised by the Kehr dissent were the subject of extensive discussion and debate by the Commission, particularly given comments from OCTC and the State Bar Court regarding their current relative lack of expertise and potential need for additional resources. To address these practical concerns, the Commission considered a number of alternatives that are discussed in detail in pages 21-23 of its Report and Recommendation. The result was the inclusion of two provisions in proposed Rule 8.4.1 that the Commission believes appropriately address the practical concerns while not diminishing the Rule's force by depriving OCTC and the State Bar Court of original jurisdiction.

First, proposed paragraph (d) requires that a lawyer who is the subject of an OCTC investigation or State Bar Court proceeding alleging a violation of the Rule "promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct." This will ensure that OCTC and the State Bar Court are "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." Proposed Comment [6]. As this recognizes, while OCTC and the State Bar Court retain original jurisdiction, they also retain the ability, should they determine it appropriate, whether for resource reasons or because of the complexity of the issues raised, to defer to a related criminal, civil, or administrative proceeding.

Second, proposed paragraph (e) requires a lawyer who receives a notice of a disciplinary charge under the Rule to provide a copy of the notice to the State and Federal agencies tasked with primary responsibility for coordinating enforcement of laws and regulations prohibiting unlawful discrimination. This will provide those agencies with the information necessary, should they determine it appropriate, to initiate their own proceedings. If they do, OCTC and the State Bar Court retain the ability to defer to those proceedings.⁹

⁹ This provision also addresses the Kehr dissent's concern that, "Congress and the California legislature have created administrative agencies to interpret and enforce anti-discrimination laws. Giving the State Bar original jurisdiction over employment discrimination claims would seem to conflict with the legislative policy by creating the possibility of non-uniform standards and by denying the regulatory agencies (EEOC and DEFH) the raw information it would have if complaints were filed with them." Proposed paragraph (e) should ensure that the appropriate federal and state agencies are advised of any claim the State Bar determines to have merit sufficient to justify a notice of disciplinary charge.

The Kehr dissent argues that no longer requiring civil or administrative proceedings as a prerequisite to State Bar jurisdiction will eliminate the deterrent to frivolous discrimination claims posed by the costs of civil litigation -- “a civil action will be filed only when it appears possible to prove and collect sufficient damages to support the cost of litigation.” As a result, the Kehr dissent argues, “it is predictable that the Bar will receive a large number of claims” that will include “claims that have no legal or no factual merit,” “claims that are trivial,” “claims brought for strategic purposes in order to use the disciplinary system as a proving ground for new theories,” and “claims brought for tactical reasons for use as leverage in disputes with lawyers over fees, malpractice, or other matters.” The Commission does not believe these predictions justify depriving the State Bar of original jurisdiction. As the Kehr dissent notes, to the extent the current Rule implements a cost-based barrier to pursuing claims of discrimination, those not pursued “no doubt includ[e] some with merit.” Eliminating a cost-based barrier by permitting original State Bar jurisdiction will allow these claims to be pursued, with the State Bar retaining discretion to reject non-meritorious claims that may be filed for strategic or tactical reasons.

The Commission believes this appropriately treats allegations of discrimination and harassment in the same manner as allegations of other types of conduct that may result in both State Bar discipline and other civil or criminal proceedings. For example, under Business & Professions Code § 6106, a lawyer may be disciplined for any act involving “moral turpitude, dishonesty or corruption.” Even if that act “constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent” to discipline. Thus, for criminal acts, the State Bar retains original jurisdiction, even though the procedural requirements for a criminal conviction vary even more widely from those in State Bar Court than do the procedures for civil discrimination actions, and even though all the policy concerns cited by the Kehr dissent regarding the potential for frivolous disciplinary claims apply equally to allegations of criminal and discriminatory conduct. The reason the State Bar retains original jurisdiction over allegations of criminal conduct involving moral turpitude, dishonesty or corruption is a recognition that conduct of this type goes directly to a lawyer’s fitness. The Commission believes the same is true of allegations of unlawful discrimination and harassment, and accordingly believes it appropriate that, as with allegations of criminal conduct under § 6106, the State Bar should have jurisdiction to impose discipline without requiring as a condition precedent the pursuit of civil or administrative proceedings.