

**PROPOSED RULE OF PROFESSIONAL CONDUCT 2.1
(No Current Rule)
Advisor**

EXECUTIVE SUMMARY

ABA Model Rule 2.1 (Advisor) was not studied by the Commission for the Revision of the Rules of Professional Conduct ("Commission") in time to be included with the Commission's request for public comment authorized by the Board last June. The Commission has now studied Model Rule 2.1, a rule that has no direct California counterpart, as well as relevant case law relating to the issues addressed by this rule. The result of this evaluation is proposed rule 2.1 (Advisor).

Rule As Issued For 45-day Public Comment

Proposed rule 2.1 requires lawyers to exercise independent professional judgment and to render candid advice. The proposed rule adopts the first sentence of ABA Model Rule 2.1 verbatim. It moves the concept incorporated in the second sentence of ABA Model Rule 2.1 to comment [2]. The professional responsibility to exercise independent professional judgment and to render candid advice is recognized as a core duty of a lawyer as evidenced by the adoption of a rule derived from Model Rule 2.1 by every other jurisdiction except California. Adding this rule highlights the importance of these professional responsibility concepts and removes any ambiguity whether the duty of independent professional judgment exists beyond the limited situations regulated by current rules 1-600 (legal service programs) and 3-310(f) (accepting compensation for representation from one other than the client).

As stated above, the blackletter of proposed rule 2.1 provides that in representing a client, a lawyer must exercise independent professional judgment and render candid advice. The Commission has considered but ultimately declined to define or explain the term "independent professional judgment" because capturing all of the situations and nuances in which a lawyer's exercise of independent professional judgment is mandated is more appropriately the subject of an ethics opinion or a treatise.

Comment [1] clarifies that the rule does not impose in every case a duty to initiated investigation of a client's affairs nor give unwanted advice. Initiating such advice is required when doing so appears to be in the client's best interest.

Comment [2] provides that in rendering advice, a lawyer may consider factors other than the law such as moral, economic, and social factors relevant to the client's situation. This concept is a part of the blackletter of ABA Model Rule 2.1 but the Commission has moved it to the Comment [2] of the proposed rule because it can be regarded as an aspirational concept.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 2.1

Commission Drafting Team Information

Lead Drafter: Daniel Eaton

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I. CURRENT ABA MODEL RULE

**[There is no California Rule that corresponds to Model Rule 2.1,
from which proposed Rule 2.1 is derived.]**

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial

specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 2.1

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 2.1

Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 2.1 Advisor

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

Comment

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

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

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 2.1)

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. ~~In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.~~

Comment

Scope of Advice

[1] ~~A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.~~ lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

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

~~[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.~~

~~[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.~~

~~[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time,~~

~~a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.~~

~~Offering Advice~~

~~[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.~~

V. RULE HISTORY

Although the origin and history of Model Rule 2.1 was not the primary factor in the Commission's consideration of proposed Rule 2.1, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 407 - 411, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

1. OCTC takes no position on this rule.

Commission Response: No response required.

2. Comment [1] could be interpreted as contrary to established law regarding the duty to investigate client matters. Also, Comment [1]'s statement that an attorney has no duty to give advice that the client has indicated is unwanted is too broad, and may be misleading.

Commission Response: The Commission believes that Comment [1] is consistent with *Butler v. State Bar* (1986) 42 Cal.3d 323, 329, cited by the commenter, because Butler states that an investigation "may" be required in certain situations. It does mandate an investigation in all circumstances. Comment [1] uses the qualifier "ordinarily" to appreciate this distinction. In addition, *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1687, cited by the commenter, is a civil liability standard arising from the facts of the particular matter. While lawyers should be mindful of this standard of care, the Commission does not believe it should be codified as an absolute disciplinary standard.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL ND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, no public comments on this rule were received. During the 45-day public comment period, four public comments were received. One comment agreed with the proposed rule, two comments disagreed, and one comment did not indicate a position. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Although there is no generalized rule or State Bar Act section providing for a duty of independent professional judgment, the following authorities reflect the fact that this is a recognized professional responsibility.

- Rule 1-600, California Rules of Professional Conduct (lawyer required to exercise independent professional judgment when participating in a legal services program)
- Rule 3-310(F), California Rules of Professional Conduct (lawyer required to avoid interference with independent professional judgment when accepting compensation from a person other than a client)
- Business and Professions Code § 6068(c) (lawyer's duty to counsel or maintain actions only "as appear to him or her legal or just")
- Business and Professions Code § 6068(g) (lawyer's duty not to encourage an action or proceeding from any corrupt motive of passion or interest)

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for the ABA Model Rule 2.1, from which proposed Rule 2.1 is derived, revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_2_1.authcheckdam.pdf (Last accessed on 2/7/17.)
- Forty-five jurisdictions have adopted a rule that is the same as Model Rule 2.1.¹ Five jurisdictions have adopted a rule that is substantially similar to Model Rule 2.1.² Only one jurisdiction, California, has not adopted a rule derived from Model Rule 2.1.

¹ The forty-five jurisdictions are: Alabama, Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio,

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

A. Concepts Accepted (Pros and Cons):

1. General: Recommend adoption of a version of ABA Model Rule 2.1, as amended.
 - Pros: In the current rules, independent professional judgment is mentioned expressly in only two limited circumstances: a lawyer's participation in a legal services program (rule 1-600); and a lawyer's acceptance of fees from a third-party payor (rule 3-310(F)). However, this professional responsibility is recognized as a core duty of a lawyer as evidenced by the adoption of a rule derived from Model Rule 2.1 by every other jurisdiction except California. It is a concept that underlies the conflict of interest rules. Adding proposed Rule 2.1 highlights the importance of independent professional judgment and candid advice in a lawyer's role as an advisor and will remove any ambiguity whether the duty of independent professional judgment exists beyond the limited situations regulated by rules 1-600 and 3-310(F).
 - Cons: Model Rule 2.1 is a guidance rule and is used as a disciplinary standard in the states that have adopted it. In California, the disciplinary standard applicable to a lawyer's advice function is the competence rule, rule 3-110.³ For disciplinary purposes, a version of Model Rule 2.1 is unnecessary and contrary to the Commission's charter.
2. Delete the second sentence of Model Rule 2.1, modify it, and include it as Comment [2].
 - Pros: As worded in Model Rule 2.1, this sentence is guidance on what a lawyer may aspire to do in rendering advice. It is not language of prohibition or a mandatory requirement. As such, it does not belong in the black letter; however, it is appropriate as a Comment, if modified to be an explanation of what is not prohibited by the rule.
 - Cons: Even as modified this language is at best aspirational guidance and at worst a substantive change to existing California law in that it could suggest that in no case would a lawyer ever be required to include, for example,

Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

² The five jurisdictions are: Alaska, Colorado, Georgia, New Mexico, and Texas.

³ The State Bar Court Review Department has stated: "Whether attorneys communicate correct legal advice to their clients is addressed by rule 3-110(A) of the Rules of Professional Conduct of the State Bar. . . ." (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 149.)

political or economic considerations in giving advice. At present, the correctness of a lawyer's advice is governed by the competence rule (see footnote 1) and it is conceivable that a lawyer's failure to give advice on significant political or economic consequences that overshadow the legal considerations of a client's situation might subject that lawyer to discipline for incompetence.

3. Include as Comment [1] the last sentence of Model Rule 2.1, Comment [5].

- Pros: Proposed Rule 2.1 would be a new rule in California and including this sentence as Comment [1] should avoid a potential ambiguity in interpreting the scope of the duty imposed by the rule. This sentence clarifies that the rule does not impose in every case a duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted. Engaging in such conduct would be required only when doing so appears to be in the client's interest.
- Cons: OCTC's August 27, 2010 comment (see above Section VI) from then Chief Trial Counsel James Towery cites *Nichols v. Keller* (1993) 15 Cal.App.4th 1672 for the proposition that an attorney might be under a duty to volunteer opinions and advice beyond the limits suggested by the terms of Model Rule 2.1 as explained by the Model Rule's Comments.

B. Concepts Rejected (Pros and Cons):

1. Include a definition or explanation of "independent professional judgment" as used in the rule.

- Pros: The meaning of "independent professional judgment" is the gravamen of this proposed new rule in California and a definition or explanation is needed to use this new rule for disciplinary purposes. Although OCTC opposed the definition drafted by the first Commission (see Section VI. above) as unclear, a different definition could be drafted.
- Cons: The concept of independent professional judgment is not susceptible to a simple definition that can capture its import in every situation. It means different things in different contexts. Although generally there is a concern that a third party, e.g., a person paying the lawyer's fee, might interfere with the lawyer's representation of the client and provision of candid advice, (e.g., current rule 3-310(F)), there are situations where the lawyer must exercise independent judgment and provide the client with advice that the client may not want to hear, regardless of third party influence. For example, in *Thomas v. Tenneco Packaging Co.* (11th Cir. 2002) 293 F.3d 1306, the court sanctioned a lawyer for rude and abusive conduct that violated several rules of professional conduct or local court rules. In reply to the lawyer's argument that she merely was following orders from the client, the Court affirmed the sanction, in part because Georgia's equivalent of Model Rule 2.1 requires

lawyers to exercise independent professional judgment, and not just follow a client's wishes or orders. To capture all of the situations and nuances in which a lawyer's exercise of independent professional judgment is mandated is more appropriately the subject of an ethics opinion or treatise.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:

1. The addition of an explicit duty of independent professional judgment in a lawyer's role as an advisor expands on a duty referenced in the limited situations of current rules 1-600 and 3-310(F) and is already impliedly recognized in current rules 1-310 and 1-320. On the one hand, to the extent that it expands the duty from these limited situations to general application when a lawyer acts as an advisor, it is a substantive change. On the other hand, exercising independent professional judgment and rendering candid advice are essential elements in a lawyer-client relationship based on trust and loyalty to the client and to that extent they are in fact not new duties.

D. Non-Substantive Changes to the Current Rule:

Not Applicable.

E. Alternatives Considered:

The primary alternative considered was to maintain the status quo of the current rules and not include a standalone rule requiring independent professional judgment. See Section IX.A.1 above.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 2.1 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 2.1 in the form attached to this Report and Recommendation.

**Proposed Rule 2.1 Advisor
Synopsis of Public Comments**

TOTAL = 4 **A = 1**
D = 2
M = 0
NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-25c	Bar Association of San Francisco (Banola) (1-13-17)	Y	A		We support proposed Rule 2.1 because the professional responsibility to exercise independent professional judgment and to render candid advice is recognized as a core duty of a lawyer that should be included within the California Rules of Professional Conduct. Adding this rule will stress the importance of this essential professional responsibility. All other jurisdictions, except California, have adopted a rule derived from Model Rule 2.1. Adopting Rule 2.1 will remove any ambiguity concerning whether the duty of independent professional judgment exists beyond the limited situations regulated by current Rules 1-600 (legal service programs) and 3-310(f) (accepting compensation for representation from one other than the client).	No response required.
Y-2016-6d	Los Angeles County Bar Association (LACBA) (Schmid) (12-20-16)	Y	D		1. Proposed Rule 2.1 is not a disciplinary standard. It is an aspirational rule that would be extremely difficult, if not impossible to enforce. It includes aspirational comments, which do not elucidate the rule. As such,	1. The Commission disagrees with the commenter's assessment. The proposed rule is not a purely aspirational rule any more than current rules 1-600 or 3-310(F), both of which mandate that lawyers

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Proposed Rule 2.1 Advisor
Synopsis of Public Comments**

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					<p>the proposed Rule is inconsistent with the Supreme Court's direction to the Second Commission.</p> <p>There is no question that independent professional judgment is a core element of a lawyer's duty of loyalty to a client. The duty is already addressed in a number of rules which focus on circumstances that can affect a lawyer's independent judgment.</p> <p>While it is possible to discipline a lawyer for representing a client in circumstances that would tend to interfere with a lawyer's exercise of independent professional judgment, it would be extremely difficult, if not impossible, to identify and prosecute a true lack of independent judgment in a disciplinary proceeding. Whether a lawyer is exercising independent judgment in a given circumstance is speculative at best. One would have to know what the lawyer was actually thinking.</p>	<p>exercise independent professional judgment. The rule provides important public protection in requiring that lawyers exercise professional judgment and render candid advice in non-litigation as well as litigation matters. The proposed rule complements other rules of professional conduct, including proposed rules 1.2.1, 1.4, 1.13, 5.4, 7.2(b), and 8.4(c); thus, its application is not limited to situations involving conflicts of interest. The rule applies in a variety of situations where a lawyer's independence of professional judgment may be compromised; e.g., lawyers hired by insurance companies to defend insureds when faced with restrictive guidelines; referral arrangements that interfere with a lawyer professional judgment in making referrals or providing candid advice.</p> <p>Rules, such as rule 1.7(b), that are intended to avoid situations that risk compromising a lawyer's independence of professional judgment are not effective without the predicate in Rule</p>

**Proposed Rule 2.1 Advisor
Synopsis of Public Comments**

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						<p>2.1 that mandates that lawyers exercise independent professional judgment and render candid advice in representing a client. Not including Rule 2.1 would leave a void in lawyer regulation and would signal that California does not view independent professional judgment as a “core element” of professional responsibility.</p> <p>In sum, rule 2.1 is not a stand-alone rule; it has been enforced along with other rules that risk impairment of a lawyer’s exercise of professional judgment. See, e.g., Matter of Halverson, 998 P.2d. 833 (Wash. 2000).</p> <p>2. The Commission considered and rejected the notion that the term “independent judgment” is ambiguous and requires a definition. It expressly rejected the first Commission’s definition. See Response 3.</p> <p>3. The simple answer to the commenter’s question is that “professional judgment” involves both the exercise of judgment that is uninfluenced</p>

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					<p>interests that are outside the lawyer-client relationship (which is along the lines of the first Commission definition) or is “independent judgment” judgment that is independent of the client’s interest so as to include social and political norms.</p> <p>4. The proposed rule appears to be more of a vehicle for the practice advice in the Comments. The two Comments present a non-disciplinary permissive discussion regarding (i) advice a lawyer may initiate when doing so may be in the client’s interest and (ii) permitting advice regarding moral, economic, social and political factors. While the Comments may be good advice to the profession, they are merely aspirational commentary. They do nothing to explain how the rule would apply as a disciplinary standard.</p> <p>Proposed Rule 2.1 and the</p>	<p>by other duties and interests as well as straightforward advice the lawyer believes is in the client’s best interest even if it involves unpleasant facts and alternatives the client may not wish to confront. Outside influence is not a prerequisite to the rule’s application. To capture all the situations and nuances in which a lawyer’s exercise of independent professional judgment is mandated is more appropriately the subject of an ethics opinion or treatise.</p> <p>4. As noted, see Response 1, the Commission disagrees with the commenter’s assessment that the rule is not a proper rule of discipline. Further, it disagrees that the comments are merely aspirational. Comment [1] clarifies that the rule does not impose in every case a duty to initiate investigation of a client’s affairs or to give advice that the client has indicated is unwanted. Engaging in such conduct would be required only when doing so appears to be in the client’s interest. Comment [2], as modified, explains what is not prohibited</p>

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					proposed comments are inconsistent with all of [the] directions from the Supreme Court. As such, the Rule should not be adopted.	by the rule, an appropriate function for a comment under the Commission's Charter.
Y-2016-21t	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Yes	NI		<ol style="list-style-type: none"> OCTC takes no position on this rule. Comment [1] could be interpreted as contrary to established law regarding the duty to investigate client matters. Also, Comment [1]'s statement that an attorney has no duty to give advice that the client has indicated is unwanted is too broad, and may be misleading. 	<ol style="list-style-type: none"> No response required. The Commission believes that Comment [1] comment is consistent with <i>Butler v. State Bar</i> (1986) 42 Cal.3d 323, 329, cited by the commenter, because <i>Butler</i> states that an investigation "may" be required in certain situations. It does mandate an investigation in all circumstances. Comment [1] uses the qualifier "ordinarily" to appreciate this distinction. In addition, <i>Nichols v Keller</i> (1993) 15 Cal.App.4th 1672, 1687, cited by the commenter, is a civil liability standard arising from the facts of the particular matter. While lawyers should be mindful of this standard of care, the Commission does not believe it should be codified as an absolute disciplinary standard.
Y-2016-7o	State Bar Standing Committee on Professional Responsibility and	Y	D	Cmt. 1, 2	1. Rule is aspirational and fails to define disciplinable conduct. The issues addressed in the	1. The professional responsibility to exercise independent professional

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	Conduct (COPRAC) (Spencer) (01-06-17)				<p>proposed rule are addressed elsewhere in the proposed rules.</p> <p>2. Comment [1] should be deleted as it is inconsistent with the proposed rule and the Commission's charter.</p> <p>3. A minority of COPRAC believes that the Commission erred in eliminating the second sentence from ABA Model Rule 2.1 and relegating</p>	<p>judgment and to render candid advice is recognized as a core duty of a lawyer as evidenced by the adoption of a rule derived from Model Rule 2.1 by every other jurisdiction except California. Adding this rule highlights the importance of these professional responsibility concepts and removes any ambiguity whether the duty of independent professional judgment exists beyond the limited situations regulated by current rules 1-600 (legal service programs) and 3-310(f) (accepting compensation for representation from one other than the client).</p> <p>2. Comment [1] is appropriate because it explains that a lawyer might be required to investigate a client's affairs and initiate advice not requested by the client when doing so appears to be in the client's best interest.</p> <p>3. The Commission disagrees and did not make the suggested change. This aspect of Model Rule 2.1 is completely permissive and not integrated with to any</p>

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					that concept to proposed comment [2]. The minority believes this is a substantive rule intended to prevent clients and disciplinary authorities from later contending that otherwise proper advice should be punished because it embodies controversial discussions of the additional factors that the lawyer viewed as relevant to the client's situation.	affirmative duty. As such the Commission believes it is a helpful comment in aiding a lawyer's general understanding of the concept of "candid advice" but it does not belong in black letter text of the rule.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 2.4
(No Current Rule)
Lawyer as Third-Party Neutral**

EXECUTIVE SUMMARY

In connection with the consideration of current rule 1-710 (Member as Temporary Judge, Referee, or Court-Appointed Arbitrator), the Commission has reviewed and evaluated ABA Model Rule 2.4 (Lawyer Serving as Third-Party Neutral). The result of the evaluation is proposed rule 2.4 (Lawyer as Third-Party Neutral). Although the Commission's proposed rule has no direct counterpart in the current California rules, the general concept of regulating a lawyer's conduct as a neutral rather than an advocate is found in current rule 1-710.

Rule As Issued For 90-day Public Comment

The main issue presented by this Commission study is whether a new rule should be adopted. The Commission is recommending adoption of a rule primarily because a new disciplinary standard that imposes duties on lawyers when acting in a "quasi-judicial" capacity would enhance public protection in an area of conduct engaged in by lawyers that has expanded¹ since the last comprehensive revision of the rules in 1989. Proposed new rule 2.4 would protect the public by helping to assure that a lawyer's role is properly understood when it is intended to be distinct from the typical, and historically common, function of a lawyer as a client's advocate. Specifically, the rule would require that a lawyer serving as a third-party neutral must inform unrepresented parties that the lawyer is not representing them and explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

In considering this rule, the Commission examined the underlying public policy issue of State Bar regulation of lawyers who engage in conduct that is judicial in nature. The Commission noted the analogous precedent of current rule 1-710 (applicable when a lawyer as a court-connected temporary judicial officer) and California Supreme Court decisional law recognizing the propriety of the State Bar discipline notwithstanding that misconduct occurred in judicial, as opposed to, lawyering activity. In *In re Scott* (1991) 52 Cal.3d 968 ("Scott"), the Supreme Court addressed the inherent power to impose attorney discipline for conduct occurring in the performance of judicial functions. While acting as a municipal court judge, respondent Michael Scott pled guilty to criminal charges of possession of cocaine and resigned his judicial post as a condition of a plea bargain. Following the entry of a guilty plea, the court referred Mr. Scott's convictions to the State Bar for a report and recommendation as to whether Mr. Scott should be suspended from the practice of law. A hearing panel of the State Bar Court recommended suspension from the practice of law with probationary conditions, but the Review Department of the State Bar Court recommended that Mr. Scott be disbarred. Mr. Scott appealed his disbarment to the California Supreme

¹ See Ethical Conundrums for the 21st Century Lawyer/Mediator – "Toto, I've Got a Feeling We're Not in Kansas Any More," by Melvin A. Rubin and Brian F. Spector, posted online at: <https://www.yumpu.com/en/document/view/43738400/ethical-conundrums-for-the-21-century-lawyer-mediator-american> in which the authors observe that: "21st Century civil mediation is increasingly dominated by lawyers escaping from private trial/commercial litigation practice."

Court arguing, “the facts and circumstances of the offense as well as [his] subsequent conduct and the many compelling factors in mitigation present here warrant against the imposition of disbarment”

In rendering its decision, the California Supreme Court noted that by resigning his judicial post as a condition of his plea bargain, the Commission on Judicial Performance did not have jurisdiction to “discipline him as a member of the judiciary,” and citing Cal. Const., art. VI, § 18, subd. (b), the Court further observed that Mr. Scott’s resignation from the bench was “tantamount to a preemptive strike-precluding his almost certain removal from judicial office by this court after proceedings before the Commission on Judicial Performance.” (*Scott* at p. 976.) Notwithstanding his resignation from the bench, the Court concluded that it retained jurisdiction in the attorney discipline system to determine Mr. Scott’s fitness to practice law:

“Our inherent power over the admission, disbarment, and suspension of attorneys has long been recognized.” *Stratmore v. State Bar* (1975) 14 Cal.3d 887, 889 [123 Cal.Rptr. 101, 538 P.2d 229, 92 A.L.R.3d 803] [attorney suspended for acts of moral turpitude committed prior to his admission to practice law.] “[U]nder our inherent power we may discipline an attorney for conduct ‘either in or out of [his] profession’ which shows him to be unfit to practice” (Id. at p. 890, quoting *The People v. Turner* (1850) 1 Cal. 143, 150.)

Scott, at pages 976-977. Consistent with the foregoing, proposed new rule 2.4 would make clear in the rules that there can be attorney disciplinary consequences when a lawyer acts as a third-party neutral. The proposed comments also promote compliance with other related regulatory standards by including references to the Judicial Council Standards for Mediators in Court Connected Mediation Programs and the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

National Background – Adoption of Model Rule 2.4

As California does not presently have a direct counterpart to Model Rule 2.4, this section reports on the adoption of the Model Rule in United States’ jurisdictions.

The ABA State Adoption Chart for ABA Model Rule 2.4, from which proposed rule 2.4 is derived, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_2_4.authcheckdam.pdf

Thirty-three jurisdictions have adopted Model Rule 2.4 verbatim (AK, AZ, AR, CO, CT, DE, DC, ID, IN, IA, KS, KY, LA, MN, MD, MI, MN, MS, MO, NE, NV, NH, NC, ND, OK, PA, RI, SD, VT, WA, WV, WI, WY); thirteen jurisdiction have adopted a rule substantially similar to Model Rule 2.4 (FL, HI, IL, MA, MT, NJ, NM, NY, OH, OR, SC, TN, UT); five jurisdictions, including California, have not adopted a rule derived from Model Rule 2.4 (AL, CA, GA, TX, VA).

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 2.4 [1-710]

Commission Drafting Team Information

Lead Drafter: Judge Karen Clopton

Co-Drafters: Daniel Eaton, Dean Stout

I. CURRENT CALIFORNIA RULE

There is no California Rule that corresponds to Model Rule 2.4, from which proposed Rule 2.4 is derived. However, there is current rule 1-710, which concerns lawyers serving as temporary judges. It is recommended that current rule 1-710 be carried forward in the proposed Rules as Rule 2.4.1.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 2.4 [1-710]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 2.4 [1-710]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 2.4 Lawyer as Third-Party Neutral

- (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons* who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows* or reasonably should know* that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

[1] In serving as a third-party neutral, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-

party neutrals. Lawyer neutrals may also be subject to various codes of ethics, such as the Judicial Council Standards for Mediators in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

[2] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm* are addressed in Rule 1.12.

[3] This rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.

IV. CURRENT ABA MODEL RULE

Rule 2.4 Lawyer Serving as Third-Party Neutral

- (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

COMMENT

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitrators in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

V. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 2.4)

Rule 2.4 Lawyer ~~Serving As~~a Third-Party Neutral

- (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons* who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows* or reasonably should know* that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

~~[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction.~~

~~Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.~~

~~[21] The role of~~In serving as a third-party neutral is not unique to lawyers, although, in some court connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. ~~Lawyer neutrals~~ Lawyer neutrals may also be subject to various codes of ethics, such as the ~~Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model~~Judicial Council Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

~~[3] Unlike nonlawyers who serve as third party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.~~

~~[42] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm* are addressed in Rule 1.12.~~

~~[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.~~

[3] This Rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.

VI. RULE HISTORY

There is no counterpart to Model Rule 2.4 in the California Rules of Professional Conduct. However, there is current rule 1-710, which concerns lawyers serving as temporary judges. It is recommended that current rule 1-710 be carried forward in the proposed Rules as Rule 2.4.1. What follows is the history of current rule 1-710.

In a letter dated January 3, 1996 from the Supreme Court to the State Bar, the State Bar was asked to propose a new Rule of Professional Conduct regulating a member of the State Bar's conduct when acting as a temporary judge. The promulgation of a rule was recommended to the Supreme Court by the Supreme Court Advisory Committee on Judicial Ethics. That committee observed that while the Code of Judicial Ethics sets standards regulating a temporary judge, the enforcement jurisdiction of the Commission on Judicial Performance extends only to sitting judges. In response, rule 1-710 was adopted by the State Bar Board of Governors on January 25, 1997 and thereafter approved by the Supreme Court, operative on March 18, 1999. As adopted, rule 1-710 functions as a conduit for the State Bar's enforcement of a lawyer's violation of Canon 6 of the Code of Judicial Ethics. Although the rule does not set substantive standards for lawyer conduct, it does incorporate by reference the duties imposed on lawyers acting in a temporary judicial capacity set forth in Canon 6D. In essence, the rule establishes an enforcement mechanism to redress violations of those standards by lawyers.

Although the origin and history of Model Rule 2.4 was not the primary factor in the Commission's consideration of proposed Rule 2.4, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 435 - 439, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VII. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule and its Comments.

Commission Response: No response required.

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

VIII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, two public comments were received. Both comments agreed with the proposed rule. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

IX. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. California law related to current rule 1-710. California Rule of Professional Conduct 1-710 applies applicable portions of the Code of Judicial Ethics to attorneys acting as a temporary judge, referee or court-appointed arbitrator. Section 1281.85 of the Code of Civil Procedure imposes Judicial Council ethics standards on arbitrators who are not court-appointed.¹
2. In re Scott (1991) 52 Cal.3d 968 re the Supreme Court's inherent power to impose attorney discipline for conduct occurring in the performance of judicial functions. While acting as a municipal court judge, Michael Scott pled guilty to possession of cocaine and resigned his judicial post as a condition of his plea bargain. While presiding over the arraignment of a defendant who had previously sold him drugs, Mr. Scott authorized reduction of the defendant's bail. Following the entry of Mr. Scott's guilty plea, the court referred his convictions to the State Bar for a report and recommendation as to whether Mr. Scott should be suspended from the practice of law. A hearing panel of the State Bar Court recommended suspension from the practice of law with probationary conditions, but the Review Department of the State Bar Court recommended that Mr. Scott be disbarred. Mr. Scott appealed his disbarment to the California Supreme Court arguing, "the facts and circumstances of the offense as well as [his] subsequent conduct and the many compelling factors in mitigation present here warrant against the imposition of disbarment"

In rendering its decision, the California Supreme Court noted its authority to impose attorney discipline upon Mr. Scott for conduct engaged in as a member of the judiciary. The Court observed that by resigning his judicial post as a condition of his plea bargain, the Commission on Judicial Performance did not have jurisdiction to "discipline him as a member of the judiciary" and, citing Cal. Const., art. VI, § 18, subd. (b), the Court further observed that Mr. Scott's resignation from the bench was "tantamount to a preemptive strike precluding his almost certain removal from judicial office by this court after proceedings before the Commission on Judicial Performance." (Scott at p. 976.) Notwithstanding his resignation from the bench, the Court observed that it retained jurisdiction to determine his fitness to practice law:

"Our inherent power over the admission, disbarment, and suspension of attorneys has long been recognized." *Stratmore v. State Bar* (1975) 14 Cal.3d 887, 889 [123 Cal.Rptr. 101, 538 P.2d 229, 92 A.L.R.3d 803] [attorney suspended for acts of moral turpitude committed prior to his admission to practice law].) "[U]nder our inherent power we may discipline

¹ California Code of Civil Procedure § 1281.85 provides, in part: "a person serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with the ethics standards for judges adopted by the Judicial Council pursuant to this section."

an attorney for conduct ‘either in or out of [his] profession’ which shows him to be unfit to practice” (Id. at p. 890, quoting *The People v. Turner* (1850) 1 Cal. 143, 150.)

As we recently explained in *Kenwick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297 [267 Cal.Rptr. 293, 787 P.2d 591], “California law makes a reasonable distinction between suspension from law practice based on the attorney’s conduct while a judge and suspension or disbarment that is based on other conduct and ordinarily arises out of proceedings before the State Bar. Investigation of judges’ conduct for purposes of judicial discipline is entrusted to the commission, and if this court accepts the commission’s recommendation of removal, the question of suspension is [then] determined by this court.” (Id. at pp. 310-311, italics in original; see also *In re Craig* (1938) 12 Cal.2d 93 [82 P.2d 442].)

In re Scott (1991) 52 Cal.3d 968, 976-977.

3. *Furia v. Helm* (2003) 111 Cal.App.4th 945 re, in a malpractice context, the application of the Rules of Professional Conduct to a lawyer’s conduct as a mediator. Plaintiff former client brought an action for malpractice and established the breach of duty element against a mediator who was also the attorney for the adverse party. The court affirmed the defendant attorney’s general demurrer based on plaintiff’s failure to allege recoverable damages (no causation because plaintiff did not rely on mediator’s advice). However, in its decision the court cautioned that an attorney who agrees to act as a neutral mediator assumes a duty to perform as a mediator with the skill and prudence ordinarily to be expected of a person performing that role.

The court referred to Rule of Professional Conduct 3-310(C) and reasoned that the role of mediator has the same duty to disclose potential conflicts that an attorney has when accepting representation of clients. The opinion suggests that even in the absence of an attorney-client relationship, before an attorney agrees to serve as a mediator, there should be complete disclosure of all facts and circumstances, which, in the attorney’s judgment, may influence the party’s selection of a mediator. Failure to make such disclosure may result in civil liability. (See, *Furia v. Helm* (2003) 111 Cal.App.4th 945 [4 Cal.Rptr.3d 357].)

4. Recent Amendments to the California Code of Judicial Ethics relevant to Rule 1-710. The California Code of Judicial Ethics was most recently amended on January 21, 2015, and these changes become effective on January 21, 2016. The amendments included changes to Canon 6D and Canon 2C, which will affect lawyers governed by rule 1-710.

Canon 6D(5)(b) requires a temporary judge, referee, or court-appointed arbitrator to disclose in writing or on the record membership in any organization that

practices “invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation, except for membership in a religious or an official military organization of the United States and membership in a nonprofit youth organization so long as membership does not violate Canon 4A [conduct of extrajudicial activities].” This Canon was amended by retaining only “a religious organization” as an exception to the disclosure requirement. Therefore, reference to “an official military organization of the United States and membership in a nonprofit youth organization so long as membership does not violate Canon 4A [conduct of extrajudicial activities]” has been deleted from Canon 6D(5)(b) as part of the most recent revision.

Canon 2C is entitled “Membership in Organizations” and it states:

A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

This Canon does not apply to membership in a religious organization or an official military organization of the United States. So long as membership does not violate Canon 4A, this canon does not bar membership in a nonprofit youth organization.

Similar to the amendments made to Canon 6D(5)(b), Canon 2C was amended by eliminating the exceptions for membership in nonprofit youth organizations and military organizations. The exception for membership in a religious organization was retained. A press release announcing these amendments can be found [here](#).

Prior to January 21, 2015, the California Code of Judicial Ethics was last amended on October 30, 2012, and those changes became effective on January 1, 2013. This revision was the first comprehensive review of the code since the court adopted the code in 1996. Some of the topics addressed by the amendments included: campaign contributions in judicial elections; conduct by candidates for judicial office, including incumbent judges; ex parte communications; definitions of impartiality, integrity, impropriety, and independence; settlements conferences; gifts, honoraria, and reimbursements; comments on pending cases; and disqualification of judges who make extrajudicial statements committing themselves to reach a particular result. A press release announcing these amendments can be found [here](#).

In addition to the foregoing, the following additional authorities relating to third-party neutrals were considered:

- Rules 10.780 – 10.783, California Rules of Court
- Rules 3.850 – 3.872, California Rules of Court
- Ethics Standards for Neutral Arbitrators in Contractual Arbitration

- Los Angeles County Bar Association Ethics Opinion 514

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for ABA Model Rule 2.4, from which proposed Rule 2.4 is derived, revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_2_4.authcheckdam.pdf (Last accessed on 2/7/17.)
- Thirty-two jurisdictions have adopted Model Rule 2.4 verbatim.² Thirteen jurisdictions have adopted a rule substantially similar to Model Rule 2.4.³ Five jurisdictions, including California, have not adopted a rule derived from Model Rule 2.4.⁴

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

A. Concepts Accepted (Pros and Cons):

1. Recommend deleting the word “Serving” from the title of the Rule.
 - Pros: Deleting the word “Serving” results in using less words while retaining the same meaning.
 - Cons: None identified.
2. Recommend including new Comment [1], which has no counterpart in Model Rule 2.4.
 - Pros: This Comment serves to highlight that the third-party neutrals in California may be subject to specific court rules, codes of ethics, or other law they must follow. The Report and Recommendation for proposed Rule 2.4.1 also recommends including this same Comment.
 - Cons: None identified.

² The thirty-three jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington, West Virginia, Wisconsin, Wyoming.

³ The thirteen jurisdictions are: Florida, Hawaii, Illinois, Massachusetts, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, South Carolina, Tennessee, and Utah.

⁴ The five jurisdictions are: Alabama, California, Georgia, Texas, and Virginia.

3. Recommend adding as Comment [2] Model Rule 2.4, Comment [4].

- Pros: It has been the Commission's practice to include cross-references to related rules (e.g. Rules 1.4 (Communication) and 1.4.1 (Communication of Settlement Offers), contain cross-references to one another). This Comment provides an important cross-reference to a rule that applies to conflicts involving a former judge or other neutral. Including this cross-reference (as did the first Commission) will alert the lawyer acting as a third party neutral to important duties that apply after the lawyer has completed providing third party neutral services.) Its retention depends on whether the Commission recommends adoption of a rule analogous to Model Rule 1.12.
- Cons: This may be viewed as an unnecessary additional Comment.

4. Recommend including new Comment [3], which has no counterpart in the Model Rules.

- Pros: This Comment provides an important cross-reference for practitioners and the public that temporary judges, referees and court-appointed arbitrators are regulated under proposed Rule 2.4.1 [current rule 1-710], not this Rule. A similar cross-reference to this Rule is contained in a Comment to proposed Rule 2.4.1.
- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Include Model Rule 2.4, Comments [1], [3] and [5].

- Pros: These Comments are viewed as either unnecessary because they fail to provide interpretive guidance or fail to explain how the Rule is applied.
- Cons: None identified.

2. Include the first sentence of the first Commission's proposed Rule 2.4(a) which provides: "A lawyer serves as a third-party neutral when the lawyer ***is engaged to assist impartially*** two or more persons who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them." (Bold and italics text denotes the first Commission's added language.)

- Pros: No need to change from the ABA language as a third-party neutral should be impartially.
- Cons: Party arbitrators owe different duties to the parties that have retained them and should not necessarily be subject to the same standards as neutral arbitrators.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Although no substantive changes to the Model Rule are recommended, there is no similar rule in the current California Rules. In that respect, there are changes in the duties set forth in the California Rules.

D. Non-Substantive Changes to the Current Rule:

1. Addition of a new Comment [2] referencing the Rule that applies to conflicts involving a former judge or other neutral.
2. Addition of a new Comment [3] referencing proposed Rule 2.4.1 and clarifying that when lawyers act as temporary judges, referees, or court-appointed arbitrators, Rule 2.4.1, and not this Rule, applies.

E. Alternatives Considered:

1. The only alternative considered was not to recommend proposed Rule 2.4. The Commission determined the Rule should be added to the Rules as it provides important public protection by regulating lawyer third party neutrals.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 2.4 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 2.4 in the form attached to this Report and Recommendation.

**Proposed Rule 2.4 Lawyer as Third-Party Neutral
Synopsis of Public Comments**

TOTAL = 2	A = 2
	D = 0
	M = 0
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43t	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-12-16)	Y	A		Supports adoption of proposed Rule 2.4.	No response required.
X-2016-104ag	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Y	A		Supports adoption of proposed Rule 2.4.	No response required.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

PROPOSED RULE OF PROFESSIONAL CONDUCT 2.4.1
(Current Rule 1-710)
Lawyer as Third-Party Neutral

EXECUTIVE SUMMARY

The Commission evaluated current rule 1-710 (Member as Temporary Judge, Referee, or Court-Appointed Arbitrator)¹ in accordance with the Commission Charter. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 2.4.1 (Lawyer as Third-Party Neutral).

Rule As Issued For 90-day Public Comment

Proposed rule 2.4.1 carries forward current rule 1-710, which clarifies that lawyers are subject to Canon 6D of the Code of Judicial Ethics when acting as a temporary judge, referee, or court-appointed arbitrator. Like the current rule, the proposed rule provides a disciplinary path for lawyers who violate applicable judicial ethics standards. Current rule 1-710 originated from a Supreme Court request sent to the State Bar in 1996, following the Supreme Court's consideration of a report and recommendation of the Supreme Court Advisory Committee on Judicial Ethics, the body which drafted the California Code of Judicial Ethics that became effective on January 15, 1996. In drafting that Code, the Advisory Committee determined that while standards could be imposed on lawyers serving as temporary judges, the Commission on Judicial Performance lacked disciplinary jurisdiction over the conduct of lawyers. Accordingly, the Supreme Court directed the State Bar to consider a new Rule of Professional Conduct that would permit the Bar to discipline lawyers who violate Canon 6D while acting in a judicial capacity. In response to the Supreme Court's request, rule 1-710 was developed, adopted by the Board and subsequently approved by the Supreme Court operative March 18, 1999.

In studying the current rule, the Commission determined that no substantive changes were warranted but some amendments are recommended as indicated below.

In the black letter text, minor stylistic revisions are recommended for clarity, including the global substitution of "lawyer" for "member."

The current second paragraph of the Discussion section to rule 1-710 is recommended to be omitted as unnecessary. There also was concern that retaining it might cause ambiguities in construing other rules.²

A new Comment [3] is recommended to clarify that the rule does not apply to a lawyer serving as a third-party neutral in a mediation or settlement conference or a neutral arbitrator pursuant to an arbitration agreement. This comment also provides a cross reference to proposed new rule 2.4 as that rule is intended apply to conduct not within the scope of proposed rule 2.4.1.

¹ There is no direct counterpart to this rule in the American Bar Association Model Rules; however, Model Rule 2.4 generally addresses lawyer conduct as a third-party neutral. Model Rule 2.4 is discussed in the executive summary of proposed rule 2.4.

² The current language states: "Nothing in rule 1-710 shall be deemed to limit the applicability of any other rule or law." As a general proposition, this is true of every rule and the Commission believes that nothing in the instant rule suggests otherwise so as to justify its retention in proposed rule 2.4.1.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 2.4.1 [1-710]

Commission Drafting Team Information

Lead Drafter: Judge Karen Clopton

Co-Drafters: Daniel Eaton, Judge Dean Stout

I. CURRENT CALIFORNIA RULE

Rule 1-710 Member as Temporary Judge, Referee, or Court-Appointed Arbitrator

A member who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject under the Code of Judicial Ethics to Canon 6D, shall comply with the terms of that canon.

Discussion

This rule is intended to permit the State Bar to discipline members who violate applicable portions of the Code of Judicial Ethics while acting in a judicial capacity pursuant to an order or appointment by a court.

Nothing in rule 1-710 shall be deemed to limit the applicability of any other rule or law.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 2.4.1 [1-710]

Vote: 11 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 2.4.1 [1-710]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 2.4.1 [1-710] Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator

A lawyer who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject to Canon 6D of the Code of Judicial Ethics, shall comply with the terms of that canon.

Comment

[1] This Rule is intended to permit the State Bar to discipline lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial capacity pursuant to an order or appointment by a court.

[2] This Rule is not intended to apply to a lawyer serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. See Rule 2.4.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-710)

Rule 2.4.1 [1-710] ~~Member~~ Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator

A ~~member~~lawyer who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject ~~under~~to Canon 6D of the Code of Judicial Ethics ~~to Canon 6D~~, shall comply with the terms of that canon.

Comment~~Discussion~~

~~Nothing in rule 1-710 shall be deemed to limit the applicability of any other rule or law.~~

[1] This Rule is intended to permit the State Bar to discipline ~~members~~lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial capacity pursuant to an order or appointment by a court.

[2] This Rule is not intended to apply to a lawyer serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. See Rule 2.4.

V. RULE HISTORY

In a letter dated January 3, 1996 from the Supreme Court to the State Bar, the State Bar was asked to propose a new Rule of Professional Conduct regulating a member of the State Bar's conduct when acting as a temporary judge. The promulgation of a rule was recommended to the Supreme Court by the Supreme Court Advisory Committee on Judicial Ethics. That committee observed that while the Code of Judicial Ethics sets standards regulating a temporary judge, the enforcement jurisdiction of the Commission on Judicial Performance extends only to sitting judges. In response, rule 1-710 was adopted by the State Bar Board of Governors on January 25, 1997 and thereafter approved by the Supreme Court, operative on March 18, 1999. As adopted, rule 1-710 functions as a conduit for the State Bar's enforcement of a lawyer's violation of Canon 6 of the Code of Judicial Ethics. Although the rule does not set substantive standards for lawyer conduct, it does incorporate by reference the duties imposed on lawyers acting in a temporary judicial capacity set forth in Canon 6D. In essence, the rule establishes an enforcement mechanism to redress violations of those standards by lawyers.

Current rule 1-710 provides that a lawyer is subject to Canon 6D of the Code of Judicial Ethics when acting as a temporary judge, referee, or court-appointed arbitrator. Rule 1-710 has no ABA Model Rule counterpart.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule, but believes that the Commission should consider whether to put language in the rule in case the Code of Judicial Ethics is changed or renumbered.

Commission Response: The Commission has not made the suggested change. It has referenced the Code of Judicial Ethics so that if the Code should change, it would not be necessary to change the rule. The important concept is that the lawyer must comply with the Code, which regulates the lawyer in the stated circumstances.

OCTC supports Comment 2, but finds Comment 1 unnecessary, as the rule on its face permits the discipline of attorneys for violations of the rule. (See proposed Rule 1.0(b)(1).) Further, with the exception of public and private reprovals, the State Bar does not discipline attorneys. Only the Supreme Court can discipline attorneys.

Commission Response: The Commission has retained Comment [1] as drafted. It appears in slightly different form in current rule 1-710 and was added at the request of the Supreme Court. The Commission is not aware of any misunderstandings or other problems that have resulted from its inclusion in the current rule.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, two public comments were received. One comment agreed with the proposed Rule, and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. California law related to current rule 1-710. California Rule of Professional Conduct 1-710 applies applicable portions of the Code of Judicial Ethics to

attorneys acting as a temporary judge, referee or court-appointed arbitrator. Section 1281.85 of the Code of Civil Procedure imposes Judicial Council ethics standards on arbitrators who are not court-appointed.¹

2. In re Scott (1991) 52 Cal.3d 968 re the Supreme Court's inherent power to impose attorney discipline for conduct occurring in the performance of judicial functions. While acting as a municipal court judge, Michael Scott pled guilty to possession of cocaine and resigned his judicial post as a condition of his plea bargain. While presiding over the arraignment of a defendant who had previously sold him drugs, Mr. Scott authorized reduction of the defendant's bail. Following the entry of Mr. Scott's guilty plea, the court referred his convictions to the State Bar for a report and recommendation as to whether Mr. Scott should be suspended from the practice of law. A hearing panel of the State Bar Court recommended suspension from the practice of law with probationary conditions, but the Review Department of the State Bar Court recommended that Mr. Scott be disbarred. Mr. Scott appealed his disbarment to the California Supreme Court arguing, "the facts and circumstances of the offense as well as [his] subsequent conduct and the many compelling factors in mitigation present here warrant against the imposition of disbarment"

In rendering its decision, the California Supreme Court noted its authority to impose attorney discipline upon Mr. Scott for conduct engaged in as a member of the judiciary. The Court observed that by resigning his judicial post as a condition of his plea bargain, the Commission on Judicial Performance did not have jurisdiction to "discipline him as a member of the judiciary" and, citing Cal. Const., art. VI, § 18, subd. (b), the Court further observed that Mr. Scott's resignation from the bench was "tantamount to a preemptive strike-precluding his almost certain removal from judicial office by this court after proceedings before the Commission on Judicial Performance." (*Scott* at p. 976.) Notwithstanding his resignation from the bench, the Court observed that it retained jurisdiction to determine his fitness to practice law:

"Our inherent power over the admission, disbarment, and suspension of attorneys has long been recognized." *Stratmore v. State Bar* (1975) 14 Cal.3d 887, 889 [123 Cal.Rptr. 101, 538 P.2d 229, 92 A.L.R.3d 803] [attorney suspended for acts of moral turpitude committed prior to his admission to practice law].) "[U]nder our inherent power we may discipline an attorney for conduct 'either in or out of [his] profession' which shows him to be unfit to practice" (*Id.* at p. 890, quoting *The People v. Turner* (1850) 1 Cal. 143, 150.)

As we recently explained in *Kenwick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297 [267 Cal.Rptr. 293, 787 P.2d 591],

¹ California Code of Civil Procedure section 1281.85 provides, in part: "a person serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with the ethics standards for judges adopted by the Judicial Council pursuant to this section."

“California law makes a reasonable distinction between suspension from law practice based on the attorney’s conduct *while a judge* and suspension or disbarment that is based on other conduct and ordinarily arises out of proceedings before the State Bar. Investigation of judges’ conduct for purposes of judicial discipline is entrusted to the commission, and if this court accepts the commission’s recommendation of removal, the question of suspension is [then] determined by this court.” (*Id.* at pp. 310-311, italics in original; see also *In re Craig* (1938) 12 Cal.2d 93 [82 P.2d 442].)

In re Scott (1991) 52 Cal.3d 968, 976-977.

3. *Furia v. Helm* (2003) 111 Cal.App.4th 945 re, in a malpractice context, the application of the Rules of Professional Conduct to a lawyer’s conduct as a mediator. Plaintiff former client brought an action for malpractice and established the breach of duty element against a mediator who was also the attorney for the adverse party. The court affirmed the defendant attorney’s general demurrer based on plaintiff’s failure to allege recoverable damages (no causation because plaintiff did not rely on mediator’s advice). However, in its decision the court cautioned that an attorney who agrees to act as a neutral mediator assumes a duty to perform as a mediator with the skill and prudence ordinarily to be expected of a person performing that role.

The court referred to Rule of Professional Conduct 3-310(C) and reasoned that the role of mediator has the same duty to disclose potential conflicts that an attorney has when accepting representation of clients. The opinion suggests that even in the absence of an attorney-client relationship, before an attorney agrees to serve as a mediator, there should be complete disclosure of all facts and circumstances, which, in the attorney’s judgment, may influence the party’s selection of a mediator. Failure to make such disclosure may result in civil liability. (See, *Furia v. Helm* (2003) 111 Cal.App.4th 945 [4 Cal.Rptr.3d 357].)

4. Recent Amendments to the California Code of Judicial Ethics relevant to rule 1-710. The California Code of Judicial Ethics was most recently amended on January 21, 2015, and these changes become effective on January 21, 2016. The amendments included changes to Canon 6D and Canon 2C, which will affect lawyers governed by rule 1-710.

Canon 6D(5)(b) requires a temporary judge, referee, or court-appointed arbitrator to disclose in writing or on the record membership in any organization that practices “invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation, except for membership in a religious or an official military organization of the United States and membership in a nonprofit youth organization so long as membership does not violate Canon 4A [conduct of extrajudicial activities].” This Canon was amended by retaining only “a religious organization” as an exception to the disclosure requirement. Therefore, reference to “an official military organization of the United States and

membership in a nonprofit youth organization so long as membership does not violate Canon 4A [conduct of extrajudicial activities]" has been deleted from Canon 6D(5)(b) as part of the most recent revision.

Canon 2C is entitled "Membership in Organizations" and it states:

A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

This canon does not apply to membership in a religious organization or an official military organization of the United States. So long as membership does not violate Canon 4A, this canon does not bar membership in a nonprofit youth organization.

Similar to the amendments made to Canon 6D(5)(b), Canon 2C was amended by eliminating the exceptions for membership in nonprofit youth organizations and military organizations. The exception for membership in a religious organization was retained. A press release announcing these amendments can be found here: http://www.courts.ca.gov/documents/sc15-Jan_23.pdf.

Prior to January 21, 2015, the California Code of Judicial Ethics was last amended on October 30, 2012, and those changes became effective on January 1, 2013. This revision was the first comprehensive review of the code since the court adopted the code in 1996. Some of the topics addressed by the amendments included: campaign contributions in judicial elections; conduct by candidates for judicial office, including incumbent judges; ex parte communications; definitions of impartiality, integrity, impropriety, and independence; settlements conferences; gifts, honoraria, and reimbursements; comments on pending cases; and disqualification of judges who make extrajudicial statements committing themselves to reach a particular result. A press release announcing these amendments can be found here: http://www.courts.ca.gov/documents/oc12-Nov_14a.pdf.

B. ABA Model Rule Adoptions

There is no ABA Model Rule corresponding to California rule 1-710.

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

A. Concepts Accepted (Pros and Cons):

1. Recommend revising the black letter of current rule 1-710 to state "is subject to Canon 6D of the Code of Judicial Ethics"; as opposed to "is subject under the Code of Judicial Ethics to Canon 6D".
 - Pros: The proposed revision provides more clarity and precision. In addition, it is grammatically correct. No substantive change is intended.

- Cons: None identified.
- 2. Recommend adding Comment [2] to provide a cross-reference to proposed Rule 2.4 relating to lawyers acting as third-party neutrals pursuant to an agreement.
 - Pros: Proposed Comment [2] provides an important cross-reference to a comparable rule. Proposed Rule 2.4.1 is limited to situations in which an attorney is acting as either a temporary judge, referee, or court-appointed arbitrator. This cross-reference helps to inform the reader there is a separate rule applicable to lawyers acting as third-party neutrals who are not subject to this Rule.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Add the phrase “quasi-judicial capacity” to clarify the application of the rule.
 - Pros: This would help expand the scope of the Rule to include lawyers acting in “quasi-judicial” capacities as well as acting as temporary judges, referees or court-appointed arbitrators.
 - Cons: This addition may cause confusion as to what is meant by a lawyer serving in a “quasi-judicial” capacity. (Cf. the meaning of a judge’s “quasi-judicial activities” in Code of Judicial Ethics, Canon 4B.)
2. Add Comment [2] to the black letter of the Rule.
 - Pros: Important and substantive provisions should be contained in the black letter of the Rule, as opposed to in the Comments.
 - Cons: These cross-references are best contained in the Comments and is the approach used elsewhere in the proposed Rules.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. No changes in duties/substantive changes are recommended to the current rule.

D. Non-Substantive Changes to the Current Rule:

1. The phrase “and is subject to Canon 6D of the Code of Judicial Ethics” has been added to replace the following phrase, “and is subject under the Code of Judicial Ethics to Canon 6D.” This revision is recommended to provide better clarity and

to conform to the style used elsewhere in the Rules. No substantive change is intended.

2. Addition of new Comment [3], which is simply a cross-reference to proposed Rule 2.4 relating to lawyers acting as third-party neutrals pursuant to, for example, an arbitration agreement.

E. Alternatives Considered:

1. The only alternative considered was not to recommend proposed Rule 2.4.1, The Commission determined that the Rule should be retained as it provides important public protection by bridging a regulatory gap the Supreme Court recognized when it recommended consideration of this Rule in 1995.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 2.4.1 [1-710] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 2.4.1 [1-710] in the form attached to this Report and Recommendation.

**Proposed Rule 2.4.1 [1-710] Lawyer as Temporary Judge,
Referee, or Court-Appointed Arbitrator
Synopsis of Public Comments**

TOTAL = 2	A = 1
	D = 0
	M = 1
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43u	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-12-16)	Yes	A		Supports adoption of proposed Rule 2.4.1	No response required.
X-2016-104ah	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	M		<p>1. OCTC supports this rule, but believes that the Commission should consider whether to put language in the rule in case the Code of Judicial Ethics is changed or renumbered.</p> <p>2. OCTC supports Comment 2, but finds Comment 1 unnecessary, as the rule on its face permits the discipline of attorneys for violations of the rule. (See proposed rule 1.0(b)(1).) Further, with the exception of public and private reprovals, the State Bar does not discipline attorneys. Only the Supreme Court can discipline attorneys.</p>	<p>1. The Commission has not made the suggested change. It has referenced the Code of Judicial Ethics so that if the Code should change, it would not be necessary to change the rule. The important concept is that the lawyer must comply with the Code, which regulates the lawyer in the stated circumstances.</p> <p>2. The Commission has retained Comment [1] as drafted. It appears in slightly different form in current rule 1-710 and was added at the request of the Supreme Court. The Commission is not aware of any misunderstandings or other problems that have resulted from its inclusion in the current rule.</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

PROPOSED RULE OF PROFESSIONAL CONDUCT 3.1
(Current Rule 3-200)
Meritorious Claims and Contentions

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-200 (Prohibited Objectives of Employment) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 3.1 (Meritorious Claims and Contentions). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules.

Rule As Issued For 90-day Public Comment

Proposed rule 3.1 in context within the Rules of Professional Conduct.

Proposed rule 3.1 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The general content, framework and numbering scheme of this subset of the Rules is based on Chapter 3 of the ABA Model Rules, which is entitled “Advocate”. Model Rules Chapter 3 corresponds to Chapter 5 of the current California Rules, entitled “Advocacy and Representation.” The following table shows the Chapter 3 Model Rules and the corresponding California Rules:

Model Rule	California Rule
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. Rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. Rule counterpart.

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules.

In general, proposed rule 3.1 carries forward the substance of current rule 3-200. Proposed paragraph (a) simplifies the language of the current rule by stating that: A lawyer shall not. . . .” The current rule uses language that refers to the acts of seeking, accepting or continuing prohibited conduct, but the Commission believes that all of these elements are captured in the unambiguous statement that a “lawyer shall not.” In addition, the specific concept of restricting

a lawyer from continuing prohibited conduct is included in paragraph (a)(1) that refers to “continuing an action. . . .”

Proposed paragraph (a) also deletes the current phrase “knows or should know.” In the context of this particular rule, the current phrase could imply a negligence standard which is not relevant to the determination of probable cause. In addition, the “knows or should know” standard is inconsistent with the malice standard in California law and might require standard of care testimony to prove a violation. It would also be a confusing deviation from the knowledge standards defined in proposed rule 1.0.1. Furthermore, including the “knows or should know” standard needlessly focuses the inquiry on a lawyer’s ability to discern motivation rather than on the most important issue of whether a matter has merit.

Paragraph (b) is derived from Model Rule 3.1 and was added to clarify that the proposed rule does not constrain a lawyer for a criminal defendant from requiring that every element of the case be established.

There is no Discussion section in the current rule and the Commission is not recommending the addition of any Comments.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission revised paragraph (b) to expressly include involuntary commitments or confinements.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 3.1 [3-200]

Commission Drafting Team Information

Lead Drafter: Raul Martinez

Co-Drafters: Howard Kornberg, Lee Harris

I. CURRENT CALIFORNIA RULE

Rule 3-200 Prohibited Objectives of Employment

A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:

- (A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or
- (B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 3.1

Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 3.1

Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 3.1 Meritorious Claims and Contentions

- (a) A lawyer shall not:
 - (1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or
 - (2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.

- (b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, may nevertheless defend the proceeding by requiring that every element of the case be established.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-200)

Rule 3.1 [3-200] ~~Prohibited Objectives of Employment~~ Meritorious Claims and Contentions

(a) A lawyer shall not:

~~A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:~~

~~(A)(1) To~~ bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

~~(B)(2) To~~ present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of ~~such~~ the existing law.

~~(B)(b)~~ A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, may nevertheless defend the proceeding by requiring that every element of the case be established.

V. RULE HISTORY

Current rule 3-200 originated with the first rules promulgated in 1928 as rule 13. The rule prohibited accepting employment when the motives are improper and specifically provided that:

A member of the State Bar shall not accept employment to prosecute or defend a case solely out of spite, or solely for the purpose of harassing or delaying another; nor shall he take or prosecute an appeal merely for delay, or for any other reason, except in good faith.

Operative January 1, 1975, rule 13 was revised and renumbered as new rule 2-110. In 1972, the State Bar's Special Committee to Study the ABA Code of Professional Responsibility developed two proposed rules addressing the substance of rule 13. A proposed rule was drafted to be identical to rule 13 but was ultimately not adopted. A second rule, proposed rule 2-110, was modeled after ABA Code DR 2-109. The rule carried forward the substance of rule 13 using language adopted from the ABA Code and added a new provision prohibiting litigation claims or defenses not warranted under existing law.

Operative April 1, 1979, rule 2-110 was revised as part of a project to revise the rules governing lawyer advertising. The introductory paragraph of the rule was revised as follows:

A member of the State Bar shall not seek or accept employment to accomplish any of the following objectives, nor shall ~~he~~ the member do so if ~~he~~ the member knows or should know that the person ~~who employs him~~ solicited for or offering the employment wishes to accomplish any of the following purposes...

The revisions were made as conforming changes to the primary changes recommended for the main advertising and solicitation rules. (See, State Bar Special Committee on Lawyer Advertising and Solicitation, Final Report 1978).

The rule was last amended in 1989, when rule 2-110 was renumbered as rule 3-200 as part of a comprehensive revision and renumbering of the entire rules. The introductory paragraph was substantively amended, adding the language “or continue” to the phrase “shall not seek or accept employment” to clarify that withdrawal would be required whenever a lawyer knows or should know an action is being maintained for any of the prohibited reasons. Additionally, amendments to paragraph (A) added an objective probable cause standard, and incorporated the limitation on appeals formerly found in paragraph (C). In doing so, the language “solely for delay” was dropped. (See pages 31-32 of Bar Misc. No. 5626, “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” December 1987.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports the rule.

Commission's Response: No response required.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, five public comments were received. Two comments agreed with the proposed Rule, two comments agreed only if modified, and one comment did not indicate a position. During the 45-day public comment period, one public comment was received. That one comment agreed with the proposed Rule. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

Two speakers appeared at the public hearing. One whose testimony was in support of the proposed rule if modified and another who did not take a position. That testimony and the Commission's response is also in the public comment synopsis table.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. Code of Civil Procedure

Code of Civil Procedure § 128.7 requires all papers presented to the court to be signed by an attorney certifying that it is not being presented for an improper purpose, that it is warranted by existing law, and that the allegations, denials and factual contentions have evidentiary support.

2. Business and Professions Code

Similar to rule 3-200, statutory provisions prescribing the duties of attorneys mandate that attorneys pursue only those matters that are legal or just and that they take no actions for an improper motive. Business and Professions Code, § 6068, subdivisions (c) and (g) provide it "is the duty of an attorney to do all of the following: ...

(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest."

3. Disciplinary Cases.

The State Bar Court has applied both the statutory provisions above and rule 3-200 in disciplinary decisions. The following selected case law demonstrates application of these provisions both to cases involving frivolous or unwarranted actions and those involving improper motives.

- *Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966 – Respondent stipulated to violations of rule 3-200 where he commenced action adverse to real property despite a bankruptcy court injunction enjoining actions affecting the real property. The bankruptcy court imposed sanctions and found the attorney’s “actions were in bad faith, frivolous and intended to cause unnecessary delay.”
- *Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112 – Respondent was found culpable of violating Business and Professions Code, § 6068(c) where, in the underlying matter, respondent had filed an appeal that relitigated issues and challenged rulings of law from the client’s earlier, related case. The Court of Appeal had sanctioned respondent, finding the appeal frivolous, devoid of merit, and prosecuted for an improper motive.
- *Sorensen v. State Bar* (1991) 52 Cal.3d 1036 – Respondent was suspended where, after being sued by a court reporting firm for an unpaid bill, he counter-claimed for fraud, turning the \$94.05 court reporter bill into a \$4,000 litigation. The court found that the attorney’s fraud action was meritless and that the attorney was motivated by spite and vindictiveness.

4. California Law Related to the Duty of Zealous Advocacy

California case law provides that the “duty of a lawyer both to his client and to the legal system, is to represent his client zealously within the bounds of the law.” *People v. Bolton* (2008) 166 Cal.App.4th 343, 357 [82 Cal.Rptr.3d 671] (citing *People v. McKenzie* (1983) 34 Cal.3d 616, 631 [194 Cal.Rptr. 462], disapproved on another ground). As noted above, one public commenter expressed concern that rule 3-200 interferes and conflicts with this duty. However, California case law also clarifies that a lawyer’s duty of zealous advocacy must be exercised “within the bounds of the law,” which include a lawyer’s ethical duties and duties owed to the court.

In the disciplinary decision *Matter of Davis*, a bankruptcy court had previously found respondent’s actions were frivolous. The Review Department stated that, while the court agreed that “attorneys have a duty to zealously represent their clients and assert unpopular positions in advancing their clients’ legitimate objectives, ... attorneys also have a duty to the judicial system to assert only legal claims or defenses that are warranted by the law or are supported by a good faith belief in their correctness.” *Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591. Based on the bankruptcy court’s findings, the Review Department rejected respondent’s assertion that his conduct was reasonable and therefore taken in good faith. *Id.*

In a civil matter, appellant appealed the trial court’s denial of his motion to stop further payment under an existing child support order. The court found the appeal frivolous and, in addressing the appellant’s lawyer, stated that “the high ethical and professional standards of a member of the bar and an officer of the court require the attorney to inform the client that the attorney’s professional responsibility precludes him or her from pursuing such an appeal, and to withdraw from the representation of the client.” *In re*

Marriage of Gong and Kwong (2008) 163 Cal.App.4th 510, 521 [77 Cal.Rptr.3d 540] (citing *Cosenza v. Kramer* (1984) 152 Cal.App.3d 1100, 1103 [200 Cal.Rptr. 18]).

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for the ABA Model Rule 3.1, which is the counterpart to current rule 3-200, revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_1.authcheckdam.pdf [Last visited 2/7/17]
- Thirty jurisdictions have adopted Model Rule 3.1 verbatim,¹ and twelve have adopted a version of Model Rule 3.1 with slight variations.² Nine jurisdictions (including California) have a different rule or a materially modified version of Model Rule 3.1.³ Of those nine jurisdictions, four have a rule that includes a malicious injury element similar to California,⁴ six have a rule that includes a harassment element,⁵ and seven have a rule that includes a knowledge element.⁶

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

A. Concepts Accepted (Pros and Cons):

1. In proposed subparagraph (a)(1), retain the current rule term “continue.”
 - Pros: The prohibition against continuing an action once the lawyer discovers that it lacks probable cause is consistent with California case law. The question of whether a lawyer is liable for malicious prosecution for continuing an action after the lawyer discovers that it lacks merit was resolved by the California Supreme Court in *Zamos v. Stroud* (2004) 32 Cal.4th 958. Retaining the term “continue” as an express prohibition provides guidance to lawyers and serves as a clear disciplinary standard.

¹ The thirty jurisdictions are: Arkansas; Colorado; Connecticut; Delaware; Florida; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana; Minnesota; Mississippi; Missouri; Nebraska; Nevada; New Hampshire; New Mexico; North Carolina; Oklahoma; Pennsylvania; Rhode Island; South Carolina; South Dakota; Utah; Vermont; Washington; and West Virginia.

² The twelve jurisdictions are: Alaska; Arizona; District of Columbia; Maine; Maryland; Massachusetts; Michigan; North Dakota; Ohio; Tennessee; Texas; and Virginia.

³ The nine jurisdictions are: Alabama; California; Georgia; Montana; New Jersey; New York; Oregon; Wisconsin; and Wyoming.

⁴ The four jurisdictions are: Alabama; Georgia; New York; Wisconsin.

⁵ The six jurisdictions are: Alabama; Georgia; Montana; New York; Wisconsin; Wyoming.

⁶ The seven jurisdictions are: Alabama; Georgia; New Jersey; New York; Oregon; Wisconsin; Wyoming.

- Cons: The term is arguably redundant as the concept already exists under California case law and is implicit in the rule. Removing this term tracks the language that OCTC recommended in its 2001 comments.
2. In proposed subparagraph (a)(1), retain current rule language “for the purpose of harassing or maliciously injuring any person.”
- Pros: Retaining this provision is in accordance with the California Supreme Court’s express direction in its April 15, 2014 letter to the State Bar that the provision in current rule 3-200 should be retained: “[T]he proposed rule should retain the long-standing aspect of California law prohibiting attorneys from asserting claims, defenses, or contentions for an improper purpose or motive to harass or maliciously injure another as embodied in current rule 3-200, its predecessors, and Business and Profession Code § 6068, subdivision (g).”
 - Cons: None identified.
3. Add new proposed paragraph (b).
- Pros: This provision would clarify that the rule does not constrain a lawyer for a criminal defendant from requiring that every element of the case be established. It effectively sanctions the appropriate advocacy of criminal defense lawyers. The same provision is taken from Model Rule 3.1 and was also proposed by the first Commission.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. In the introductory clause to proposed paragraph (a), add phrase “In a proceeding before a tribunal.”
- Pros: This change is in accordance with the Supreme Court’s directive in its April 15, 2014 letter, which stated the rule should be limited “to attorney conduct in proceedings before a tribunal.”
 - Cons: None identified. The term “tribunal” is defined in proposed Rule 1.0.1(m).
2. Retain the term “employment” as found in the title and black letter of the current rule (or alternatively, substitute the term “representation” for employment).
- Pros: The term is used in the current rule and there is no evidence that it has limited the rule’s application.
 - Cons: Retaining the term “employment” (or alternatively “representation”) could lead to a limiting interpretation that the rule does not apply to lawyers appearing in propria persona. Case law has applied the rule to lawyers acting

in pro per. *Sorensen v. State Bar* (1991) 52 Cal.3d 1036. Further, the term “employment” is a vestige of the 1975 California Rules, which imported the term from the ABA Code of Professional Responsibility (1969). The ABA Model Rules eliminated the use of that term.

3. From current introductory paragraph, retain prohibition against seeking employment.

- Pros: “Seek” was added to the rule in 1979 as a conforming change to changes recommended for the advertising and solicitation rules.
- Cons: A prohibition against seeking employment could make an attempt to violate the rule a separate violation even where lawyer never files an action. The prohibition could subject a lawyer to discipline for targeted mailings, even though a lawyer would likely not be able to determine the merits of a suit before being retained.

4. From current introductory paragraph, retain “knows or should know.”

- Pros: Including “knows or should know” would ensure that the rule is not limited to the knowledge standard for malicious prosecution. Including this concept reflects the duty to investigate a claim before filing or making an assertion.
- Cons: The phrase “knows or should know” imports a negligence standard, which is not relevant to the determination of probable cause. Such a standard would invite or require expert testimony on the adequacy of investigation. The Supreme Court directed that the rule retain a malicious injury element, which has a malice/intent standard. The “knows or should know” standard is inconsistent with the malice standard and would require standard of care testimony to prove a violation. Furthermore, including this standard focuses the inquiry on the lawyer’s ability to discern motivation rather than on whether a matter has merit.

5. In proposed subparagraph (a)(1), add a prohibition “for an improper purpose.”

- Pros: This prohibition would conform the Rules to the current law. The concept of an improper purpose is found in both California Code of Civil Procedure § 128.7⁷ and Federal Rule of Civil Procedure 11 [procedural rules requiring certification that actions are meritorious and not presented for an improper purpose].
- Cons: There is no need to add an additional prohibition to a clause that the Supreme Court has accepted. See April 15, 2014 Supreme Court letter to

⁷ Code of Civil Procedure § 128.7(b)(1) provides that a condition for making a filing with a court is that “[i]t is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”

State Bar. The current rule provision that is being carried forward adequately captures the concept of improper motive.

6. In proposed subparagraph (a)(1), add “sole” to modify the phrase “purpose of harassing or maliciously injuring any person.”
 - Pros: This concept would limit application of the rule and is consistent with case law holding that actions should be held to be frivolous only when brought for an improper motive or when it indisputably has no merit. *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.
 - Cons: The term “sole” is unnecessary since the rule also requires that an action (or filing) may not be brought without probable cause *and* for the purpose of harassing or maliciously injuring. A mixed motive is irrelevant; the rule requires both.
7. In proposed subparagraph (a)(1), add prohibition against actions “solely for delay.”
 - Pros: This prohibition would conform the rule to the current law. The concept of delay is found in both California Code of Civil Procedure § 128.7 and Federal Rule of Civil Procedure 11 [procedural rules requiring certification that actions are meritorious and not presented for an improper purpose such as to cause unnecessary delay].
 - Cons: A prohibition against bringing an action solely for purposes of delay injects problems in proving a lawyer’s state of mind and divining whether the lawyer’s purpose was also combined with legitimate objectives designed to advance the client’s interests.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Deletion of “seek.” Lawyers would not have an ethical duty cast in terms of seeking employment for a prohibited purpose. The prohibition in the proposed rule is against bringing or continuing an action that is meritless or for an improper purpose.
2. Deletion of “knows or should know.” The “knows or should know” language in the current Rule refers to the “objective” of the lawyer’s employment which is ambiguous as whether this refers to the intent of the lawyer or the client and injects unnecessary problems in proving a lawyer’s subjective intent in pursuing litigation. The proposed rule would impose a duty on lawyers to not bring or continue an action without probable cause and for the purpose of harassing or

maliciously injuring, regardless of whether the lawyer knows or should know that the objective is to bring such a claim. Lawyers would also have a duty to not bring a claim that is not warranted under existing law regardless of whether the lawyer knows or should know that the objective is to present such a claim.

3. Addition of “In a proceeding before a tribunal.” Lawyer conduct prohibited by the proposed rule would be limited to conduct in proceedings before a tribunal.

D. Non-Substantive Changes to the Current Rule:

1. Deleting reference to “employment” in both the title and black letter of the Rule to avoid an interpretation that the rule does not apply to lawyers appearing in pro per. Case law has applied the rule to lawyers acting in pro per. *Sorensen v. State Bar* (1991) 52 Cal.3d 1036. (See paragraph IX.B.1, above.)
2. Changing the title to reflect the rule’s content, i.e., that it is not limited to a lawyer who has been retained (employed) by a client. The title is the same as that for Model Rule 3.1.
3. Substituting the term “lawyer” for “member”.
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
4. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California under *pro hac vice* admission (see current rule 1-100(D)(1)) to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
5. Changing the structure of the introductory clause to paragraph (a) to track language that OCTC suggested in its 2001 comment. Change numbering and beginning of subparagraphs to conform to the new structure.
 6. In subparagraph (a)(2), substituting “the” for “such.”

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 3.1 [3-200] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 3.1 [3-200] in the form attached to this Report and Recommendation.

**Proposed Rule 3.1 [3-200] Meritorious Claims and Contentions
Synopsis of Public Comments**

TOTAL = 1 **A = 1**
D = 0
M = 0
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-21u	Office of Chief Trial Counsel (OCTC) (01-09-17)	Y	A	3.1	OCTC supports this rule.	No response required.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

PROPOSED RULE OF PROFESSIONAL CONDUCT 3.2
(No Current Rule)
Delay of Litigation

EXECUTIVE SUMMARY

The Commission evaluated ABA Model Rule 3.2 (Expediting Litigation) for which there is no California counterpart. The Commission also reviewed relevant California statutes, rules and case law relating to the issues addressed by the proposed rule. The result of the Commission's evaluation is proposed rule 3.2 (Delay of Litigation).

Rule As Issued For 90-day Public Comment

Proposed rule 3.2 in context within the Rules of Professional Conduct.

Proposed rule 3.2 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The general content, framework and numbering scheme of this subset of the Rules is based on Chapter 3 of the ABA Model Rules, which is entitled "Advocate". Model Rules Chapter 3 corresponds to Chapter 5 of the current California Rules, entitled "Advocacy and Representation." The following table shows the Chapter 3 Model Rules and the corresponding California Rules:

Model Rule	California Rule
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. Rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. Rule counterpart.

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules.

Proposed rule 3.2 prohibits a lawyer from using means that have no substantial purpose other than to delay or prolong a proceeding, or to cause needless expense. The Commission recommends adoption of New York rule 3.2 (Delay of Litigation) instead of Model Rule 3.2

(Expediting Litigation),¹ which requires a lawyer to make reasonable efforts to “expedite” litigation, for several reasons. First, it has been widely recognized that delay tactics in litigation that greatly increase the cost for prosecuting a lawsuit threaten to limit access to the justice except for the most affluent. Second, prohibiting undue delay and needless expense are significant concerns in the litigation process that will help protect the administration of justice and the public. Such tactics are rightfully prohibited when they are used to frustrate an opposing party’s ability or attempt to obtain a rightful remedy or redress. Third, establishing such prohibitory conduct as a minimum standard of professional responsibility is consistent with the first principle of the Commission’s Charter: “The Commission’s work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection of the public.” Finally, the Model Rule imposes an affirmative duty on a lawyer to make reasonable efforts to “expedite” litigation, which is a rule structure more appropriate for an aspirational statement. The proposed rule prohibits delay, which is more appropriate for a disciplinary rule, as is required by the Commission’s Charter.

There is one comment to the rule. The comment provides cross-reference to other rules addressing unnecessary delay. The reference to proposed rule 1.3 informs the reader that attorneys are required to act with reasonable diligence and the reference to proposed rule 3.1(b) is intended to address concerns that rule 3.2, standing alone, would prohibit use of delaying tactics by a lawyer who represents a criminal defendant in a capital case. The reference to Business and Professions Code section 6128(b) informs the reader that attorneys are guilty of a misdemeanor who willfully delay their client’s suit with a view to the lawyer’s own gain.

National Background – Adoption of Model Rule 3.2

As California does not presently have a direct counterpart to Model Rule 3.2, this section reports on the adoption of the Model Rule in United States’ jurisdictions.

Other than California, all jurisdictions but three have adopted some version of ABA Model Rule 3.2.²

The ABA State Adoption Chart for ABA Model Rule 3.2 is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_2.authcheckdam.pdf

Thirty-nine states have adopted Model Rule 3.2 verbatim.³ Two jurisdictions have adopted a slightly modified version of Model Rule 3.2.⁴ Six jurisdictions have adopted a version of the rule that substantially diverges from Model Rule 3.2.⁵

¹ ABA Model Rule 3.2 states:

“A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”

² The three jurisdictions are: Ohio, Oregon, and Virginia.

³ The thirty-nine jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico (but uses a different rule number), North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

⁴ The two jurisdictions are: New Jersey and Tennessee.

⁵ The six jurisdictions are: District of Columbia, Georgia, Nebraska, Nevada, New York, and Texas.

COMMISSION REPORT AND RECOMMENDATION: RULE 3.2

Commission Drafting Team Information

Lead Drafter: James Ham

Co-Drafters: Daniel Eaton, Dean Stout

I. CURRENT ABA MODEL RULE

[There is no California Rule that corresponds to Model Rule 3.2.
The proposed Rule is based on the New York Rule 3.2.]

ABA Model Rule 3.2 Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

I.A. CURRENT NEW YORK RULE

The Commission recommends the adoption of New York Rule 3.2. The Model Rule imposes an affirmative duty on a lawyer to make reasonable efforts to "expedite" litigation. The proposed Rule being recommended prohibits delay.

New York Rule 3.2 Delay of Litigation

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.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Such tactics are prohibited if their only substantial purpose is to frustrate an opposing party's attempt to obtain rightful redress or repose. It is not a justification that such tactics are often tolerated by the bench and bar. The question is whether a competent lawyer acting in

good faith would regard the course of action as having some substantial purpose other than delay or needless expense. Seeking or realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 3.2

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 3.2

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE 3.2 (CLEAN)

Rule 3.2 Delay of Litigation

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.

Comment

See Rule 1.3 with respect to a lawyer's duty to act with reasonable* diligence and Rule 3.1(b) with respect to a lawyer's representation of a defendant in a criminal proceeding. See also Business and Professions Code § 6128(b).

IV. COMMISSION'S PROPOSED RULE (REDLINE TO MODEL RULE 3.2)

Rule 3.2 ~~Expediting~~Delay of Litigation

~~A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.~~

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.

Comment

See Rule 1.3 with respect to a lawyer's duty to act with reasonable diligence and Rule 3.1(b) with respect to a lawyer's representation of a defendant in a criminal proceeding. See also Business and Professions Code § 6128(b).

~~[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it~~

~~is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.~~

IV.A. COMMISSION'S PROPOSED RULE (REDLINE TO NEW YORK RULE 3.2)

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.

Comment

~~[1] Dilatory practices bring the administration of justice into disrepute. Such tactics are prohibited if their only substantial purpose is to frustrate an opposing party's attempt to obtain rightful redress or repose. It is not a justification that such tactics are often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay or needless expense. Seeking or realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.~~

See Rule 1.3 with respect to a lawyer's duty to act with reasonable* diligence and Rule 3.1(b) with respect to a lawyer's representation of a defendant in a criminal proceeding. See also Business and Professions Code § 6128(b)

V. RULE HISTORY

Although the origin and history of Model Rule 3.2 was not the primary factor in the Commission's consideration of proposed Rule 3.2, that information is published in *A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, Art Garwin, Editor, 2013 American Bar Association, at pages 447-450, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

Information on the adoption of New York Rule 3.2 is published online at the New York Legal Ethics Reporter website: <http://www.newyorklegalethics.com/simon-on-new-rules-rule-2-1-through-3-3a1/> [last checked February 7, 2017]. This article *Simon on New Rules: Rule 2.1 Through 3.3(a)(1)*, by Professor Roy Simon was originally published in NYPRR September 2009 issue.

An excerpt is provided below:

Rule 3.2 ("Delay of Litigation") is a new rule that had no equivalent in the Disciplinary Rules of the Code of Professional Responsibility. Rule 3.2 provides:

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.

The key to understanding Rule 3.2 is the phrase “no substantial purpose.” What does this mean? In a breach of contract suit, may the defendant’s lawyer make a hopeless but time-consuming motion for summary judgment so that the defendant can continue to earn interest on his money before offering a settlement? In a foreclosure action, may a lawyer seek a continuance to give his client more time to raise money to avoid foreclosure? May a plaintiff’s lawyer ratchet up discovery demands, or refuse to stipulate to indisputable facts, to wear down the defendant financially? The answer to all of these questions will be “no” under Rule 3.2 unless the lawyer has some legitimate and reasonably important justification beyond those given in my examples.

What might those additional justifications be? The Comment to Rule 3.2 — the shortest Comment in the new rules, consisting of a single paragraph — is of minimal help. It says that “[d]ilatory practices” — even if they are “often tolerated by the bench and bar” — are prohibited “if their only substantial purpose is to frustrate an opposing party’s attempt to obtain rightful redress or repose.” Is the test subjective or objective? Is good faith enough?

Yes, good faith is enough. The Comment says: “The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay or needless expense.” But that brings us back to square one, trying to define a “substantial” purpose. The Comment offers only negative advice: “Seeking or realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.” With so little guidance and so many incentives to delay litigation or use tactics that impose significant costs on opposing parties, courts and ethics committees will need to be very discerning to determine whether a proffered justification for suspicious conduct rises to the level of a “substantial purpose.”

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):
 1. OCTC supports this rule and its Comments.
Commission Response: No response required.
- **State Bar Court**: No comments were received from State Bar Court.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

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

During the 90-day public comment period, four public comments were received. Two comments agreed with the proposed Rule and two comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

For related California Law, see the Report and Recommendation for proposed Rule 1.3 Diligence.

B. ABA Model Rule Adoptions

Other than California, all jurisdictions but three have adopted some version of ABA Model Rule 3.2.¹

The ABA State Adoption Chart for ABA Model Rule 3.2, revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_2.authcheckdam.pdf (last visited 2/7/17).
- Thirty-nine jurisdictions have adopted Model Rule 3.2 verbatim.² Two jurisdictions have adopted a slightly modified version of Model Rule 3.2.³ Six jurisdictions have adopted a version of the rule that substantially diverges from Model Rule 3.2.⁴

¹ The three jurisdictions are: Ohio, Oregon, and Virginia.

² The thirty-nine jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico (but uses a different rule number), North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

³ The two jurisdictions are: New Jersey and Tennessee.

⁴ The six jurisdictions are: District of Columbia, Georgia, Nebraska, Nevada, New York and Texas.

- For the reasons set forth in Section IX, below, the Commission recommends adoption of a Rule that substantially diverges from the Model Rule and would join the six jurisdictions whose rules are substantially different.

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

A. Concepts Accepted (Pros and Cons):

1. General. Recommend adoption of a rule, not currently in the California Rules of Professional Conduct, that would prohibit lawyers from engaging in delay in litigation.

- Pros: It has been widely recognized that delay tactics in litigation that greatly increase the cost of prosecuting a lawsuit threaten to limit access to the justice system except for the most affluent. This fact has recently been recognized by the Chief Justice of the United States, who wrote:

“As for the lawyers, most will readily agree—in the abstract—that they have an obligation to their clients, and to the justice system, to avoid antagonistic tactics, wasteful procedural maneuvers, and teetering brinksmanship. I cannot believe that many members of the bar went to law school because of a burning desire to spend their professional life wearing down opponents with creatively burdensome discovery requests or evading legitimate requests through dilatory tactics. The test for plaintiffs’ and defendants’ counsel alike is whether they will affirmatively search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results.

I am hardly the first to urge that we must engineer a change in our legal culture that places a premium on the public’s interest in speedy, fair, and efficient justice.” (See *2015 Year-End Report on the Federal Judiciary*, at page 11 (12/21/15), available at: <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> (last visited 2/7/17).

- Cons: The concept in the Rule, avoiding delay, is already covered in other proposed Rules, Rule 1.3 (Diligence) and 3.1 (Meritorious Claims and Contentions) and by statute in Bus. and Prof. Code § 6128(b).⁵

2. Recommend adoption of title to New York rule 3.2.

- Pros: The New York rule title (Delay of Litigation) is more appropriate than the ABA title (Expediting Litigation). The Model Rule imposes an affirmative duty

⁵ Section 6128(b) states every attorney is guilty of a misdemeanor who either: “(b) Willfully delays his client’s suit with a view to his own gain.”

on a lawyer to make reasonable efforts to “expedite” litigation. The proposed rule being recommended prohibits delay.

- Cons: None identified.

3. Recommend adoption of New York Rule 3.2.

- Pros: Prohibiting undue delay and needless expense are significant concerns in the litigation process that will help protect the administration of justice and the public. Such tactics are rightfully prohibited when they are used to frustrate an opposing party’s ability or attempt to obtain a rightful remedy or redress. Establishing such prohibitory conduct as a minimum standard of professional responsibility is consistent with the first principle of the Commission’s Charter: “The Commission’s work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection of the public.” In addition, the Model Rule imposes an affirmative duty on a lawyer to make reasonable efforts to “expedite” litigation, a rule structure more appropriate for an aspirational statement. The proposed Rule being recommended prohibits delay, which is more appropriate for a disciplinary rule, as is required by the Commission’s Charter.
- Cons: The proposed Rule diverges from the Model Rule language which has been adopted verbatim or nearly verbatim in a substantial majority of jurisdictions.

4. Recommend adoption of a single Comment.

- Pros: The Comment provides cross-reference to other Rules addressing unnecessary delay. The reference to proposed Rule 1.3 informs the reader that attorneys are required to act with reasonable diligence and the reference to proposed Rule 3.1(b) is intended to address concerns that that Rule 3.2, standing alone, would prohibit delaying tactics by a lawyer who represents a criminal defendant in a capital case.
- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of the Comment to Model Rule 3.2.

- Pros: The Model Rule comment explains the policy underlying the rule.
- Cons: No comment is needed to explicate this rule. Moreover, the comment to Model Rule 3.2 is inapposite to the proposed rule.

C. Changes in Duties/Substantive Changes to the Current Rule:

This would be new rule of professional conduct in California and is a substantive change in that violation of the Rule would subject a lawyer to discipline.

D. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 3.2 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Commission adopt proposed Rule 3.2 in the form attached to this Report and Recommendation.

**Proposed Rule 3.2 Delay of Litigation
Synopsis of Public Comments**

TOTAL = 4
A = 2
D = 0
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43w	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	M	3.2	Insert "unduly" before "delay."	If the conduct of a lawyer has "no substantial purpose other than to delay or prolong the proceeding or ... cause needless expense" the conduct is unethical and subjects the attorney to discipline. Conduct which delays a proceeding but which has a substantial purpose other than simply delay or the purpose of causing needless expense, is not subject to the rule. The modifier "unduly" also creates ambiguity when the standard for culpability is a finding of "no substantial purpose." The Commission believes that adding the word "unduly" is inadvisable.
X-2016-66n	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	A	3.2	Comment that refers to rule 1.3 and Business and Professions Code section 6128 is helpful as lawyers may be unaware of these concepts	No response required.
X-2016-76i	Los Angeles County Bar Association (LACBA) (Schmid) (9-21-16)	Y	M	3.2	ABA Rule 3.2 is superior because it recognizes lawyer's duty to expedite litigation and should be adopted instead of proposed rule.	Proposed Rule 3.2 is a disciplinary rule establishing standards of conduct. The language of ABA Model Rule 3.2 is aspirational and sets an amorphous standard that

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Proposed Rule 3.2 Delay of Litigation
Synopsis of Public Comments**

TOTAL = 4 **A = 2**
 D = 0
 M = 2
 NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						would be difficult to enforce. Proposed Rule 3.2 sets forth a bright line standard whereas the ABA Model Rule does not.
X-2016-104aj	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	A	3.2	OCTC supports adoption of proposed Rule 3.2.	No response required.

PROPOSED RULE OF PROFESSIONAL CONDUCT 3.3
(Current Rule 5-200)
Candor Toward The Tribunal

EXECUTIVE SUMMARY

The Commission evaluated current rule 5-200 (Trial Conduct) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 3.3 (Candor Toward The Tribunal). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 3.3 (Candor Toward The Tribunal).

Rule As Issued For 90-day Public Comment

Proposed Rule 3.3 in context within the Rules of Professional Conduct. Proposed Rule 3.3 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The content, framework and numbering scheme of this subset of the Rules is generally based on Chapter 3 of the ABA Model Rules, which is entitled "Advocate." Model Rules Chapter 3 corresponds to Chapter 5 of the current California Rules, entitled "Advocacy and Representation." The following table shows the Chapter 3 Model Rules and the corresponding California Rules:

Model Rule	California Rule
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. Rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. Rule counterpart.

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules, but for many of the rules recommends retaining the language of the California Rules, which is more specific and precise, and accordingly more appropriate for a set of disciplinary rules. However, in the case of proposed Rule 3.3, the Commission determined that a rule patterned on Model Rule 3.3 would be more appropriate as a disciplinary rule.

Recommendation that proposed Rule 3.3 be circulated for public comment. Proposed Rule 3.3 is based on Model Rule 3.3, a version of which has been adopted in every jurisdiction in the country. (See National Backdrop – Adoption of Model Rule 3.3, below.) The drafting team believes that the Model Rule approach regarding a lawyer's duty of candor is superior to the

approach of current rule 5-200 (Trial Conduct) because it more clearly identifies the kind of conduct that the rule is intended to regulate, an attribute preferable in a disciplinary rule. For example, current rule 5-200(A) and (B) are nearly verbatim transcriptions of the two clauses of Bus. & Prof. Code § 6068(d), a provision that has remained virtually unchanged since the California Legislature adopted the Field Code in 1872.¹ Paragraph (A) cautions a lawyer to “employ, for the purpose of maintaining the causes confided to the lawyer, such means only as are consistent with the truth,” but provides no insight into what “such means” are consistent with the truth, and thus what “means” are not. Similarly, paragraph (B) prohibits a lawyer from “seeking to mislead the judge . . . by an artifice,” but does not clarify what a prohibited “artifice” might be.

In sum, the Model Rule approach, under which specific prohibited conduct is identified, is preferable in a disciplinary rule. The greater detail of the proposed rule should enhance compliance by lawyers in performing the duties they owe the court as officers of the legal system, as well as facilitate enforcement. The need for increased detail in the rule is particularly evident regarding measures a lawyer is permitted to take to correct fraudulent or criminal conduct of another in relation to a proceeding before a tribunal. That is because, contrary to Model Rule jurisdictions under which duties under their versions of rule 3.3 trump a lawyer’s duty of confidentiality, the text of proposed Rule 3.3 expressly states that the lawyer’s duty to take reasonable remedial measures is subordinate to California’s strict duty of confidentiality under Rule 1.6 and Bus. & Prof. Code § 6068(e).

Text of Rule 3.3. The proposed Rule’s language, based on the Model Rule, provides a clearer statement of what conduct is required and prohibited under the rule.

Paragraph (a)’s introductory clause incorporates a “knowledge” standard. The requirement of known falsity is important from a practical as well as a policy standpoint. A rule that could be violated by gross negligence would have an improper chilling effect on advocacy and could render the lawyer a guarantor of the truth of the facts presented.

Subparagraph (a)(1) [based on Model Rule 3.3(a)(1)] provides that a lawyer shall not 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.” A lawyer is on notice that the lawyer may not knowingly make *any* false statement of fact or law or fail to correct a *material* false statement of fact or law.

Subparagraph (a)(2) [derived from Model Rule 3.3(a)(2)], prohibits a lawyer from failing “to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse” to the client’s position. It states the lawyer’s duty to disclose to the tribunal adverse legal authority in the controlling jurisdiction, which is preferable to the narrowly defined duties in current rule 5-200(C) and (D). Nevertheless, to further clarify the provision’s intent, the Commission recommends adding language from rule 5-200(C), which provides a lawyer shall not “misquote to a tribunal the language of a book, statute, decision or other authority.”² The

¹ Bus. & Prof. Code § 6068(d) provides it is the duty of an attorney:

(d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

The only change since 1872 has been to render the provision gender neutral.

² In response to a request by OCTC, the Commission is also recommending that the substance of 5-200(D) (a lawyer “shall not, knowing its invalidity, cite as authority a decision that has been overruled or a

Commission determined that a generalized statement of what is prohibited together with a specific example, is better than a narrowly-defined statement of prohibited conduct.

Subparagraph (a)(3) [based on Model Rule 3.3(a)(3)], states with precision what conduct is prohibited – offering false evidence – and then identifies steps the lawyer must take to remediate harm to the tribunal should the lawyer subsequently learn that of the evidence’s falsity.”

Paragraph (b) confronts head-on a lawyer’s duty when the lawyer knows that a person *has* engaged in criminal or fraudulent conduct related to a proceeding. Unlike Model Rule jurisdictions, however, the provision is limited by the lawyer’s confidentiality duties under Rule 1.6 and Bus. & Prof. Code § 6068(e).

Paragraph (c) importantly delimits the duration of the lawyer’s duties under the preceding three paragraphs. The lawyer’s duties continue to the end of the proceeding and do not terminate upon discharge by the client or the lawyer’s withdrawal.

Paragraph (d) proscribes appropriate conduct when a lawyer is appearing in an *ex parte* proceeding where the other side is not given notice or an opportunity to be heard.

There are seven comments to the proposed rule, each of which provides interpretative guidance or clarifies how the proposed rule, which is intended to govern a broad array of situations, should be applied.

Comment [1] describes the scope of the rule’s application, i.e., that it also applies to ancillary proceedings such as depositions, a concept that might not be apparent in a rule addressing conduct before a “tribunal.”

Comment [2], as noted (see footnote 2), has been included to address concerns OCTC expressed in its 2010 Comment about the deletion of the language in current rule 5-200(C) [now incorporated into subparagraph (a)(2)] and (D). The comment incorporates nearly verbatim the language in current rule 5-200(D).

Comment [3], regarding the term “legal authority in the controlling jurisdiction,” provides critical interpretative guidance for the term, which in some instances can encompass legal authority outside of the jurisdiction in which a court is physically located. The comment is not strictly a definition but instead explains how a strict interpretation of the term “controlling jurisdiction,” i.e., to mean the politically-defined jurisdiction in which the court is located, would be inaccurate.

Comment [4] provides a suggested course of conduct for a lawyer to preserve the integrity of the legal process by identifying preventive measures a lawyer might take to prevent another from engaging in fraudulent or criminal conduct related to a tribunal proceeding. It also notes that under paragraphs (a) and (b), if the lawyer is unsuccessful in averting the conduct, the lawyer must refuse to offer the false evidence. In addition, the comment identifies the narrative approach, a procedure sanctioned in California case law that is cited, when the person who intends to testify falsely is the lawyer’s criminal defendant client.

Comment [5] provides important guidance for a lawyer who seeks to perform the lawyer’s duties to engage in “reasonable remedial measures” as required under paragraph (b) when a fraud has

statute that has been repealed or declared unconstitutional”) be retained in a comment to clarify the application of paragraph (a)(1). (See Comment [2].)

been perpetrated on the court. In particular, the comment provides cross-references to rules and statutes that provide further guidance.

Comment [6] provides interpretative guidance on when a proceeding is deemed to have concluded and the lawyer's duties under the rule are terminated. In particular, it recognizes that the duties under paragraph (b) to rectify fraudulent conduct before a tribunal do not apply when the lawyer learns of the fraudulent or criminal course of conduct only after the lawyer's representation has terminated.

Comment [7], regarding a lawyer's withdrawal from representation occasioned by events contemplated by the rule's provisions, provides important guidance that when a lawyer complies with the lawyer's duties under the rule, the lawyer does not necessarily need to withdraw. However, the comment also notes that withdrawal may be mandatory when, as a consequence of the lawyer's compliance, the lawyer-client relationship deteriorates to the extent the lawyer can no longer competently represent the client or continued representation will result in a violation of the Rules.

In addition to the recommended provisions, the Commission declined to recommend a provision suggested in public comment that would expressly bar plagiarism in briefs or other submissions to a court. The Commission determined a specific prohibition on plagiarism is not necessary and not appropriate in a disciplinary rule. In any event, such conduct would be better addressed under proposed rule 8.4(c) or Bus. & Prof. Code § 6106.³ Moreover, there is no evidence that adopting such a provision would promote a national standard as the Commission is unaware of any jurisdiction that has expressly addressed plagiarism in its Rules.

National Background – Adoption of Model Rule 3.3

Every jurisdiction except California has adopted some version of Model Rule 3.3. Twenty-one jurisdictions have adopted Model Rule 3.3 verbatim.⁴ Sixteen jurisdictions have adopted a slightly modified version of Model Rule 3.3.⁵ Thirteen jurisdictions have adopted a version of the rule that is substantially different from Model Rule 3.3.⁶

³ Proposed rule 8.4 (c) provides it is professional misconduct for a lawyer to:

(c) engage in conduct involving moral turpitude, dishonesty, fraud, deceit or reckless or intentional misrepresentation

⁴ The twenty-one jurisdictions are: Arizona, Arkansas, Colorado, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Hampshire (although the order of paragraphs (c) and (d) are reversed), Rhode Island, Utah, Vermont, West Virginia, and Wyoming.

⁵ The sixteen jurisdictions are: Alaska, Connecticut, Georgia (Georgia retains a rule substantially similar to the former Model Rule from 1983), Hawaii (Hawaii retains a rule substantially similar to the former Model Rule from 1983), Maine, Mississippi (Mississippi retains the former Model Rule language from 1983), Missouri, New Jersey (New Jersey retains a rule substantially similar to the former Model Rule from 1983), New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Wisconsin.

⁶ The thirteen jurisdictions are: Alabama, District of Columbia, Florida, Maryland, Massachusetts, Michigan, New York, North Dakota, Oregon, Tennessee, Texas, Virginia, and Washington.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission revised paragraphs (a), (c), and (d) for clarity. Comment [3] was added to make clear that in addition to this rule, lawyers are remain bound by their statutory obligations to never mislead a judge or judicial officer, nor commit an act of moral turpitude, dishonesty or corruption. Comment [4] was added to clarify that paragraph (d) does not apply to ex parte communications otherwise not prohibited by law or by the tribunal.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 3.3 [5-200]

Commission Drafting Team Information

Lead Drafter: Mark Tuft

Co-Drafters: Danny Chou, Raul Martinez

I. INTRODUCTION

Proposed Rule 3.3 is based on Model Rule 3.3, a version of which has been adopted in every jurisdiction in the country. The Commission believes that the Model Rule approach regarding a lawyer's duty of candor is superior to the approach of current rule 5-200 (Trial Conduct) because it more clearly identifies the kind of conduct that is regulated under the Rule, an attribute that is preferable in a disciplinary rule. For example, current rule 5-200(A) and (B) are nearly verbatim transcriptions of the two clauses of Business and Professions Code section 6068(d), a provision that has remained virtually unchanged since California adopted the Field Code in 1872.¹ Paragraph (A) cautions a lawyer to "employ, for the purpose of maintaining the causes confided to the lawyer, such means only as are consistent with the truth," but provides no insight into what "such means" are. Similarly, paragraph (B) prohibits a lawyer from "seeking to mislead the judge . . . by an artifice," but does not clarify what a prohibited "artifice" might be.

The proposed Rule's language, based on the Model Rule, in some respects provides a clearer statement of what conduct is required and prohibited under the Rule. For example, paragraph (a)(1) provides that a lawyer shall not 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." A lawyer is on notice that the lawyer may not knowingly make *any* false statement of fact or law or fail to correct a *material* false statement of fact or law. Similarly, paragraph (a)(2) [based on Model Rule 3.3(a)(2)] clarifies the lawyer's duty to disclose to the tribunal adverse legal authority in the controlling jurisdiction, which is preferable to the narrowly-defined duties in current rule 5-200(C) and (D). Paragraph (a)(3) states with precision what conduct is prohibited – offering false evidence – and then identifies steps the lawyer must take to remediate harm to the tribunal should the lawyer subsequently learn that of the evidence's falsity. Proposed paragraph (b) confronts head-on a lawyer's duty when the lawyer knows that a person has engaged in criminal or fraudulent conduct related to a proceeding. Unlike Model Rule jurisdictions, however, the provision is limited by the lawyer's confidentiality duties under Rule 1.6 and Business and Professions Code section 6068(e). Importantly, paragraph (c) of the proposed rule delimits the duration of the lawyer's duties under the

¹ Bus. & Prof. Code § 6068(d) provides it is the duty of an attorney:

(d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

The only change since 1872 has been to render the provision gender neutral.

preceding three paragraphs, and paragraph (e) proscribes appropriate conduct when a lawyer is appearing in an ex parte proceeding where the other side is not given notice or an opportunity to be heard.

Finally, there are nine Comments that are limited to interpreting the rule or explaining how the rule is to be applied, appropriate functions of the Comments.

II. CURRENT CALIFORNIA RULE

Rule 5-200 Trial Conduct

In presenting a matter to a tribunal, a member:

- (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;
- (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;
- (C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;
- (D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and
- (E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

III. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 3.3 [5-200]

Vote: 13 (yes) – 1 (no) – 1 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 3.3 [5-200]

Vote: X (yes) – X (no) – X (abstain)

IV. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 3.3 [5-200] Candor Toward The Tribunal*

- (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.

V. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 5-200)

Rule 3.3 [5-200] Trial Conduct

~~In presenting a matter to a tribunal, a member:~~

- ~~(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;~~
- ~~(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;~~
- ~~(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;~~
- ~~(D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and~~
- ~~(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness~~

(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.

VI. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 3.3)

Rule 3.3 [5-200] Candor Toward ~~the~~The Tribunal*

(a) A lawyer shall not ~~knowingly~~:

- (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 ~~an adjudicative~~ 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, ~~including, if necessary, disclosure to the tribunal~~ 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, ~~and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6~~ 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 ~~who is representing a client in the~~ proceedings of a tribunal* including ancillary proceedings such as a deposition conducted pursuant to a tribunal's authority. See Rule ~~4-01.0.1~~1.0.1(m) for the definition of "tribunal." ~~It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable~~

~~remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.~~

[2] ~~This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that~~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~~knows to be false.~~

Representations by a Lawyer

[3] ~~An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).~~

Legal Argument

[43] ~~Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.~~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.

Offering Evidence

~~[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.~~

~~[6] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows* that the 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. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer and, if unsuccessful, must refuse to offer the false evidence. If only a portion of a witness's criminal defendant insists on testifying, and the lawyer knows* that the testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false. 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.~~

~~[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].~~

~~[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.~~

~~[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].~~

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.

~~[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.~~

~~[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.~~

Preserving Integrity of Adjudicative Process

~~[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court~~

~~official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.~~

Duration of Obligation

~~[136] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. 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.

Ex Parte Proceedings

~~[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.~~

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.

~~[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.~~

VII. RULE HISTORY

Current rule 5-200 originated in 1928 as former rule 17, operative on July 24, 1928. (See, *The State Bar Journal* (July 1928) Vol. III, No.1, p. 17.) Rule 17 provided: "A member of the State Bar shall not intentionally misquote to a judge, judicial officer or jury the testimony of a witness, the argument of opposing counsel or the contents of a document; nor shall he intentionally misquote to a judge or judicial officer the language of a book, statute or decision; nor shall he, with knowledge of its invalidity and without disclosing such knowledge, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional."

In 1972, former rule 14 was renumbered as rule 7-105, "Trial Conduct," which provided:

Rule 7-105 Trial Conduct

In presenting a matter to a tribunal, a member of the State Bar shall:

- (1) Employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and shall not seek to mislead the judge, judicial officer or jury by an artifice or false statement of fact or law. A member of the State Bar shall not intentionally misquote to a judge or judicial officer the language of a book, statute or decision; nor shall he, with knowledge of its invalidity and without disclosing such knowledge, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional. A member of the State Bar shall refrain from asserting his personal knowledge of the facts at issue, except when testifying as a witness.
- (2) Disclose, unless privileged or irrelevant, the identities of the clients he represents.

Former rule 7-105 was amended in 1989 as part of a comprehensive study and revision of the Rules of Professional Conduct. The amendments included renumbering the rule 5-200 and dividing the rule into five paragraphs to make it easier to follow. New paragraph (C) continued the prohibition on intentionally misquoting authorities but changed "judge or judicial officer" to "tribunal" to indicate that an attorney's duty of candor is equally applicable when the lawyer is appearing before an administrative

tribunal as when appearing before a judge or judicial officer. Paragraph (2) of rule 7-105 which required an attorney to disclose, unless privileged or irrelevant, the identity of the client was deleted as unnecessary.

Rule 5-200 Trial Conduct

In presenting a matter to a tribunal, a member:

- (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;
- (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;
- (C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;
- (D) Shall not, knowing of its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and
- (E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

VIII. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. “Knowing” standard is contrary to established standards of conduct; contrary to the State Bar Act, the current rules and case law interpreting those authorities; misleading to attorneys as to their professional obligations and; creates confusion in disciplinary law making enforcement more difficult.

Commission Response: The Commission disagrees. The definition of “knowingly” in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the “knowingly” standard is appropriately used in this Rule, which addresses a lawyers statements and the submission or presentation of evidence to a court.

2. OCTC is concerned that the proposed rule is far more limited than current rule 5-200, which prohibits an attorney from seeking to mislead a judge, judicial officer, or jury by an artifice or false statement of factor law. The proposed rule would only prohibit a false statement of fact or law. (See *In the Matter of Parish* (Review Dept.) 5 Cal. State Bar Ct. Rptr. 370, 376 [interpreting Canon 5 of the Judicial Code of Ethics to apply only to factual misrepresentations, but not to statements that may be misleading or true statements that might imply or suggest, through innuendo, false conclusions; Review Department concluded that on its face the language of Canon 5 only reached factual

misrepresentations].)² California has long held that an attorney is required to refrain from misleading and deceptive acts without qualification. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 315.) No distinction is made among concealment, half-truth, and false statement of fact. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Further, express and implied representations, as well as material omissions, support finding a statement misleading. (See e.g. *In re Naney* (1990) 51 Cal.3d 186 [“Both express and implied representations of ability to practice are prohibited”]; *In the Matter of Kirwin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 630, 636-637; *Franklin v. State Bar* (1986) 41 Cal.3d 700, 709.)

Commission Response: The Commission disagrees with the commenter’s assessment of current rule 5-200, which is simply a restatement of Bus. & Prof. C. § 6068(d). As stated in the Commission’s Report and Recommendation on proposed Rule 3.3, it believes that “the Model Rule approach regarding a lawyer’s duty of candor is superior to the approach of current rule 5-200 (Trial Conduct) because it more clearly identifies the kind of conduct that is regulated under the rule, an attribute that is preferable in a disciplinary rule.” The more specific approach should provide greater public protection and promote respect for the administration of justice.

3. OCTC is concerned that the proposed rules do not provide for when an attorney (1) states or alludes at trial to evidence that the attorney knows, or reasonably should know, is not relevant or admissible evidence, or has already been ruled inadmissible (see *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 118); (2) states the attorney’s belief in the credibility of a witness (see *Hawk v. Superior Court, supra*, 42 Cal.App.3d at p. 123); or (3) violates discovery orders of a court. OCTC recognizes that arguably they could be included in proposed Rule 3.4, but they are not specifically there, either. They should be included somewhere.

Commission Response: The Commission believes that (1) is covered by this Rule; (2) is addressed in proposed Rule 3.4(g); and (3) is addressed in Rule 3.4(f).

4. OCTC supports the Comments to this rule.

Commission Response: No response required.

² Canon 5B(1)(b) prohibits a judge or candidate for judicial office from making “knowing misrepresentations, including false or misleading statements, during an election campaign because doing so would violate Canons 1 and 2A, and may violate other canons.” There is a proposal to amend this Canon to include not only false statements of fact, but misleading statements as well.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

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

IX. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, fourteen public comments were received. Four comments agreed with the proposed Rule, five comments disagreed, and five comments agreed only if modified. During the 45-day public comment period, five public comments were received. Two comments disagreed with the proposed Rule and three comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was not in support of the proposed rule. That testimony and the Commission's response is also in the public comment synopsis table.

X. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. Business and Professions Code §§ 6068(b), (c), (d) and 6128(a).

In addition to California Rule of Professional Conduct 5-200, an attorney's duty to judges, judicial officers, and tribunals is governed by Business and Professions Code §§ 6068(b), (c), and (d).

Business and Professions Code section 6068(b) states it is the duty of an attorney to "maintain the respect due to the courts of justice and judicial officers." Section 6068(c) states it is the duty of an attorney to "counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense." Section 6068(d) contains the same language as rule 5-200(A) and (B). Section 6068(d) states it is the duty of an attorney to "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

Also, Business and Professions Code section 6128(a) provides that a lawyer is guilty of a misdemeanor if the lawyer either: (a) is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.

2. Duty of Confidentiality vs. Duty of Candor to the Court.

In California, lawyers are often faced with the competing duties of candor to the court and the duty of confidentiality to one's client. Business and Professions Code section 60068(e)(1) requires an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Current rule 3-100(A) provides, "A member shall not reveal information protected from disclosure by Business and Professions Code § 6068, subdivision (e)(1) without the informed written consent of the client . . ." except, pursuant to subdivision 6068(e)(2), the lawyer reasonably believes disclosure is necessary to prevent a life-threatening criminal act. There is no similar exception in statute or rule to the duty of confidentiality to prevent or rectify a client's fraudulent conduct before a tribunal.

Thus, a lawyer's duty to maintain inviolate the client's secrets may conflict with the lawyer's duty of candor to the court such as when a court orders an attorney to answer a question that would require the lawyer to reveal confidential information of a client. While the duty of confidentiality does not allow an attorney to abandon his or her duty of candor to courts and administrative tribunals, none of the Business and Professions Code sections cited above state that those obligations owed the court supersede or preempt the duty of confidentiality.

Under the ABA Model Rules, a lawyer's duty to the client is qualified by the duty of candor to the court. (See Model Rule 3.3(c) and Comment [2]).³ In California, however, the duty of confidentiality is not qualified by the lawyer's duty of candor to the court. Therefore, when an attorney has received information concerning a client, the attorney may not be at liberty to answer questions from the court if the answers would reveal that client's confidential information. If, for example, a client's family member told the attorney the client was under the influence of drugs and would not be coming to court and the attorney was asked by the judge if she "had any idea why her client was not there," the attorney would be prohibited from answering the question. (See, [San Diego County Bar Association Ethics Opinion 2011-1](#)). If the lawyer were to answer the

³ Model Rule 3.3(c) provides:

(c) *The duties* stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and *apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.* (Emphasis added).

ABA Model Rule 3.3, Comment [2], provides:

"This Rules sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false."

court's question in the negative, she would violate her duty of candor to the court, per rule 5-200 and § 6068(d), because she would have an idea why her client was not there (as relayed by the client's family member). If the lawyer were to answer in the affirmative, even without disclosing the reason why the client was not present, she could violate her duty of confidentiality under § 6068(e) because that answer might cause a harmful inference to be drawn to the detriment of her client, thus violating her duty not to reveal client confidential information to the client's detriment. (See, Cal. State Bar Formal Opns. 1993-133; 1981-58; 1980-52 – defining confidential information as information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or detrimental to the client.) The San Diego County Bar's ethics opinion concludes that, under these facts, the attorney's "only ethical option is to inform the court respectfully that due to applicable ethics rules she is not at liberty to answer the question."

In the criminal context, California Courts of Appeal have approved the use of the "narrative" form of testimony, which avoids a lawyer assisting the lawyer's client in committing perjury. (See, e.g., *People v. Jennings* (1999) 70 Cal.App.4th 899 [approving the narrative approach to testimony when a lawyer reasonably believes the client intends to commit perjury]; *People v. Johnson* (1998) 62 Cal.App.4th 608 [same]. Compare Model Rule 3.3, Cmt. [7].)

3. Duty of Confidentiality v. Duty to Refrain from Not Engaging In or Furthering Deception

While the duty of confidentiality prevents a lawyer from disclosing a client's fraudulent conduct, a lawyer may not participate in or further such conduct. When a client is engaging in an ongoing fraud the lawyer must be careful to avoid furthering, or assisting, the fraud in any way. (See [CAL 1996-146](#).)

In *Nix v. Whiteside* (1986) 475 U.S. 157, a criminal defendant petitioned for habeas corpus relief from his conviction by arguing ineffective assistance of counsel because his lawyer advised him the lawyer would seek to withdraw from representation if the defendant insisted on committing perjury. While preparing for his state-court criminal trial on murder charges, the defendant "consistently told his attorney that although he had not actually seen a gun in the victim's hand when he stabbed the victim, he was convinced that the victim had a gun." (*Id.*) The witnesses who were present when the stabbing occurred told the attorney that they had not seen a gun and no gun was found. The defendant was convicted for murder and alleged that he had been denied effective assistance of counsel due to his attorney's refusal to allow him to testify as he had proposed.

The United States Supreme Court held that the Sixth Amendment right of a criminal defendant to assistance of counsel is not violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial. The Court stated that an attorney must attempt to dissuade the client from committing perjury: "(A)t minimum the attorney's first duty when confronted with a proposal for perjurious

testimony is to attempt to dissuade the client from the unlawful course of conduct.” *Id.* at 169. (See also [CAL 1983-74](#).)

In *Bryan v. Bank of America* (2001) 86 Cal.App.4th 185, the attorney’s client became delusional and disappeared. The attorney filed for a continuance in the court of appeal to preserve the client’s case. The attorney believed the duty of confidentiality prevented him from disclosing his client’s situation. As a result, the attorney felt he was justified in representing that he had obtained the client’s permission to obtain an extension of time to file an appeal when in reality he was unable to locate the client. The appellate court stated these representations constituted dishonest and inexcusably inaccurate factual misrepresentations that were not only ethically objectionable but interfered with the judicial responsibility to insure that appellate court matters are conducted expeditiously and that public confidence in efficient administration of justice at the appellate level is maintained. (*Id.* at 194.) As a result of the attorney’s actions, the court imposed sanctions in the form of attorney fees.

In *In re Young* (1989) 49 Cal.3d 257, the California Supreme Court affirmed the imposition of discipline against an attorney who provided a false name to a bail bondsman to secure the client’s release from jail in order to protect the client’s identity and secrets. In rejecting the attorney’s arguments against discipline the court stated:

[P]etitioner violated his oath and duties as an attorney under §§ 6068 and 6103 when he arranged bail for his client under a false name. An attorney’s duty to maintain his client’s confidences does not extend to affirmative acts which further a client’s unlawful conduct. While petitioner admittedly had not duty to disclose that his client gave the arresting officer a false name, he had a duty not to further his client’s unlawful conduct by arranging bail for him under a false name. Petitioner’s actions misled the bail bondsman and the officers of the court responsible for bail and allowed a fugitive wanted for a violent felony to evade prosecution. We conclude that there is sufficient evidence that petitioner acted dishonestly, and that his misconduct constituted a fraud on the court.

(*Id.* at 265.)

4. Duty to Inform the Court of Misrepresentations and Aid the Court in Avoiding Error

In *Datig v. Dove Books, Inc.* (1999) 73 Cal.App.4th 964, a defense attorney obtained an ex parte dismissal of the plaintiff’s action based upon plaintiff’s failure to timely file a second amended complaint. Prior to filing the ex parte motion, the defense attorney did not verify whether the complaint had in fact been filed or give notice of or serve a copy of the motion on the plaintiff. Several days after entry of the dismissal, plaintiff’s counsel provided the defense attorney with a file-stamped copy of the second amended complaint showing it was timely filed. Plaintiff’s counsel asked defense attorney to stipulate to vacate the dismissal order. Defense attorney refused.

Citing Business and Professions Code §§ 6068(b), (c), and (d), as well as, Rule of Professional Conduct 5-200(B), the appellate court said that the defense attorney violated his duty as an officer of the court. This was evident due to (1) defense attorney's failure, once he had direct evidence that the second amended complaint had been timely filed, to stipulate to the vacation of the judgment which had been obtained on the sole ground that it had *not* been timely; (2) his subsequent reliance on what he then knew to be a judgment obtained on the basis of a misrepresentation to the court, to (a) seek additional relief against the plaintiff (in the form of attorney's fees and costs), and (b) file and maintain an action for malicious prosecution against the plaintiff and her attorney; and (3) his opposition to plaintiff's motion to vacate the judgment, at a time when he was fully aware that a factual misrepresentation to the judge was the sole basis for entry of that judgment. Following the defense attorney's presentation during oral argument, the court stated the following in its published decision:

At oral argument, it was apparent that [defense attorney] did not feel that he had done anything wrong. We therefore find it necessary to state, explicitly, that although a misrepresentation to the court may have been made negligently, not intentionally, it is still a misrepresentation, and once the attorney realizes that he or she has misled the court, even innocently, he or she has an affirmative duty to immediately inform the court and to request that it set aside any orders based upon such misrepresentation; also, counsel should not attempt to benefit from such improvidently entered orders. As the court stated in *Furlong v. White*, an attorney has a duty not only to tell the truth in the first place, but a duty to "*aid the court in avoiding error and in determining the cause in accordance with justice and the established rules of practice.*" (51 Cal.App. 265, 271, italics added.) Observance of this duty, we might add, prevents the waste of judicial resources, and the opposing party's time and money.

(*Id.* at 980-981.)

B. ABA Model Rule Adoptions

All jurisdictions have adopted some version of ABA Model Rule 3.3. The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 3.3: Candor To The Tribunal," revised December 1, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3.3.authcheckdam.pdf [Last visited 2/7/2017]
- Twenty-one jurisdictions have adopted Model Rule 3.3 verbatim.⁴ Sixteen jurisdictions have adopted a slightly modified version of Model Rule 3.3.⁵

⁴ The twenty-one jurisdictions are: Arizona, Arkansas, Colorado, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Hampshire (although the order of paragraphs (c) and (d) are reversed), Rhode Island, Utah, Vermont, West Virginia, and Wyoming.

Fourteen jurisdictions have adopted a version of the rule that is substantially different from Model Rule 3.3.⁶

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

A. Concepts Accepted (Pros and Cons):

1. General: Recommend adopting a rule patterned on Model Rule 3.3 rather than carry forward current rule 5-200
 - Pros: See Section I, Introduction, above, for why the Model Rule approach is preferable in a disciplinary rule. In addition, the greater detail of the proposed Rule should enhance compliance by lawyers in performing the duties they owe the court as officers of the legal system, as well as facilitate enforcement. This is particularly true regarding measures a lawyer is permitted to take to correct fraudulent or criminal conduct of another in relation to a proceeding. That is because the black letter, contrary to Model Rule jurisdictions, expressly states that the lawyer's duty to take reasonable remedial measures is subordinate to California's strict duty of confidentiality under Rule 1.6 and Bus. & Prof. Code § 6068(e).
 - Cons: As noted in the Introduction, the provisions in 5-200(A) and (B) have been in existence in California since 1872. A body of case law has grown around these provisions. There is no evidence that current rule 5-200 has been ineffective in regulating lawyers' duty of candor to tribunals.
2. Recommend adoption of a knowledge standard in paragraphs (a) and (b)
 - Pros: The requirement of known falsity is important from a policy as well as a practical standpoint. A rule that could be violated by gross negligence would have an improper chilling effect on advocacy and could make the lawyer a guarantor of the truth of the facts presented. The function of cross examination is to probe the validity of doubtful evidence. "Legitimate evidence is often of unknown reliability." (See Hazard & Hodes, *The Law Governing Lawyers* §32.05.) Rest. § 120 provides further support for the scienter requirement. Further, the case law cited by OCTC in support of a gross

⁵ The sixteen jurisdictions are: Alaska, Connecticut, Georgia (Georgia retains a rule substantially similar to the former Model Rule from 1983), Hawaii (Hawaii retains a rule substantially similar to the former Model Rule from 1983), Maine, Mississippi (Mississippi retains the former Model Rule language from 1983), Missouri, New Jersey (New Jersey retains a rule substantially similar to the former Model Rule from 1983), New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Wisconsin.

⁶ The fourteen jurisdictions are: Alabama, California, District of Columbia, Florida, Maryland, Massachusetts, Michigan, New York, North Dakota, Oregon, Tennessee, Texas, Virginia, and Washington.

negligence standard is mixed. (Compare *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174 [respondent knowingly made false statements to courts in Texas and California under which knowledge can be inferred from the circumstances; lawyer's unqualified and unequivocal statements to judges under circumstances that should have caused him or her at least some uncertainty are at a minimum deceptive and support a finding of culpability] and *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 855 ["It is inconceivable that such a practice could have become standard in petitioner's office without his knowledge"] with *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 281-282 [violation of 5-200(B) even though nondisclosure occurred through gross neglect].)

- Cons: Current rule 5-200(B) and Bus. & Prof. Code §§ 6068(d) and 6106 have been held to require only gross negligence to establish a violation. Incorporating a knowledge requirement into the rule would be an unnecessary change in the law.

3. Recommend adoption of paragraph (a)(1), which is identical to MR 3.3(a)(1) and the first Commission's Rule 3.3(a)(1)

- Pros: Proposed paragraph (a)(1) is a stronger and clearer statement of a lawyer's duty than current rule 5-200(B). It identifies with precision the conduct that is proscribed and imposes an affirmative duty to correct a false statement of material fact previously made. Current rule 5-200(B) is vague; it is not certain what is meant by the term "artifice."
- Cons: Rule 5-200(B), which is virtually identical to Bus. & Prof. Code § 6068(d), has been the law in California since 1872, with many cases decided under its standard. This would be a change in the law with possible unintended consequences.

4. Recommend a departure from the Model Rule by adopting a Rule that expressly provides Rule 1.6 and Bus. & Prof. Code § 6068(e) limit a lawyer's duty to take reasonable remedial measures under paragraphs (a)(2) or (c). In a Model Rule jurisdiction, the duty of candor to the tribunal expressly trumps the duty of confidentiality as set forth in the jurisdiction's counterpart to Model Rule 1.6.

- Pros: Since 1872, a lawyer's duty of confidentiality has been paramount in California, with only one express exception, effective in 2004, that permits a lawyer to disclose confidential information to prevent a life-threatening criminal act. (See Bus. & Prof. Code § 6068(e)(2) and current rule 3-100(B) [proposed Rule 1.6(b)].) It is beyond the purview of the Commission or the Court to create by rule an exception to the duty of confidentiality that resides in a statute, § 6068(e)(1). In any event, the policies underlying a strong duty of confidentiality, including the promotion of trust by the client in the client's representative in the adversarial legal system, warrants subordinating the

duty of candor to confidentiality. Whether the duty of candor should be subordinated to the duty of confidentiality requires balancing the policies underlying the latter against the policy supporting the former. It is the Commission's unanimous consensus that confidentiality policies outweigh the policies supporting candor to the tribunal.

- Cons: Every other jurisdiction in the country recognizes that the duty of confidentiality is subordinate to a lawyer's duty of candor with good reason. Avoiding fraud in the judicial process is critical to promoting respect for the administration of justice and the legal profession. If there is an exception to confidentiality that is justified, it is one that mandates that a lawyer take reasonable measures to prevent a fraud being perpetrated on the court.

5. In paragraph (b), include the phrase "intends to engage" in addition to "is engaging or has engaged".

- Pros: The reason for including "intends to engage" is to require a lawyer, who has actual knowledge and an opportunity to take reasonable remedial measures, to take steps to prevent crime or fraud by anyone from affecting the proceedings. There are many examples where this could arise. For example, another party, other counsel or a witness or a third party could intend to submit false evidence or to engage in bribery or perjury that threatens to affect the integrity of the proceeding. The objective is to prevent fraud on the tribunal when the lawyer is in a position to prevent it and not after the fact.
- Cons: The trigger for imposing the lawyer's duty, another person "intends to engage" in criminal or fraudulent conduct, is too vague and ambiguous a standard for triggering a lawyer's duty. It will tend to chill legitimate advocacy.

6. Recommend adoption of paragraph (c), which delimits the duration of the lawyer's duties as provided in paragraphs (a) and (b) to the conclusion of the proceeding or representation, whichever comes first.

- Pros: The duration of the duty should extend to the conclusion of the proceeding *only if* the lawyer-client relationship continues to that point. Otherwise, the duty should end upon termination of the relationship for the following reasons:

(1) the lawyer lacks standing after termination of the lawyer's employment. The lawyer should not have a duty to be involved in a time-consuming controversy after the lawyer has been discharged which could abrogate the lawyer's loyalty to a former client; and

(2) the lawyer's involvement in such a controversy after termination risks interference with the relationship between client and successor counsel.

- Cons: Aside from the fact that a lawyer owes a general duty as an officer of

the legal system to promote respect for and integrity of the legal process, there are a number of reasons to recommend adoption of Model Rule 3.3(c) but to delete the Model Rule's statement that the duty of candor supersedes the duty of confidentiality:

(1) a lawyer who has been discharged or has withdrawn has standing to correct the lawyer's false statement of material law or fact under paragraph (a);

(2) the lawyer would not interfere with the relationship between the former client and the client's new lawyer by advising the new lawyer of relevant facts including the existence of criminal or fraudulent conduct in the proceeding or urging that corrective action be taken;

(3) the lawyer may only take remedial measures under paragraph (a)(2), (a)(3) and (b) to the extent permitted under Bus. & Prof. Code § 6068(e) and Rule 1.6;

(4) to limit the duties, as recommended by the Commission, to the end of the proceeding *or termination of the lawyer-client relationship* would allow lawyers to circumvent paragraphs (a) and (b) by simply withdrawing from the representation; and

(5) there is no known state variation that limits Model Rule 3.3(c) as recommended by the Commission.

7. In paragraph (d), recommend adoption of the concept in Model Rule 3.3(d) but modify the provision for clarity.

- Pros: The recommendation to adopt in paragraph (e), a departure from Model Rule 3.3(d), is necessary to accommodate unique features of California ex parte proceedings. Model Rule 3.3(d) contemplates “true” ex parte proceedings where the opposing party is not given notice or an opportunity to be heard. In California, 24-hour notice is required unless exigent circumstances exist. (See Rule of Court 3.1203.⁷) In federal court, ex parte applications are submitted on paper—no appearance by counsel is required.

⁷ California Rules of Court, rule 3.1203 provides:

Rule 3.1203. Time of notice to other parties

(a) Time of notice

A party seeking an ex parte order must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance, absent a showing of exceptional circumstances that justify a shorter time for notice.

(b) Time of notice in unlawful detainer proceedings

A party seeking an ex parte order in an unlawful detainer proceeding may provide shorter notice than required under (a) provided that the notice given is reasonable.

A lawyer should not be required to advise the tribunal of “all material facts” known to the lawyer if it is anticipated that the opposing lawyer will be present.

- Cons: None identified.

8. Recommend moving the concept in rule 5-200(E) into proposed Rule 3.4

- Pros: The concept of rule 5-200(E), that a lawyer should not assert personal knowledge of the facts at issue, is more appropriately placed in Rule 3.4, as it is in Model Rule jurisdictions. Rule 3.4 addresses a lawyer’s duties with respect to the preservation and suppression of evidence.
- Cons: The placement of rule 5-200(E) in proposed Rule 3.3 is equally appropriate as the Rule addresses statements made in court. (See, e.g., proposed Rule 3.3(a)(1), (2) and (c).)

9. Recommend adoption of Comment [1] regarding the scope of the Rule

Pros: Comment [1] describes the scope of the rule’s application, i.e., that it also applies to ancillary proceedings such as depositions, a concept that might not be apparent in a rule addressing conduct before a “tribunal.” The Comment’s inclusion is thus justified. The Comment also provides a cross-reference to the definition of “tribunal” that further describes the scope of the rule’s application.

Cons: Comment [1] states the obvious.

10. Recommend adoption of Comment [2], which incorporates current rule 5-200(D)

- Pros: Comment [2] has been included to address concerns expressed to the first Commission about the deletion of the language in current rule 5-200(C) and (D). The Comment incorporates nearly verbatim the language in current rule 5-200(D). The Commission has recommended that the language of 5-200(C) be added to proposed paragraph (a)(2). See paragraph 4, above.
- Cons: None identified.

11. Recommend adoption of Comment [3] regarding the term “legal authority in the controlling jurisdiction” in paragraph (c)

- Pros: The Comment provides critical interpretative guidance for the term, which can in some instances encompass legal authority outside of the jurisdiction in which a court is physically located. The Comment is not strictly a definition but instead provides an example of how a strict interpretation of the term, i.e., to mean the politically-defined jurisdiction in which the court is located, would be inaccurate.

- Cons: A definition should be in the black letter of the rule.

12. Recommend adoption of Comment [4], regarding preventive measures a lawyer should take to avoid another from engaging in fraudulent or criminal conduct related to a tribunal proceeding

- Pros: The Comment provides a suggested course of conduct for a lawyer to preserve the integrity of the legal process. A lawyer's persuasive skills constitute a critical resource in preventing such fraudulent or criminal conduct. The Comment identifies this as a preventive measure the lawyer can take but also notes that under paragraphs (a) through (c), if the lawyer is unsuccessful in averting the conduct, the lawyer *must* refuse to offer the false evidence.

In addition, the Comment identifies the narrative approach, a procedure sanctioned in California case law that is cited, when the person who intends to testify falsely, is the lawyer's criminal defendant client.

In sum, the Comment provides interpretative guidance about the term "remedial measures."

- Cons: The "narrative approach" already exists in the case law, as does the concept that a lawyer should engage a client who intends to commit perjury in a dialog regarding the consequences of such conduct. The Comment is unnecessary.

13. Recommend adoption of Comment [5], which addresses "reasonable remedial measures" under paragraphs (a)(3) and (b)

- Pros: The Comment provides important guidance for a lawyer who seeks to perform the lawyer's duties to engage in reasonable remedial measures when a fraud has been perpetrated on the court. In particular, the Comment provides cross-references to rules and statutes that provide further guidance.
- Cons: A lawyer is expected to be familiar with the duties described in the Comment. It is not necessary.

14. Recommend adoption of Comment [6] regarding paragraph (c) and the duration of duties under the rule

- Pros: The Comment provides helpful guidance on when a proceeding is deemed to have concluded and the lawyer's duties under the rule terminated.
- Cons: The provisions in the Comment should be in the black letter.

15. Recommend adoption of Comment [7] that notes paragraph (d) does not prohibit ex parte communications not otherwise prohibited by law or the tribunal

- Pros: The Comment provides interpretative guidance regarding the general prohibition on ex parte communications with a tribunal.
- Cons: If this Comment is intended to except certain conduct from the Rule, it should be in the black letter.

16. Recommend adoption of Comment [8] regarding withdrawal from the representation

- Pros: The Comment provides important guidance that when a lawyer complies with the lawyer's duties under the rule, the lawyer does not necessarily need to withdraw. However, the Comment also notes that withdrawal may be mandatory when, as a consequence of the lawyer's compliance, the lawyer-client relationship deteriorates to the extent the lawyer can no longer competently represent the client or continued representation will result in a violation of the Rules.
- Cons: The Comment neither interprets the black letter's meaning nor provides guidance on its application and should not be included.

17. Recommend adoption of Comment [9], which cites to other authority under which lawyers may be disciplined for conduct that violates the proposed Rule

- Pros: The Comment provides cross-references to Business and Professions Code §§ 6068(d) and 6106. These are broad statutes under which lawyers are commonly charged in the discipline system for conduct that would also violate this Rule. Alerting lawyers to these statutes should help promote compliance with the Rule.
- Cons: The statutory sections exist and all lawyers are assumed to be aware of them. This Comment is superfluous.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of a specific intent standard – “seek to mislead” – in paragraph (a)(2). This would have rejected the knowledge standard that applies to Model Rule 3.3(a)(2).

- Pros: Such a proposed provision would more accurately reflect the current law in California that requires a lawyer to intend to mislead the court by failing to disclose to the tribunal legal authority in the controlling jurisdiction the lawyer knows is directly adverse. (See *Ainsworth v. State Bar of California* (1988) 46 Cal.3d 1218, 1225 [finding violation of rule 7-107 because petitioner “committed acts with *intent to mislead* . . . the court by misrepresenting the status of Jerald C.; and *sought to deceive* the court with a false statement of

law,” emphasis added]; *Schaefer v. State Bar of California* (1945) 26 Cal.2d 738, 748 [“since it does not appear that petitioner *intentionally attempted to mislead the court*, we do not believe the incident warrants the imposition of disciplinary punishment,” emphasis added].)

The requirement in Model Rule 3.3(a)(2) that the lawyer disclose “directly adverse” authority is vague and would force attorneys to do their adversary’s work for them. Lawyers would be compelled to disclose authority which is not on “all fours” and is distinguishable. “Unclear rules risk blunting an advocate’s zealous representation of a client.” (*Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1197-1198.) The intent to mislead requirement in proposed A “seek to mislead” standard would mitigate against the risk that a lawyer will be disciplined for engaging in protected conduct while acting as zealous advocates for the lawyer’s clients.

- Cons: Current California authority does not preclude the knowledge standard in a proposed paragraph (a)(2), which is required for important public policy and public protection reasons that would not be provided by the proposed provision. Some courts correctly describe that the duty to disclose adverse legal authority of the controlling jurisdiction known to the lawyer that is not disclosed by opposing court exists because the court needs to be aware of that authority in order to intelligently rule on the matter. (See *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82 fn. 9.) Requiring an “intent to mislead” standard would be more difficult to prove and would diminish the well-established purpose for the rule. (See Rest. 3d. §111(2)). On-point legal authority includes not only statutes and case law, but ordinances, regulations and administrative rulings. With the sharp increase in pro se litigants, over-crowded dockets and court calendars, the tribunal must rely on counsel to disclose direct adverse authority in the controlling jurisdiction known to the lawyer and not revealed by the other side. The few reported California cases on the subject were decided under §6068(d), which does not have a knowledge requirement. The proposed provision would overlap with paragraph (a)(1) and fails to provide adequate public protection.

2. Recommend adoption of a provision that would expressly bar plagiarism in briefs or other submissions to a court

- Pros: Plagiarism in brief or other submission to the court in effect is a false statement about the source of the document being submitted and violates a lawyer’s duty of candor to the court. Specifically prohibiting plagiarism in a rule should increase confidence in the legal profession and improve the administration of justice, as well as help promote a useful national standard.
- Cons: A specific prohibition on plagiarism is not necessary and not appropriate in a disciplinary rule. In any event, such conduct would be better addressed under proposed Rule 8.4(c) or Business and Professions Code §

6106.⁸ Moreover, there is no evidence that adopting such a provision would promote a national standard as the Commission is unaware of any jurisdiction that has expressly addressed plagiarism in its Rules.

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Incorporating a "knowledge" standard in paragraph (a) is a substantive change in the law as current rule 5-200 does not include such a standard.
2. Mandating that a lawyer take reasonable remedial measures to correct fraudulent or criminal conduct related to a proceeding of which the lawyer is aware is a substantive change to the Rules, although such a duty already exists in the lawyer's role as an officer of the legal system.

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".
 - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not

⁸ Proposed Rule 8.4 (c) provides it is professional misconduct for a lawyer to:

- (c) engage in conduct involving moral turpitude, dishonesty, fraud, deceit or reckless or intentional misrepresentation

have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

3. Except for the changes identified in Section C, above, the proposed rule provisions are non-substantive changes.

E. Alternatives Considered:

None.

XII. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Mr. Cardona, Mr. Chou, Judge Stout and Mr. Tuft submitted a written dissent. See attached for the full text of the dissent and the Commission’s response to the dissent.

XIII. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of Rule 3.3 [5-200] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 3.3 [5-200] in the form attached to this Report and Recommendation.

**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."

**Proposed Rule 3.3 [5-200(A)] Candor Toward the Tribunal
Synopsis of Public Comments**

TOTAL = 5 **A = 0**
D = 2
M = 3
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-27d	Alternate Public Defender Los Angeles County (Fukai) (01-17-17)	Y	D		We urge the Commission to reject any ethical duty which would require criminal defense attorneys to cite authority contrary to their clients' interests. We urge the Commission to write an explicit exception for criminal defense lawyers. A vague reference to "constitutional provisions" fails to give sufficiently clear direction. We urge the Commission to include in the Comment the following statement: "The obligation to disclose to the tribunal legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel does not apply to criminal defense counsel."	<p>The Commission is not aware of authority supporting the commenter's position that a criminal defense lawyer's failure of candor to a court about the applicable law is always protected by constitutional principles. In the event a constitutional issue were to arise, the last sentence in comment [4] provides that the obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions. The Commission does not recommend a provision under which a criminal defense lawyer's failure of candor to a court about the applicable law is always protected by constitutional principles and that such conduct can never be disciplined. Such a determination is for the court.</p> <p>Paragraph (a)(2) does not require a criminal defense lawyer to argue the case against his or her client. The requirement is not a rule of advocacy and is consistent</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Proposed Rule 3.3 [5-200(A)] Candor Toward the Tribunal
Synopsis of Public Comments**

TOTAL = 5 **A = 0**
D = 2
M = 3
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						with other criminal procedure rules such as <i>Anders</i> and <i>Wende</i> that prohibit appointed appellant counsel from submitting meritless appeals in criminal cases, and in the case of <i>Wende</i> , to certify that there are no meritorious issues.
Y-2016-28b	Public Defender Los Angeles County (Emling) (01-17-17)	Y	D		RRC1 noted in a Comment to the previously proposed Rule 3.3, that “whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules.” Recognition of applicable constitutional principles does not appear in the current version of the proposed Rule or the Comment. We assert that a client’s constitutional right to zealous representation is unfairly infringed upon by the proposed Rule, thus we urge the Commission to reject imposing an ethical duty requiring criminal defense attorneys to cite authority contrary to their client’s interests.	See response to Los Angeles County Alternate Public Defender, above.
Y-2016-21v	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	M		OCTC concerned with “knowingly” standard. Current rule can be violated by gross negligence, recklessness and willful blindness.	OCTC’s comment appears to disregard the application of the definition of “knowingly” in disciplinary cases. Many of the cases OCTC cites involved conduct that would satisfy the

**Proposed Rule 3.3 [5-200(A)] Candor Toward the Tribunal
Synopsis of Public Comments**

TOTAL = 5	A = 0
	D = 2
	M = 3
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>Proposed rule far more limited than current rule in that it only prohibits a false statement of fact or law.</p> <p>Proposed rules do not address an attorney who alludes at trial to evidence that is not relevant or is not admissible.</p> <p>OCTC supports Comments except for the use of “knowingly” in Comment 4.</p>	<p>definition in Rule 1.0.1 (f) (e.g., conduct constituting “willful blindness” or “recklessness”). Proof of the cognitive standard under rules requiring knowledge is typically by circumstantial evidence. See, e.g., <i>United States v. Benjamin</i>, 328 F.2d 854 (2d Cir. 1964) – “the Government can meet its burden [of proving willfulness in a criminal prosecution for aiding others in mail and securities fraud] by showing that a defendant deliberately closed his eyes to facts that he had a duty to see.” That a lawyer’s knowledge “may be inferred from the circumstances” means that evidence of facts and circumstances that enables a disciplinary authority to infer that knowledge will satisfy the cognitive element of the rule. At the same time, the definition is important to distinguish negligence conduct or conduct that is being judged in hindsight. The Commission is not aware of charging or proof problems in the many jurisdictions that have adopted this cognitive standard.</p>

**Proposed Rule 3.3 [5-200(A)] Candor Toward the Tribunal
Synopsis of Public Comments**

TOTAL = 5 **A = 0**
D = 2
M = 3
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-7p	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (01-06-17)	Y	M	(c)	Paragraph (c) should be amended to reflect the fact that an attorney who has been terminated but may still appear before the tribunal continues to be obligated to deal with the tribunal with the requisite candor.	The Commission agrees with the commenter's point regarding paragraph (c) but would not exclude paragraph (a)(3) and (b). The Commission believes that firing a lawyer or a lawyer's decision to withdraw in order to avoid having to take any steps to correct criminal or fraudulent conduct is against public policy. The Commission is not aware of any jurisdiction where that standard is the rule.
Y-2016-14	U.S. Department of Justice (Ludwig) (01-06-17)	Y	M	Cmt.	Comment should address the concept that the rule is not violated if a lawyer offers evidence for the purpose of establishing its falsity.	The Commission has added A new Comment [5] stating that: "A lawyer does not violate paragraph (a)(3) if the lawyer offers the evidence for the purpose of establishing its falsity."

PROPOSED RULE OF PROFESSIONAL CONDUCT 3.4
(Current Rules 5-310, 5-220 & 5-200(E))
Fairness to Opposing Party and Counsel

EXECUTIVE SUMMARY

The Commission evaluated current rules 5-310 (Prohibited Contact With Witnesses), 5-220 (Suppression of Evidence) and 5-200(E) (Asserting Personal Knowledge of Facts) in accordance with the Commission Charter. In addition, the Commission considered the national standard of the ABA counterpart, Model Rule 3.4 (Fairness to Opposing Party and Counsel). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed Rule 3.4 (Fairness to Opposing Party and Counsel).

Rule As Issued For 90-day Public Comment

Proposed Rule 3.4 in context within the Rules of Professional Conduct. Proposed Rule 3.4 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The general content, framework and numbering scheme of this subset of the Rules is based on Chapter 3 of the ABA Model Rules, which is entitled "Advocate". Model Rules Chapter 3 corresponds to Chapter 5 of the current California Rules, entitled "Advocacy and Representation." The following table shows the Chapter 3 Model Rules and the corresponding California Rules:

Model Rule	California Rule
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. Rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. Rule counterpart.

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules, but for many of the rules recommends retaining the language of the California Rules, which is more specific and precise, and accordingly more appropriate for a set of disciplinary rules and, with respect to Rule 3.4, to reject the adoption of language in Model Rule that is vague or ambiguous.

Recommendation that proposed Rule 3.4 be circulated for public comment. Proposed Rule 3.4 incorporates several concepts that are intended to promote fair competition in the adversary system of justice. Specifically, the rule includes prohibitions against destruction or

concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery, and so forth. The concepts in Model Rule 3.4, on whose structure proposed Rule 3.4 is based, are found in three current California Rules of Professional Conduct: rule 5-310 (Prohibited Contact With Witnesses); rule 5-220 (Suppression of Evidence); and rule 5-200 (Trial Conduct). In conformance with the Charter principle that the Commission is to start with the relevant California rule, the Commission began its study of this rule topic with those California rules. However, in acknowledgement of its decision early in the rules revision process to recommend adoption of the Model Rules' format and numbering, the Commission determined that the three concepts should be combined in a single rule numbered 3.4.

In drafting the proposed rule, the Commission largely agreed with the first Commission's approach to its proposed rule 3.4 by:

- (i) retaining rule 5-310 as paragraphs (d) and (e) largely unchanged in the structure of Model Rule 3.4, as these provisions contain specific prohibitions on lawyer conduct;
- (ii) retaining rule 5-220 as paragraph (b) as a general statement of the prohibition against suppressing evidence;
- (iii) incorporating several provisions of Model Rule 3.4 [paragraphs (a), (c) and (f)] that more precisely identify and describe evidence-suppressing conduct that the rule is intended to prevent;
- (iv) retaining rule 5-200(E) in paragraph (g); and
- (v) rejecting several provisions of Model Rule 3.4 [MR 3.4(d), (e) and (f)] as vague and overbroad, and likely to chill legitimated advocacy.

The principal reason for the foregoing approach is that a disciplinary rule should clarify with precision the kind of the conduct that can subject a lawyer to discipline rather than simply provide a generalized prohibition against suppressing evidence, (rule 5-220). There are several provisions in Model Rule 3.4 that identify with more precision than current rule 5-220 the kind of conduct a disciplinary rule intended at least in part to promote fair competition in the adversarial system of justice should prohibit. Specifically MR 3.4(a), (b) and (c) have been retained as paragraphs (a), (c) and (f). Several other Model Rule paragraphs, specifically paragraphs (d), (e) and (f), on the other hand, conflict with California law, are overbroad and likely to chill legitimate advocacy, or both.¹

Text of Rule 3.4.

Paragraph (a) is identical to Model Rule 3.4(a) and prohibits a lawyer from destroying or altering documents, or counseling or assisting another to do so.

¹ The rejected Model Rule 3.4 provisions provide that a lawyer shall not:

- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Paragraph (b) carries forward rule 5-220 to provide a general statement prohibiting the suppression of evidence.

Paragraph (c) is identical to Model Rule 3.4 and prohibits a lawyer from falsifying evidence or assisting a witness to testify falsely.

Paragraph (d) carries forward rule 5-310(B) nearly verbatim, the only change being to substitute “lawyer” for “member”.

Paragraph (e) carries forward rule 5-310(A) verbatim.

Paragraph (f) is identical to Model Rule 3.4(c) and prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal but clarifies that a lawyer may openly refuse to obey based on an assertion that no valid obligation exists.

Paragraph (g) carries forward the language of rule 5-200(E), but adds a provision from Model Rule 3.4(e) that prohibits a lawyer from stating an opinion about the guilt or innocence of an accused.

There are two comments to proposed Rule 3.4, both of which explain how the rule should be applied. Comment [1] clarifies that a lawyer may take temporary possession of evidence for examination but may not alter or destroy it, and provides cross-references to California statutes and case law that impose further obligations on the handling of evidence.

Comment [1] also provides specific references to statutes and case law that impose legal obligations on lawyers and clients to preserve evidence. Comment [2] clarifies an important limitation on the rule’s application, i.e., that a violation of a civil or criminal discovery rule does not by itself constitute a violation of the rule.

Non-substantive aspects of the proposed rule include rule numbering to track the Commission’s general proposal to use the Model Rules’ numbering system and the substitution of the term “lawyer” for “member.”

National Background – Adoption of Model Rule 3.4

Every jurisdiction except California has adopted some version of Model Rule 3.4. Thirty-three jurisdictions have adopted Model Rule 3.4 verbatim.² Ten jurisdictions have adopted a slightly modified version of Model Rule 3.4.³ Seven jurisdictions have adopted a version of the rule that substantially diverges from Model Rule 3.4.⁴

² The thirty-three jurisdictions are: Alabama, Arizona, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

³ The ten jurisdictions are: Alaska, Arkansas, Colorado, Hawaii, Kentucky, Michigan, North Carolina, Pennsylvania, Tennessee, and Virginia.

⁴ The seven jurisdictions are: Florida, Georgia, New York, Ohio, Oregon, Texas, and Washington.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 3.4 [5-310, 5-220, and 5-200]

Commission Drafting Team Information

Rule 5-310

Lead Drafter: Mark Tuft

Co-Drafters: Danny Chou, Raul Martinez

Rule 5-220

Lead Drafter: Joan Croker

Co-Drafters: George Cardona, Nanci Clinch

I. INTRODUCTION

Proposed Rule 3.4 incorporates several concepts that are intended to promote fair competition in the adversary system of justice, that is, the rule includes prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and so forth. The concepts in Model Rule 3.4, on whose structure proposed Rule 3.4 is based, are found in three current California Rules of Professional Conduct: rule 5-310 (Prohibited Contact With Witnesses); rule 5-220 (Suppression of Evidence); and rule 5-200 (Trial Conduct). In conformance with the Charter principle that the Commission is to start with the relevant California rule, two different drafting teams were assigned the three California rules, one team assigned 5-310 and the other assigned rules 5-200 and 5-220. Acknowledging this Commission's decision early in the rules revision process to recommend adoption of the Model Rules' format and numbering, both drafting teams determined that the three concepts should be combined in a single rule numbered 3.4.

In drafting the proposed rule, the Commission took the following approach to its proposed Rule 3.4 by:

- (i) retaining rules 5-310 [paragraphs (d) and (e)] and 5-220 [paragraph (b)] largely unchanged into the structure of Model Rule 3.4,
- (ii) incorporating several provisions of Model Rule 3.4 [paragraphs (a), (c) and (f)] that more precisely identify and describe conduct prohibited under the rule;
- (iii) retaining rule 5-200(E) as paragraph (g); and
- (iv) rejecting several provisions of Model Rule 3.4 [paragraphs (d), (e), and (f)] as vague and overbroad, and likely to chill legitimated advocacy.

II. CURRENT CALIFORNIA RULES

Rule 5-310 Prohibited Contact With Witnesses

A member shall not:

- (A) Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.
- (B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a member may advance, guarantee, or acquiesce in the payment of:
 - (1) Expenses reasonably incurred by a witness in attending or testifying.
 - (2) Reasonable compensation to a witness for loss of time in attending or testifying.
 - (3) A reasonable fee for the professional services of an expert witness.

Rule 5-220 Suppression of Evidence

A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.

Rule 5-200(E) Trial Conduct

In presenting a matter to a tribunal, a member:

* * * * *

- (E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

III. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 3.4 [5-310][5-320][5-220]

Vote: 14 (yes) – 1 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 3.4 [5-310][5-320][5-220]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

IV. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 3.4 [5-200(E), 5-220, 5,310] Fairness to Opposing Party and Counsel

A lawyer shall not:

- (a) 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. A lawyer shall not counsel or assist another person* to do any such act;
- (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;
- (c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (d) directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:
 - (1) expenses reasonably* incurred by a witness in attending or testifying;
 - (2) reasonable* compensation to a witness for loss of time in attending or testifying; or
 - (3) a reasonable* fee for the professional services of an expert witness;
- (e) advise or directly or indirectly cause a person* to secrete himself or herself or to leave the jurisdiction of a tribunal* for the purpose of making that person* unavailable as a witness therein;
- (f) knowingly* disobey an obligation under the rules of a tribunal* except for an open refusal based on an assertion that no valid obligation exists; or
- (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.

Comment

[1] Paragraph (a) applies to evidentiary material generally, including computerized information. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. See, e.g., Penal Code § 135; 18 United States Code §§ 1501-1520. Falsifying evidence is also generally a criminal offense. See, e.g., Penal Code § 132; 18 United States Code § 1519. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not

alter or destroy material characteristics of the evidence. Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities, depending on the circumstances. See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].

[2] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule.

V. COMMISSION'S PROPOSED RULE
(REDLINE TO CURRENT CALIFORNIA RULES 5-310, 5-220, AND 5-200)

~~Rule 5-310 Prohibited Contact With Witnesses~~ Rule 3.4 Fairness to Opposing Party and Counsel

A ~~member~~lawyer shall not:

- (a) 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. A lawyer shall not counsel or assist another person* to do any such act;

~~Rule 5-220 Suppression of Evidence~~

- (b) ~~A member shall not~~suppress any evidence that the ~~member's~~memberlawyer or the ~~member's~~lawyer's client has a legal obligation to reveal or to produce~~;~~;
- ~~(A) Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.~~
- (c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (Bd) ~~Directly~~directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the ~~witness's~~witness's testimony or the outcome of the case. Except where prohibited by law, a ~~member~~lawyer may advance, guarantee, or acquiesce in the payment of:
- (1) ~~Expenses~~expenses reasonably* incurred by a witness in attending or testifying~~;~~;
 - (2) ~~Reasonable~~reasonable* compensation to a witness for loss of time in attending or testifying~~;~~; or
 - (3) ~~A~~a reasonable* fee for the professional services of an expert witness~~;~~;

- (e) advise or directly or indirectly cause a person* to secrete himself or herself or to leave the jurisdiction of a tribunal* for the purpose of making that person* unavailable as a witness therein;
- (f) knowingly* disobey an obligation under the rules of a tribunal* except for an open refusal based on an assertion that no valid obligation exists; or

Rule 5-200 Trial Conduct

- (Eg) ~~Shall not~~in trial, assert personal knowledge of ~~the~~ facts ~~at~~in issue, except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused.

Comment

[1] Paragraph (a) applies to evidentiary material generally, including computerized information. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. See, e.g., Penal Code § 135; 18 United States Code §§ 1501-1520. Falsifying evidence is also generally a criminal offense. See, e.g., Penal Code § 132; 18 United States Code § 1519. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities, depending on the circumstances. See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].

[2] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule.

VI. RULE HISTORY

A. Rules 5-310 and 5-220

The concept of current rule 5-310 was included in the original 1928 Rules as former rule 15, operative on July 24, 1928. Rule 15 provided: “A member of The State Bar shall not advise a person, whose testimony could establish or tend to establish a material fact, to avoid service of process, or secrete himself or otherwise to make his testimony unavailable.” There was no counterpart to current rule 5-220 in the 1928 rules.

In 1975, former rule 15 was revised to incorporate the substance of ABA Model Code of Professional Responsibility, DR 7-109. It was renumbered California rule 7-107 and titled “Contact with Witnesses.” Paragraph (A) of this rule introduced a prohibition against suppression of evidence. Rule 7-107 provided:

Rule 7-107 Contact with Witnesses

A member of the State Bar shall not:

- (A) Suppress any evidence that he or his client has a legal obligation to reveal or produce.
- (B) Advise or directly or indirectly cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.
- (C) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of his case. Except where prohibited by law, a member of the State Bar may advance, guarantee or acquiesce in the payment of:
 - (1) Expenses reasonably incurred by a witness in attending or testifying.
 - (2) Reasonable compensation to a witness for his loss of time in attending or testifying.
 - (3) A reasonable fee for the professional services of an expert witness.

Former rule 7-107 was amended in 1989 as part of a comprehensive revision of the Rules of Professional Conduct. Paragraph (A) of former rule 7-107 was deleted and moved in to a new, standalone rule 5-220 “Suppression of Evidence” which provided:

Rule 5-220 Suppression of Evidence

A member shall not suppress any evidence that the member or the member’s client has a legal obligation to reveal or to produce.

There were no substantive changes to paragraphs (B) and (C), however, the rule was renumbered as rule 5-310, retitled “Prohibited Contact with Witnesses,” and the paragraphs were designated as paragraph (A) and (B). Rule 5-310 provided:

Rule 5-310 Prohibited Contact With Witnesses

A member shall not:

- (A) Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.
- (B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness’s testimony or the outcome of the case. Except where prohibited by law, a member may advance, guarantee, or acquiesce in the payment of:

- (1) Expenses reasonably incurred by a witness in attending or testifying.
- (2) Reasonable compensation to a witness for loss of time in attending or testifying.
- (3) A reasonable fee for the professional services of an expert witness.

Rule 5-310 has not been amended since 1989.

B. Rule 5-200

Current rule 5-200 originated in 1928 as former rule 17, operative on July 24, 1928. (See, *The State Bar Journal* (July 1928) Vol. III, No.1, p. 17.) Rule 17 originally provided:

“A member of the State Bar shall not intentionally misquote to a judge, judicial officer or jury the testimony of a witness, the argument of opposing counsel or the contents of a document; nor shall he intentionally misquote to a judge or judicial officer the language of a book, statute or decision; nor shall he, with knowledge of its invalidity and without disclosing such knowledge, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional.”

In 1975, a new rule 7-105, “Trial Conduct,” replaced former rule 17. Rule 7-105 provided:

Rule 7-105 Trial Conduct

In presenting a matter to a tribunal, a member of the State Bar shall:

- (1) Employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and shall not seek to mislead the judge, judicial officer or jury by an artifice or false statement of fact or law. A member of the State Bar shall not intentionally misquote to a judge or judicial officer the language of a book, statute or decision; nor shall he, with knowledge of its invalidity and without disclosing such knowledge, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional. A member of the State Bar shall refrain from asserting his personal knowledge of the facts at issue, except when testifying as a witness.
- (2) Disclose, unless privileged or irrelevant, the identities of the clients he represents.

The first sentence of former Rule 7-105 incorporated nearly verbatim the language of Bus. & Prof. Code § 6068(d). Other concepts included a new prohibition against a lawyer asserting personal knowledge of the facts at issue except when testifying as a witness.

Former Rule 7-105 was amended in 1989. The amendments included renumbering the rule 5-200. Rule 5-200 provided:

Rule 5-200 Trial Conduct

In presenting a matter to a tribunal, a member:

- (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;
- (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;
- (C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;
- (D) Shall not, knowing of its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and
- (E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

Rule 5-200 continued the restrictions on lawyer conduct when presenting a matter to a tribunal found in former rule 7-105 and divided the rule into paragraphs to make it easier to follow.

Paragraph (A) continued the requirement that an attorney employ only such means as are consistent with truth.

Paragraph (B) continued the prohibition on using an artifice or false statement of law or fact to mislead, but suggests amending the party to be mislead from “judge or judicial officer” to “tribunal”. This is intended to make clear that the attorney’s duty of candor is equally applicable when the member is appearing before an administrative tribunal.

Paragraph (C) continued the prohibition on intentionally misquoting authorities and proposes that “judge or judicial officer” be changed to “tribunal” for the reasons outlined above.

Paragraph (D) continued the prohibition on knowingly citing as authority a case, or statute that has been overruled, repealed, or declared unconstitutional.

Paragraph (E) continued the prohibition on asserting personal knowledge of the facts at issue.

Paragraph (2) of the former rule 7-105 which required an attorney to disclose, unless privileged or irrelevant, the identity of the client was deleted as unnecessary.

Rule 5-200 has not been amended since 1989.

VII. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports subsections (a) through (e), and (g).

Commission Response: No response required.

2. OCTC has concerns about subsection (f)'s requirement that the attorney "knowingly" disobey an obligation under the rule of a tribunal for the same reasons expressed regarding that term in proposed Rule 1.9, 3.3, and the General Comments section of this letter. Moreover, this rule encourages attorneys not to know the rules of a tribunal. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].) An attorney is required to know or at least search for the rules of a tribunal. Mere negligence is not a basis for discipline, but recklessness, gross negligence, or repeated conduct can be. (See current rule 3-110; *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 113.)

Commission Response: The Commission disagrees. The definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the "knowingly" standard is appropriately used in this Rule, which addresses a lawyer's statements and the submission or presentation of evidence to a court.

3. Also, it is unclear whether "an obligation under the rules of a tribunal" in subsection (f) includes local court rules, a judge's individualized preferences, or some other matters. Without additional clarification or definition, the intended meaning of this rule will be a major source of debate, confusion, and litigation. This lack of clarity will make it difficult to enforce.

Commission Response: The Commission does not understand what is meant by a "judge's preference." An "obligation" or "duty" would typically arise from a statute, rule or a court order, including a local court order.

4. OCTC requests clarification from the Commission whether this rule is violated when a lawyer advises a person, who is not a client, that he or she need not voluntarily speak with opposing counsel/party in the matter.

Commission Response: The Commission believes that the conduct about which the commenter inquires is subsumed in paragraph (e).

5. OCTC supports the Comments.

Commission Response: No response required.

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

VIII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, nine public comments were received. Three comments agreed with the proposed Rule, three comments disagreed, and three comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

IX. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law – Rule 5-310

1. Discipline for Advising Witness to Make Themselves Unavailable as a Witness

In *Snyder v. State Bar* (1976) 18 Cal.3d 286, 291 the Supreme Court of California disbarred attorney Snyder, concluding among other things, that his “advising his clients on two occasions to make their testimony unavailable as deposition witnesses, despite court orders, constituted willful violations of [former] rule 15, Rules of Professional Conduct.” *Id.*

In *Waterman v. State Bar* (1936) 8 Cal.2d 17, the Supreme Court of California suspended attorney Herbert Waterman for six months for, among other things, violating former rule 15 by advising his client and two other witnesses not to appear to testify as part of a local bar association investigation for unprofessional conduct by Waterman. *Id.* at 19-20.

2. Penal Code § 136.1 - Intimidation of Witnesses

In addition to a lawyer being subject to discipline for improper contacts with witnesses, the intimidation of witnesses is punishable as a crime. Threats and intimidation of witnesses, such as preventing or dissuading a witness from testifying at either a civil or criminal trial, is a misdemeanor. Penal Code § 136.1 provides, in part:

(a) Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

(1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

(2) Knowingly and maliciously attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

(3) For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice.

(b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

(1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge.

(2) Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof.

(3) Arresting or causing or seeking the arrest of any person in connection with that victimization.

In *In re Lee* (1988) 47 Cal.3d 471, attorney Lee was found to have engaged in moral turpitude and was disbarred for soliciting the intimidation of a witness by force or threat when he sought the murder of a potential witness against him in violation of California Penal Code § 653f.¹

3. Prosecutorial Misconduct

In a criminal proceeding, witness intimidation by a prosecutor may be grounds for a finding of prosecutorial misconduct. See: *People v. Hill* (1998) 17 Cal.4th 800; and *Earp v. Ornoski* (9th Cir. 2005) 431 F.3d 1158. See also; 1 CA Criminal Practice: Motions, Jury Instructions and Sentencing § 12:8.

¹ California Penal Code section 653f, subdivision (a):

Every person who, with the intent that the crime be committed, solicits another to offer, accept, or join in the offer or acceptance of a bribe, or to commit or join in the commission of carjacking, robbery, burglary, grand theft, receiving stolen property, extortion, perjury, subornation of perjury, forgery, kidnapping, arson or assault with a deadly weapon or instrument or by means of force likely to produce great bodily injury, or, by the use of force or a threat of force, to prevent or dissuade any person who is or may become a witness from attending upon, or testifying at, any trial, proceeding, or inquiry authorized by law, shall be punished by imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of Section 1170, or by a fine of not more than ten thousand dollars (\$10,000), or the amount which could have been assessed for commission of the offense itself, whichever is greater, or by both the fine and imprisonment.

B. Related California Law – Rule 5-220

With respect to criminal cases, there is a significant difference between a client telling his or her lawyer in confidence of a completed crime and the lawyer taking possession of, and concealing the fruits, or instrumentalities, of that crime. While rule 5-220 states it is the duty of an attorney not to suppress evidence, the issue of an attorney's duty to turn over to the police or prosecution evidence of a crime has been addressed in California case law.

In *People v. Meredith* (1981) 29 Cal.3d 682, the prosecution had called as its witness a defense investigator who testified that he had seen the victim's partially burnt wallet in a burn barrel behind the defendant's residence. Defendant had told his counsel of the location of the wallet and counsel had instructed the investigator to retrieve the wallet. Counsel examined the wallet and then turned it over to the police. It was conceded that the wallet itself was properly admitted into evidence and that the attorney-client privilege protected conversations between defendant, his counsel and the counsel's investigator. The California Supreme Court held that the defense investigator's observation of the location of the wallet, which was the product of a privileged communication between defendant and his counsel, was not protected. Because the defendant had altered the location of the evidence which precluded the prosecution from making the same observation, the investigator's testimony was deemed admissible. (*Id.* 29 Cal.3d at 695.)

In *People v. Lee* (1970) 3 Cal.App.3d 514, a deputy public defender who had been assigned to represent the defendant received a pair of defendant's shoes from defendant's wife. Before the preliminary hearing the public defender was relieved as counsel and a private attorney was appointed to represent the defendant. In order to avoid a charge of suppressing evidence, and to prevent seizure of the evidence by the district attorney without a prior determination of a possible claim of privilege with respect to the evidence, the deputy public defender delivered the shoes to a municipal court judge. The district attorney obtained a search warrant from a second judge and obtained the shoes from the municipal court judge. The appellate court opinion held neither the public defender nor the defendant's substituted counsel had the right to withhold from the prosecution the shoes which had bloodstains that were subsequently determined to be of the same blood type as the victim. The appellate court stated:

A defendant in a criminal case may not permanently sequester physical evidence such as a weapon or other article used in the perpetration of a crime by delivering it to his attorney . . . Such evidence given the attorney during legal consultation for information purposes and used by the attorney in preparing the defense of his client's case, whether or not the case ever goes to trial, could clearly be withheld for a reasonable period of time. It follows that the attorney, after a reasonable period, should, as an officer of the court, on his own motion turn the same over to the prosecution . . . the fact that the client delivered such evidence to his attorney may be privileged, the physical object itself does not become privileged merely by reason of its transmission to the attorney.

Id. 3 Cal.App.3d at 526.

In *People v. Superior Court (Fairbank)* (1987) 192 Cal.App.3d 32, the defense counsel came into possession of physical evidence related to charges against the client, and the issue was whether that evidence must be turned over to the police and/or prosecution. This appellate court, citing the *Meredith* and *Lee* decisions, above, held that the obligation to provide the prosecution with access to physical evidence and information about its alteration is absolute. This court concluded by saying:

Meredith means what it says. The defense decision to remove or alter evidence is a tactical choice. If counsel or an agent of counsel choose to remove, possess, or alter physical evidence pertaining to the crime, counsel must immediately inform the court of the action. The court, exercising care to shield privileged communications and defense strategies from prosecution view, must then take appropriate action to ensure that the prosecution has timely access to physical evidence possessed by the defense and timely information about alteration of any evidence.

Id. 192 Cal.App.3d at 39-40.

C. Related California Law – Rule 5-200(E)

See Section VI on the history of the current rule. In addition, the Commission rule 5-210 (Member as Witness) (see proposed rule 3.7).

D. ABA Model Rule Adoptions

All jurisdictions have adopted some version of ABA Model Rule 3.4. The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 3.4: Fairness to Opposing Party and Counsel,” revised September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_4.authcheckdam.pdf [Last visited 2/6/16]
- Thirty-three jurisdictions have adopted Model Rule 3.4 verbatim.² Ten jurisdictions have adopted a slightly modified version of Model Rule 3.4.³ Eight jurisdictions have adopted a version of the rule that substantially diverges from Model Rule 3.4.⁴

² The thirty-three jurisdictions are: Alabama, Arizona, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

³ The ten jurisdictions are: Alaska, Arkansas, Colorado, Hawaii, Kentucky, Michigan, North Carolina, Pennsylvania, Tennessee, and Virginia.

⁴ The eight jurisdictions are: California, Florida, Georgia, New York, Ohio, Oregon, Texas, and Washington.

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

A. Concepts Accepted (Pros and Cons):

1. Recommend that the proposed rule carry forward the substance of current rules 5-310 (Contact with Witnesses), 5-220 (Suppression of Evidence) and 5-200(E) (Trial Conduct), but include provisions from Model Rule 3.4 that identify with specificity conduct that the rule is intended to prevent.

- Pros: There is no evidence that current rules 5-310, 5-220 or 5-200(E) have been ineffective in promoting fair competition within the adversarial system of justice. Nevertheless, a *disciplinary* rule should clarify with precision the kind of the conduct that can subject a lawyer to discipline rather than a generalized prohibition against suppressing evidence, (rule 5-220).

In that regard, there are several provisions in Model Rule 3.4 that identify with more precision than current rule 5-220 the kind of conduct a disciplinary rule intended at least in part to promote fair competition in the adversarial system of justice should prohibit, i.e., Model Rule 3.4(a), (b) and (c), which have been incorporated into the proposed Rule as paragraphs (a), (c) and (f):

(i) Model Rule 3.4(a) prohibits among other things a lawyer from destroying or altering documents, or counseling or assisting another to do so.

(ii) Model Rule 3.4(b) prohibits a lawyer from falsifying evidence or assisting a witness to testify falsely.

(iii) Model Rule 3.4(c) prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal but clarifies that a lawyer may openly refuse to obey based on an assertion that no valid obligation exists.

- Cons: There is no evidence that current rules 5-310, 5-220 and 5-200(E) have been ineffective in preventing the kind of conduct that inhibits fair competition in the adversarial system or that they need to be embellished by addition of the Model Rule provisions.

2. Recommend adoption of two clarifying Comments:

(i) Comment [1] clarifies that a lawyer may take temporary possession of evidence for examination but may not alter or destroy it, and provides cross-references to California statutes and case law that impose further obligations on the handling of evidence.

Comment [1] also provides specific references to statutes and case law that impose legal obligations on lawyers and clients to preserve evidence.

(ii) Comment [2] clarifies an important limitation on the rule's application, i.e., that a violation of a civil or criminal discovery rule does not by itself constitute a violation of the rule.

- Pros: Both Comments clarify how the rule is applied. Further, by providing cross-references to statutes and case law that impose legal obligations on lawyers and clients to preserve evidence, Comment [1] explains the term “legal obligation” in paragraph (b).
- Cons: Both Comments are unnecessary. Comment [1] simply provides cross-references to law with which a lawyer should already be familiar. Comment [2] states the obvious proposition that a violation of a rule or statute does not by itself warrant discipline.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of Model Rule 3.4(d), (e) and (f).⁵

- Pros: A disciplinary rule should identify with specificity the kinds of conduct it is intended to prohibit and the violation of which can subject a lawyer to discipline. The aforementioned model rule provisions do that.
- Cons: None of the provisions should be adopted:
 - (i) Model Rule 3.4(d) conflicts with California legislative policy, which provides for: (1) a comprehensive system of discovery remedies (e.g., C.C.P., § 2019 – 2036.050); (2) Court supervision of discovery misconduct and abuse through a variety of means, including sanctions and contempt (e.g., C.C.P., § 1992, 2019.030, 2020.240, 2023.010, 2023.020); and (3) no reporting of attorney sanctions for discovery matters (Bus. & Prof. Code §6068(o)(3)).

This public policy is sound because: (1) the tribunal before which a matter is

⁵ Model Rule 3.4(d) – (f) provide that a lawyer shall not:

- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

pending is better equipped to control discovery delay or frivolous requests; (2) discovery misconduct is not necessarily indicative of unfitness to practice law; and (3) more serious discovery abuses can subject a lawyer to discipline through other standards (e.g., Bus. & Prof. C., §6103 – failure to comply with court order; §6068(b) – failure to maintain respect for the courts; or other parts of the proposed rule.)

(ii) Model Rule 3.4(e) is overbroad, ambiguous and is likely to chill legitimate advocacy. Abuses can best be controlled by the trial judge through proper objections by the opponent.

(iii) As noted in public comment received by the first Commission, Model Rule 3.4(f), except to the extent it incorporates the concept in rule 5-200(E), is ambiguous, overly broad and duplicative, and is arguably in conflict with paragraph (a).

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. The Commission believes that there are no substantive changes in proposed Rule 3.4. First, the Commission has not made any substantive changes to current rules 5-200, 5-310 and 5-200(E), carrying them forward largely intact as paragraphs (b), (d), (e), and (f). To the extent the rule incorporates provisions from Model Rule 3.4, they do not add duties but rather elaborate responsibilities that already exist under the current rule provisions, as is appropriate in a disciplinary rule. (See Section X.A.1, above.)

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term “lawyer” for “member”.
 - Pros: The current Rules' use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.

2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. As noted in Section X.C, above, none of the other proposed revisions are intended as substantive changes to current rule 5-310.

E. Alternatives Considered:

See Section X.A, above. The main alternative considered was whether to retain the existing California structure of separate rules or move to the national standard of a combined rule.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 3.4 in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 3.4 in the form attached to this Report and Recommendation

**Proposed Rule 3.4 [5-200(E), 5-220, 5-310] Fairness to Opposing Party
and Counsel**
Synopsis of Public Comments

TOTAL = 9 **A = 3**
 D = 3
 M = 3
 NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-23	Baruh, Jeffrey A. (8-1-16)	N	A		Expresses concern with the lack of enforcement of Santa Clara's Code of Professionalism. Believes the State Bar and judges should enforce the rules so that they are taken seriously and complied with by lawyers.	Enforcement practices and policies are beyond the scope of the Commission's project to revise the rules. It should be noted, however, that pursuant to its Charter, the Commission is proposing new and amended rules that continue the function of the rules as disciplinary standards. The Commission has further made a deliberate effort to address ambiguities in rule language and to reconcile rules with developments in professional responsibility that have occurred since the rules were last revised. The Commission believes this approach will contribute to the effective enforcement of the rules by the State Bar.
X-2016-43bg	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (9-8-16)	Y	A	3.4	Supports adoption of proposed Rule 3.4.	No response required.
X-2016-66p	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	A	3.4	Supports adoption of proposed Rule 3.4.	No response required.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Proposed Rule 3.4 [5-200(E), 5-220, 5-310] Fairness to Opposing Party
and Counsel
Synopsis of Public Comments**

TOTAL = 9 **A = 3**
D = 3
M = 3
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-83f	Garrett, Christopher (9-26-16)	N	D	3.4	Rule unnecessarily burdens one's public petition or speech rights.	The commenter's concern is not directed to the substance of proposed rule 3.4 (or rules 3.3 and 3.5), but rather to the definition of "tribunal" as proposed in Rule 1.0.1(m), which the commenter suggests would import rules 3.3 to 3.5 into proceedings before local governmental bodies. As such, no response concerning Rule 3.4 is necessary. Please see Commission's response to the commenter concerning Rule 1.0.1. In addition, the Commission has made some changes to Rule 3.5 that it believes removes some of the concerns the commenter has expressed with respect to this rule. See revised paragraph (a) of Rule 3.5 which adds the terms "statute" and "judicial officer" to both broaden and narrow that provision's application, respectively. See also revised paragraph (c) of Rule 3.5, which now includes in the definition of "judge" and "judicial officer" the following: "(iv) members of an administrative body acting in an adjudicative capacity;"

**Proposed Rule 3.4 [5-200(E), 5-220, 5-310] Fairness to Opposing Party
and Counsel**
Synopsis of Public Comments

TOTAL = 9 **A = 3**
 D = 3
 M = 3
 NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-93i	Los Angeles County Public Defender (Brown) (9-23-16)	Y	M	(e)	Rule lack the necessary mens rea requirement and paragraph (e) should include the term "intentionally."	The Commission has not made the suggested change. The Commission does not understand how a lawyer might "unintentionally" engage in the conduct prohibited by paragraph (e), i.e., "advise or directly or indirectly cause a person* to secrete himself or herself or to leave the jurisdiction of a tribunal* for the purpose of making that person* unavailable as a witness therein."
X-2016-97c	Freedman, Daniel (9-27-16)	N	D	3.4	Rule would put land use attorney profession in jeopardy by chilling speech, restricting the attorney's ability to be zealous for the client, and opening attorney to discipline as retribution.	See the Commission's response above to Christopher Garrett (X-2016-83f). (9-26-16).
X-2016-104aI	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M	(f)	1. "Knowing" standard is contrary to established standards of conduct; contrary to the State Bar Act, the current rules and case law interpreting those authorities; misleading to attorneys as to their professional obligations and; creates confusion in disciplinary law making enforcement more difficult. An attorney is required to know or at least search for the rules of a tribunal.	1. The Commission disagrees. The definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the "knowingly" standard is appropriately used in this Rule, which addresses a lawyer's statements and the submission or presentation of evidence to a court.

**Proposed Rule 3.4 [5-200(E), 5-220, 5-310] Fairness to Opposing Party
and Counsel**
Synopsis of Public Comments

TOTAL = 9 **A = 3**
D = 3
M = 3
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>2. It's unclear if the "obligation" is provided by established rules or a judge's preference.</p> <p>3. Requests clarification if rule applies to when attorney advises a nonclient to not speak with opponent in matter.</p>	<p>2. The Commission does not understand what is meant by a "judge's preference." An "obligation" or "duty" would typically arise from a statute, rule or a court order, including a local court order.</p> <p>3. The Commission believes that the conduct about which the commenter inquires is subsumed in paragraph (e).</p>
X-2016-126c	Ivester, David (9-27-16)	N	D	3.4	Proposed Rule 1.0.1's broad definition of the word "tribunal" will limit and interfere with administrative law practitioners' ability to advocate for clients in administrative proceedings.	See the Commission's response above to Christopher Garrett (X-2016-83f). (9-26-16).
X-2016-129c	California Building Industry Association (CBIA) (Cammarota) (9-27-16)	Y	M	1.0.1, 3.4	Proposes amended definition of "tribunal" under proposed rule 1.0.1 such that attorney communications are not "chilled" by proposed rule 3.4.	See the Commission's response above to Christopher Garrett (X-2016-83f). (9-26-16)

PROPOSED RULE OF PROFESSIONAL CONDUCT 3.5
(Current Rules 5-300 and 5-320)
Contact With Judges, Officials, Employees and Jurors

EXECUTIVE SUMMARY

The Commission evaluated current rules 5-300 (Contact With Officials) and 5-320 (Contact With Jurors) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 3.5 (Impartiality and Decorum of the Tribunal). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed Rule 3.5 (Contact With Judges, Officials, Employees and Jurors).

Rule As Issued For 90-day Public Comment

Proposed Rule 3.5 in context within the Rules of Professional Conduct. Proposed rule 3.5 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The general content, framework and numbering scheme of this subset of the Rules is based on Chapter 3 of the ABA Model Rules, which is entitled "Advocate". Model Rules Chapter 3 corresponds to Chapter 5 of the current California Rules, entitled "Advocacy and Representation." The following table shows the Chapter 3 Model Rules and the corresponding California Rules:

Model Rule	California Rule
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. Rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. Rule counterpart.

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules, but for many of the rules recommends retaining the language of the California Rules, which is more specific and precise, and accordingly more appropriate for a set of disciplinary rules.

Recommendation that proposed Rule 3.5 be circulated for public comment. Proposed Rule 3.5 addresses two topics, (i) contact with judicial officials and (ii) contact with jurors, topics that are addressed in two separate rules in the current California Rules of Professional Conduct, rules 5-300 (judicial officers) and 5-320 (jurors). The ABA Model Rules address those two topics in a single rule, Model Rule 3.5.

In conformance with the Charter principle that the Commission is to start with the relevant California rule, the two California rules were separately assigned. However, acknowledging the Commission's decision early in the rules revision process to recommend adoption of the Model Rules' format and numbering, the Commission determined that the two topics could be combined in a single rule numbered 3.5. Further, the Commission also determined that the substance of the two current California rules, which are more detailed and identify more precisely the kinds of conduct prohibited under the rules, were more appropriate as disciplinary standards. Accordingly, although numbered 3.5, proposed rule 3.5 largely carries forward, without substantive change, the language of current California rules 3-500 and 3-520:

- (i) paragraphs (a) through (c) carry forward the content of current rule 5-300; and
- (ii) paragraphs (d) through (l) carry forward the content of current rule 5-320.

There are two principal reasons for this recommendation. First, carrying forward the specificity of current California rules 5-300 and 5-320 should avoid challenges of overbreadth and vagueness and better serve the purpose of the proposed Rules to protect the integrity of the legal system and promote the administration of justice by specifying the conduct that is prohibited. Second, defining what conduct is or is not acceptable better aids judicial personnel, lawyers and jurors from engaging in conduct that might be well meaning, but reflects adversely upon the fairness of the judicial process.

The **title of the rule** was also revised by in part combining the titles of current rules 5-300 and 5-320, and adding references to "judges" and "employees," to more accurately describe the content of the rule, which, as a disciplinary rule, regulates the extent to which lawyers may engage in communicating with judges and jurors.

Text of Rule 3.5.

Paragraph (a) carries forward current rule 5-300(A), but the first sentence has been revised to recognize the various codes or standards of conduct or ethics that regulate the conduct of court personnel and point lawyers to the different sources of law besides the proposed rule that regulate their conduct in giving gifts to judges or court personnel. The second sentence remains unchanged.

Paragraph (b) carries forward rule 5-300(B), amended to recognize exceptions to its application. It specifies circumstances when ex parte communications with judges, judicial officers and personnel, and jurors are prohibited. It is preferable to the Model Rule, which simply provides for a blanket prohibition "unless authorized to do so by law or court order."

Paragraph (c) revises the definition of "judge" and "judicial officer" in rule 5-300(C) to include administrative law judges, neutral arbitrators, and State Bar Court judges. The change clarifies the rule's application to those additional neutral decision-makers.

Paragraphs (d) through (f) and (h) through (l) carry forward the current rule 5-320(A) through (C) and (E) through (I), with only minor changes to conform to this Commission's style and formatting (e.g., "lawyer" for "member"). As noted, these provisions provide more specificity regarding prohibited conduct in relation to jurors, which should enhance compliance and facilitate enforcement. Paragraph (k) recognizes that a lawyer can address a juror as part of the proceedings and paragraph (l) defines "juror" to mean "any empaneled, discharged, or excused juror."

Paragraph (g) supplements current rule 5-320(D) with the specific prohibitions set forth in MR

3.5(c). The Commission determined that Model Rule 3.5(c) is an exception to the Model Rules' approach in that it identifies in detail the conduct that is prohibited. That detailed description is appropriately included in a disciplinary rule.

There are three comments to the proposed rule, each of which provides interpretative guidance or clarifies how the proposed rule, which is intended to govern a broad array of situations, should be applied. Comment [1] provides examples of codes or standards of conduct referred to in paragraph (a). It clarifies what is intended by the clause "applicable code of judicial ethics, code of judicial conduct, or standards governing" court employees in paragraph (a) by providing examples of such codes or standards. Comment [2] refers to CCP § 206, which provides specific guidance on what communications with jurors are permitted. Comment [3] clarifies when a lawyer may communicate with a discharged juror. It provides an important clarification that even after a particular juror is discharged, a lawyer may not communicate with the juror until the entire jury is discharged.

In addition to the recommended provisions, the Commission declined to recommend Model Rule 3.4(d), which prohibits a lawyer from engaging "in conduct intended to disrupt a tribunal." The Commission determined it is unnecessary in light of the Commission's recommended adoption of Model Rule 8.4(d) as proposed Rule 8.4(d) (providing it is misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice")

Non-substantive aspects of the proposed rule include rule numbering to track the Commission's general proposal to use the Model Rules' numbering system and the substitution of the term "lawyer" for "member."

National Background – Adoption of Model Rule 3.5

Every jurisdiction except California has adopted some version of Model Rule 3.5. Fifteen jurisdictions have adopted Model Rule 3.5 verbatim.¹ Twenty-one jurisdictions have adopted a slightly modified version of Model Rule 3.5.² Fourteen jurisdictions have adopted a version of the rule that diverges substantially from Model Rule 3.5.³

Post Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made several amendments to the text of proposed Rule 3.5.

In paragraph (a), the Commission added the term "statute" in the first sentence and the term "judicial officer" in the second sentence.

In paragraph (b), the term "permitted" was substituted for "authorized."

In paragraph (c), the following clause was added to the definition of "'judge' or 'judicial officer'": "(iv) members of an administrative body acting in an adjudicative capacity."

¹ The fifteen jurisdictions are: Arizona, Arkansas, Idaho, Illinois, Indiana, Iowa, Louisiana, Missouri, New Hampshire, New Mexico, Oklahoma, Pennsylvania, Rhode Island, Washington, and Wyoming.

² The twenty-one jurisdictions are: Colorado, Connecticut, Delaware, District of Columbia, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Jersey, Nebraska, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin.

³ The fourteen jurisdictions are: Alabama, Alaska, Florida, Georgia, Hawaii, Kansas, Maryland, Minnesota, New York, North Carolina, Ohio, Texas, Vermont, and Virginia.

In paragraph (g), the Commission merged subparagraphs (g)(3) and (4) and replaced the draft language with language from current rule 5-320(D).

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 3.5 [5-300 and 5-320]

Commission Drafting Team Information

Rule 5-300

Lead Drafter: Dean Stout
Co-Drafters: James Ham, Lee Harris

Rule 5-320

Lead Drafter: Howard Kornberg
Co-Drafters: Daniel Eaton, Carol Langford

I. INTRODUCTION

Proposed Rule 3.5 addresses contact with judicial officials and jurors, topics that are addressed in two separate rules under the current California Rules of Professional Conduct, rules 5-300 (Contact With Officials) and 5-320 (Contact With Jurors). The ABA Model Rules address the topics in a single rule, Model Rule 3.5.

In conformance with the Charter principle that the Commission is to start with the relevant California rule, the two California rules were assigned to two different drafting teams. Acknowledging this Commission's decision early in the rules revision process to recommend adoption of the Model Rules' format and numbering, both drafting teams determined that the two topics could be combined in a single Rule numbered 3.5. However, both drafting teams also determined that the substance of the two current California rules, which are more detailed and identify more precisely the kinds of conduct prohibited under the rules, were more appropriate as disciplinary standards. Accordingly, although numbered 3.5, the proposed Rule largely carries forward without substantive changes the substance of the two current California rules:

- (i) paragraphs (a) through (c) carry forward the content of current rule 5-300; and
- (ii) paragraphs (d) through (l) carry forward the content of current rule 5-320.

Changes were made to rule 5-300(A) and (C) to conform the rule to recent (2013) changes in the Code of Judicial Ethics and to more accurately delimit the scope of the rule's application.

II. CURRENT CALIFORNIA RULES

Rule 5-300 Contact With Officials

- (A) A member shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship

between the member and the judge, official, or employee is such that gifts are customarily given and exchanged. Nothing contained in this rule shall prohibit a member from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.

- (B) A member shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, except:
 - (1) In open court; or
 - (2) With the consent of all other counsel in such matter; or
 - (3) In the presence of all other counsel in such matter; or
 - (4) In writing with a copy thereof furnished to such other counsel; or
 - (5) In ex parte matters.
- (C) As used in this rule, “judge” and “judicial officer” shall include law clerks, research attorneys, or other court personnel who participate in the decision-making process.

Rule 5-320 Contact With Jurors

- (A) A member connected with a case shall not communicate directly or indirectly with anyone the member knows to be a member of the venire from which the jury will be selected for trial of that case.
- (B) During trial a member connected with the case shall not communicate directly or indirectly with any juror.
- (C) During trial a member who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the member knows is a juror in the case.
- (D) After discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service.
- (E) A member shall not directly or indirectly conduct an out of court investigation of a person who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service.

- (F) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a person who is either a member of a venire or a juror.
- (G) A member shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the member has knowledge.
- (H) This rule does not prohibit a member from communicating with persons who are members of a venire or jurors as a part of the official proceedings.
- (I) For purposes of this rule, "juror" means any empanelled, discharged, or excused juror.

III. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 3.5

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 3.5

Vote: X (yes) – X (no) – X (abstain)

IV. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 3.5 [5-300 5-320] Contact With Judges, Officials, Employees, and Jurors

- (a) Except as permitted by statute, an applicable code of judicial ethics or code of judicial conduct, or standards governing employees of a tribunal,* a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal.* This Rule does not prohibit a lawyer from contributing to the campaign fund of a judge or judicial officer running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (b) Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a ruling of a tribunal,* or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:
 - (1) in open court; or
 - (2) with the consent of all other counsel in the matter; or

- (3) in the presence of all other counsel in the matter; or
 - (4) in writing* with a copy thereof furnished to all other counsel in the matter;
or
 - (5) in ex parte matters.
- (c) As used in this Rule, “judge” and “judicial officer” shall also include (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; (iv) members of an administrative body acting in an adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.
 - (d) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows* to be a member of the venire from which the jury will be selected for trial of that case.
 - (e) During trial a lawyer connected with the case shall not communicate directly or indirectly with any juror.
 - (f) During trial a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows* is a juror in the case.
 - (g) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known* to the lawyer a desire not to communicate;
 - (3) the communication involves misrepresentation, coercion, or duress, or is intended to harass or embarrass the juror or to influence the juror’s actions in future jury service.
 - (h) A lawyer shall not directly or indirectly conduct an out of court investigation of a person* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person* in connection with present or future jury service.
 - (i) All restrictions imposed by this Rule also apply to communications with, or investigations of, members of the family of a person* who is either a member of a venire or a juror.
 - (j) A lawyer shall reveal promptly to the court improper conduct by a person* who is either a member of a venire or a juror, or by another toward a person* who is

either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.

- (k) This Rule does not prohibit a lawyer from communicating with persons* who are members of a venire or jurors as a part of the official proceedings.
- (l) For purposes of this Rule, “juror” means any empaneled, discharged, or excused juror.

Comment

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

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

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

V. COMMISSION’S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULES 5-300 AND 5-320)

Rule 3.5 [5-300] Contact With Judges, Officials, Employees, and Jurors

- (Aa) ~~A member~~ Except as permitted by statute, an applicable code of judicial ethics or code of judicial conduct, or standards governing employees of a tribunal,* a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal ~~unless the personal or family relationship between the member and the judge, official, or employee is such that gifts are customarily given and exchanged. Nothing contained in this rule shall.*~~ This Rule does not prohibit a ~~member~~ lawyer from contributing to the campaign fund of a judge or judicial officer running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (Bb) ~~A member~~ Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a ruling of a tribunal,* or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before ~~such~~ the judge or judicial officer, except:
 - (1) ~~In~~ in open court; or

- (2) ~~With~~with the consent of all other counsel in ~~such~~the matter; or
 - (3) ~~In~~in the presence of all other counsel in ~~such~~the matter; or
 - (4) ~~In~~in writing* with a copy thereof furnished to ~~such~~all other counsel in the matter; or
 - (5) ~~In~~in ex parte matters.
- (C**c**) As used in this ~~rule~~Rule, “judge” and “judicial officer” shall ~~include~~also include (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; (iv) members of an administrative body acting in an adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

~~Rule 5-320 Contact With Jurors~~

- (A**d**) A ~~member~~lawyer connected with a case shall not communicate directly or indirectly with anyone the ~~member~~lawyer knows* to be a member of the venire from which the jury will be selected for trial of that case.
- (B**e**) During trial a ~~member~~lawyer connected with the case shall not communicate directly or indirectly with any juror.
- (G**f**) During trial a ~~member~~lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the ~~member~~lawyer knows* is a juror in the case.
- (g) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known* to the lawyer a desire not to communicate;
 - (D**3**) ~~After discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury that are~~the communication involves misrepresentation, coercion, or duress, or is intended to harass or embarrass the juror or to influence the juror’s actions in future jury service.
- (E**h**) A ~~member~~lawyer shall not directly or indirectly conduct an out of court investigation of a person* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person* in connection with present or future jury service.

- (F*i*) All restrictions imposed by this ~~rule~~[Rule](#) also apply to communications with, or investigations of, members of the family of a person* who is either a member of a venire or a juror.
- (G*j*) A ~~member~~[lawyer](#) shall reveal promptly to the court improper conduct by a person* who is either a member of a venire or a juror, or by another toward a person* who is either a member of a venire or a juror or a member of his or her family, of which the ~~member~~[lawyer](#) has knowledge.
- (H*k*) This ~~rule~~[Rule](#) does not prohibit a ~~member~~[lawyer](#) from communicating with persons* who are members of a venire or jurors as a part of the official proceedings.
- (I*l*) For purposes of this ~~rule~~[Rule](#), “juror” means any ~~empanelled~~[empaneled](#), discharged, or excused juror.

Comment

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

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

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

VI. RULE HISTORY

A. Rule 5-300

In 1972, the California State Bar Special Committee to Study the ABA Code of Professional Responsibility proposed Rule 7-109, the predecessor to 5-300, as follows:

- (A) A member of the State Bar shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the member and the judge, official or employee is such that gifts are customarily given and exchanged.
- (B) A member of the State Bar shall not directly or indirectly, in the absence of opposing counsel, communicate with or argue to a judge or judicial officer, upon the merits of a contested matter pending before such judge or judicial officer, except in open court; nor shall he, without furnishing opposing counsel

with a copy thereof, address a written communication to a judge or judicial officer concerning the merits of a contested matter pending before such judge or judicial officer. The rule shall not apply to ex parte matters.

Comment:

Rule 7-109(A) is the substance of ABA Code DR 7-110(A) as amended. In recommending this Rule, the Committee also had before it the text of the 1971 tentative draft of the Canons of Judicial Ethics, Canon 4(C) and the text of 1971 State Bar Conference of Delegates Resolution 8-2.

Rule 7-109(B) is the identical text of present Rule 16, Rules of Professional Conduct.

(See State Bar of California Special Committee to Study the ABA Code of Professional Responsibility, Final Report (1972) at p. 51.)

In 1975, Rule 7-109, as further amended, was approved by the California Supreme Court as follows:

Rule 7-108. Contact with Officials

- (A) A member of the State Bar shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the member and the judge, official or employee is such that gifts are customarily given and exchanged.
- (B) A member of the State Bar shall not directly or indirectly, in the absence of opposing counsel, communicate with or argue to a judge or judicial officer, upon the merits of a contested matter pending before such judge or judicial officer, except in open court; nor shall he, without furnishing opposing counsel with a copy thereof, address a written communication to a judge or judicial officer concerning the merits of a contested matter pending before such judge or judicial officer. The rule shall not apply to ex parte matters.

Rule 5-300 was amended in 1989. The 1989 amendments can be summarized as follows:

**Proposed Rule 5-300. Contact with Officials.
(Current Rule 7-108)**

Proposed rule 5-300 continues the limitations on attorney contacts with officials found in current rule 7-108.

Paragraph (A) regarding giving anything of value to an official is expanded to state explicitly that campaign contributions are not prohibited.

The proposed amendments to paragraph (B) regarding ex parte contacts with officials are intended merely as a change in format.

Paragraph (C) is new and is intended to define the phrase “judge or judicial officer” as used in this rule. The inclusion of law clerks, research attorneys or other court personnel who participate in the decision-making process is proposed to acknowledge the influence such personnel may have on pending matters and to make the scope of the prohibited communication more in tune with reality.

(See Bar Misc. No. 5626, “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” December 1987, p. 51.)

Amendments Operative 1989 (Comparison of Current Rule to Former Rule)

Rule 5-300. 7-108. Contact with Officials

- (A) A member of the State Bar shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the member and the judge, official, or employee is such that gifts are customarily given and exchanged. Nothing contained in this rule shall prohibit a member from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (B) A member of the State Bar shall not directly or indirectly, ~~in the absence of opposing counsel, communicate with or argue to a judge or judicial officer, upon the merits of a contested matter pending before such judge or judicial officer, except; in open court; nor shall he, without furnishing opposing counsel with a copy thereof, address a written communication to a judge or judicial officer concerning the merits of a contested matter pending before such judge or judicial officer. The rule shall not apply to ex parte matters.~~
- (1) In open court; or
 - (2) With the consent of all other counsel in such matter; or
 - (3) In the presence of all other counsel in such matter; or
 - (4) In writing with a copy thereof furnished to such other counsel; or
 - (5) In ex parte matters.
- (C) As used in this rule, the phrase "judge or judicial officer" shall include law clerks, research attorneys, or other court personnel who participate in the decision-making process.

(See Bar Misc. No. 5626, “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California,

And Memorandum And Supporting Documents In Explanation,” December 1987, Enclosure 2.)

Rule 5-300 was again amended in 1992. Those amendments are summarized as follows:

Proposed amendment to paragraph (C) would revise the definition of the phrase “judge or judicial officer” to specifically define the terms “judge” and “judicial officer”. No substantive change is intended.

(See “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” December 1991, Supreme Court number 24408, at p. 20.)

Amendments Operative 1992 (Comparison of Current Rule to Former Rule)

Rule 5-300. Contact with Officials

- (A) A member shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the member and the judge, official, or employee is such that gifts are customarily given and exchanged. Nothing contained in this rule shall prohibit a member from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (B) A member shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, except:
- (1) In open court; or
 - (2) With the consent of all other counsel in such matter; or
 - (3) In the presence of all other counsel in such matter; or
 - (4) In writing with a copy thereof furnished to such other counsel; or
 - (5) In ex parte matters.
- (C) As used in this rule, ~~the phrase~~ “judge” ~~or~~ and “judicial officer” shall include law clerks, research attorneys, or other court personnel who participate in the decision-making process.

(See “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” December 1991, Supreme Court number 24408, Enclosure 2.)

B. Rule 5-320

Current rule 5-320 originated in 1975 as former rule 7-106, which was derived from ABA Model Code of Professional Responsibility, DR 7-108 and provided:

Rule 7-106. Communication with or Investigation of Jurors

- (A) Before the trial of a case, a member of the State Bar connected therewith shall not communicate directly or indirectly with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.
- (B) During the trial of a case:
 - (1) A member of the State Bar connected therewith shall not communicate directly or indirectly with any member of the jury.
 - (2) A member of the State Bar who is not connected therewith shall not communicate directly or indirectly with a juror concerning the case.
- (C) Rule 7-106 (A) and (B) do not prohibit a member of the State Bar from communicating with veniremen or jurors as a part of the official proceedings.
- (D) After discharge of the jury from further consideration of a case with which the member of the State Bar was connected, the member of the State Bar shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service.
- (E) A member of the State Bar shall not conduct directly or indirectly an out of court investigation of either a venireman or a juror of a type likely to influence the state of mind of such venireman or juror present or future jury service.
- (F) All restrictions imposed by rule 7-106 upon a member of the State Bar also apply to communications with or investigations of, members of a family of a venireman or a juror.
- (G) A member of the State Bar shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family of which the member of the State Bar has knowledge.

As part of the comprehensive revision of the Rules of Professional Conduct, rule 7-106 was renumbered to 5-320 and became operative in 1989. While no substantive amendments were recommended at that time, rule 5-320 provided:

Rule 5-320. ~~7-106. Communication with or Investigation of~~ Contact with Jurors

- (A) ~~Before the trial of a case, a~~ A ~~member of the State Bar connected therewith with~~ a case shall not communicate directly or indirectly with anyone ~~he~~ the member knows to be a member of the venire from which the jury will be selected for the trial of ~~the~~ that case.
- (B) ~~During the trial of a case (1) A~~ a ~~member of the State Bar connected therewith~~ with the case shall not communicate directly or indirectly with any member of the jury.
- (C) ~~During trial (2) A~~ a ~~member of the State Bar who is not connected therewith with~~ the case shall not communicate directly or indirectly ~~with a juror~~ concerning the case with anyone a member knows is a juror in the case.
- (C) ~~Rule 7-106 (A) and (B) do not prohibit a member of the State Bar from communicating with veniremen or jurors as a part of the official proceedings.~~
- (D) After discharge of the jury from further consideration of a case ~~with which the member of the State Bar was connected, the~~ a member of the State Bar shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service.
- (E) ~~A member of the State Bar~~ shall not conduct directly or indirectly an out of court investigation of either a venireman or a juror of a type likely to influence the state of mind of such venireman or juror present or future jury service.
- (F) All restrictions imposed by rule ~~7-106~~ 5-320 upon a member ~~of the State Bar~~ also apply to communications with or investigations of, members of ~~a~~ the family of a venireman or a juror.
- (G) ~~A member of the State Bar~~ shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his or her family, of which the member ~~of the State Bar~~ has knowledge.
- (H) Rule 5-320 does not prohibit a member from communicating with veniremen or jurors as a part of the official proceedings.

In 1992, rule 5-320 was further revised. The amendment to paragraph (B) expanded the prohibition to encompass the definition of "juror" proposed in new paragraph (I) and precluded members from communicating with empaneled, discharged or excused jurors during a trial. In conjunction with amended paragraph (B), paragraph (I) expanded the rule to prohibit communications with discharged or excused jurors during the pendency of the trial. The amendment was intended to protect the administration of justice by preventing a member from learning about the jury's deliberations during such trial.

Amendment to paragraphs (E), (F), (G), and (H) replaced the terms "venireman" and "veniremen" with gender neutral language.

The 1992 amendments to rule 5-320 provided:

Rule 5-320. Contact with Jurors

- (A) A member connected with a case shall not communicate directly or indirectly with anyone the member knows to be a member of the venire from which the jury will be selected for trial of that case.
- (B) During trial a member connected with the case shall not communicate directly or indirectly with any ~~member of the jury~~ juror.
- (C) During trial a member who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone ~~a~~ the member knows is a juror in the case.
- (D) After discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service.
- (E) A member shall not ~~conduct~~ directly or indirectly conduct an out of court investigation of a person who is either a venireman member of a venire or a juror of a type in a manner likely to influence the state of mind of such venireman or juror person in connection with present or future jury service.
- (F) All restrictions imposed by this rule ~~5-320 upon a member~~ also apply to communications with, or investigations of, members of the family of a ~~venireman~~ person who is either a member of a venire or a juror.
- (G) A member shall reveal promptly to the court improper conduct by a ~~venireman~~ person who is either a member of a venire or a juror, or by another toward a ~~venireman~~ person who is either a member of a venire or a juror or a member of his or her family, of which the member has knowledge.
- (H) This Rule 5-320 does not prohibit a member from communicating with ~~veniremen~~ persons who are members of a venire or jurors as a part of the official proceedings.
- (I) For purposes of this rule, "juror" means any empaneled, discharged, or excused juror.

The 1992 amendments were the last revisions of rule 5-320.

VII. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule but recommends that the rule also prohibit communications to a juror or prospective juror that are intended to prevent or encourage the juror from communicating with the other party or the court after their discharge. (*Lind v. Medevac* (1990) 219 Cal.App.3d 516.) While this has been interpreted under what is now subparagraph (g)(4), it would be clearer and more enforceable if it was its own prohibition.

Commission Response: The Commission has not made the suggested change, given that a current rule provision, which has been carried forward in the proposed rule as paragraph (g)(4), has been held to apply to the situation described.

2. OCTC supports the Comments.

Commission Response: No response required.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

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

VIII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

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

During the 90-day public comment period, nine public comments were received. Two comments disagreed, six comments agreed only if modified, and one comment did not indicate a position. During the 45-day public comment period, two public comments were received. Both comments agreed with the proposed Rule. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

IX. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. California law related to current rule 5-300.

Gifts to Judges.

With regard to 5-300(A), California Code of Civil Procedure Section 170.9 and California Code of Judicial Ethics, Canon 4D(5) govern acceptance of gifts. (See: [California Judges Association Judicial Ethics Committee Opinion 44 \(1995\)](#) re Limitations on Accepting Gifts Under the Code of Judicial Ethics and CCP Sec. 170.9; [Committee on Judicial Ethics Formal Opinion 2014-005 \(2014\)](#) Accepting Gifts Of Little Or Nominal Value Under The Ordinary Social Hospitality Exception; and [Committee on Codes of Conduct Advisory Opinion No. 98](#) Gifts to Newly Appointed Judges, United States Courts, Guide to Judicial Policy, Vol. 2B, Ch. 2, page 98-1.)

Ex Parte Communications.

Varied authorities overlap with the ethical conduct governed by 5-300(B). Pursuant to the California Code of Judicial Ethics, a judge may communicate ex parte only in certain enumerated instances. (See Cal. Code Jud. Ethics, Canon 3B(7).) Moreover, case law holds that ex parte communications between attorney and judge are severely disfavored. (*Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal.App.4th 994, 1002 [60 Cal.Rptr.3d 542] [“Generally ex parte contacts between a judge and counsel are improper, and if not unjust in actuality, give the appearance of injustice.”], citing *In re Hancock* (1977) 67 Cal.App.3d 943, 947-949 [136 Cal.Rptr. 901].) Ex parte communications with a judge are also specifically governed by separate authority in the criminal context. (See Penal Code sections 1203,1204; *In re Hancock* (1977) 67 Cal.App.3d 943, 947-949 [136 Cal.Rptr. 901]; *In re Calhoun* (1976) 17 Cal.3d 75, 83-85 [130 Cal.Rptr. 139].)

2. California law related to current rule 5-300.

California Code of Civil Procedure

Pursuant to California Code of Civil Procedure §206, jurors have a right to not discuss the deliberations or verdict in a criminal matter. The judge must explain this statutory right to the jury before discharging them from the case. An attorney in the case must inform jurors of the statutory right prior to any discussion regarding jury deliberations or the verdict.

Related California law.

Attorneys are permitted to communicate with jurors regarding a civil case after the conclusion of the trial, and may contact the jurors to determine whether there is a

basis for challenging the jury verdict (See *Lind v. Medevac, Inc.* (1990) 219 Cal.App.3d 516).

B. ABA Model Rule Adoptions

All jurisdictions have adopted some version of ABA Model Rule 3.5. The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 3.5: Impartiality And Decorum Of The Tribunal,” revised September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_5.pdf (Last visited February 7, 2017.)
- Fifteen jurisdictions have adopted Model Rule 3.5 verbatim.¹ Twenty-one jurisdictions have adopted a slightly modified version of Model Rule 3.5.² Fifteen jurisdictions have adopted a version of the rule that is substantially different from Model Rule 3.5.³

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

A. Concepts Accepted (Pros and Cons):

1. General: Recommend carrying forward the substance of current rules 5-300 (Contact with Officials) and 5-320 (Contact with Jurors) rather than the adoption of the substance of Model Rule 3.5.
 - Pros: As noted in the introduction, the California rules that comprise proposed Rule 3.5 specify in greater detail than Model Rule 3.5 the conduct that the Rule is intended to regulate. It is the consensus of the Commission that these detailed provisions are more appropriate for a disciplinary rule than is the content of Model Rule 3.5. Carrying forward the specificity of current California rules 5-300 and 5-320 should avoid challenges of overbreadth and vagueness and better serve the purpose of the proposed Rules to protect the integrity of the legal system and promote the administration of justice by specifying the conduct that is prohibited. Finally, defining what conduct is acceptable and

¹ The fifteen jurisdictions are: Arizona, Arkansas, Idaho, Illinois, Indiana, Iowa, Louisiana, Missouri, New Hampshire, New Mexico, Oklahoma, Pennsylvania, Rhode Island, Washington, and Wyoming.

² The twenty-one jurisdictions are: Colorado, Connecticut, Delaware, District of Columbia, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Jersey, Nebraska, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin.

³ The fifteen jurisdictions are: Alabama, Alaska, California, Florida, Georgia, Hawaii, Kansas, Maryland, Minnesota, New York, North Carolina, Ohio, Texas, Vermont, and Virginia.

what is not better aids judicial personnel, lawyers and jurors from engaging in conduct that might be well meaning, but reflects adversely upon the fairness of the judicial process. This latter effect ultimately should provide better public protection.

- Cons: None identified.
2. Recommend adopting a rule title that more accurately describes the content of current rules 5-300 and 5-320 than do the current titles of those rules: “Contact With Judges, Officials, Employees, and Jurors.”
- Pros: The combination title more accurately describes the content of the rule, which, as a disciplinary rule, regulates the extent to which lawyers may engage in contacting judges and other court officials or employees, and jurors. Moreover, the Model Rule title, which refers to “impartiality *and decorum*” of a tribunal, is inaccurate given the Commission’s recommendation not to adopt Model Rule 3.5(d), which prohibits a lawyer from engaging “in conduct intended to disrupt a tribunal.”
 - Cons: Even assuming the reference to “decorum” is deleted, the remaining part of the Model Rule title correctly describes the rationale for the rule: maintaining the impartiality of a tribunal. Moreover, the title has been adopted by nearly every jurisdiction in the country.
3. Recommend revising the first sentence of paragraph (a) to conform the proposed Rule to amendments to the California Code of Judicial Ethics and to recognize the various statutes, codes or standards of conduct or ethics that regulate the conduct of court personnel.
- Pros: The Code of Judicial Ethics was revised in 2013 to eliminate the exception recognized in current rule 5-300(A) for “customary” gifts. Accordingly, the second clause of paragraph (a) that permitted such gifts has been deleted. In addition, the Commission recognized that there are a large number of codes or standards of conduct that regulate the conduct of court personnel. The insertion of the first clause of proposed paragraph (a) is intended to provide an exception for gifts only to the extent they are permitted under such codes or standards.
 - Cons: None identified.
4. In paragraph (b), add a clause that provides an exception to the prohibited conduct to recognize that a lawyer may be so permitted by law, the Code of Judicial Ethics, a ruling of the tribunal or a court order.
- Pros: Paragraph (b) specifies the circumstances when ex parte communications with judges, judicial officers and personnel, and jurors are prohibited; when any communications with jurors are prohibited; and when certain communications are permitted in order to create a brighter line for

compliance with the law and for establishing proof in disciplinary and regulatory proceedings. This is preferable to the Model Rule, which simply provides for a blanket prohibition “unless authorized to do so by law or court order.”

- Cons: The addition of the opening clause of paragraph (b) is unnecessary as it states the obvious.
5. In paragraph (c), recommend revising the definition of “judge” and “judicial officer” to clarify that it includes administrative law judges, neutral arbitrators, State Bar Court judges, and members of an administrative body acting in an adjudicative capacity.
- Pros: The same concerns about ensuring the impartiality of decisions and the corresponding effect it will have on respect for the judicial process applies to decisions made by ALJ’s, neutral arbitrators and State Bar Court judges. The Rule should clarify the Rule’s application to those neutral decision-makers. The Commission recommends including language from the Commission’s definition of “tribunal”⁴ to more precisely identify the intended scope of the Rule rather than force a lawyer to import that language into the definition to appreciate that scope.⁵
 - Cons: It is unnecessary to make the change because this Commission has adopted a definition of “tribunal” that incorporates nearly all of the language that has been added to the definition. The definition should expressly refer to “presiding officers of a tribunal” and by reference to that definition, a lawyer would understand the Rule’s scope.
6. In paragraphs (d) through (f) and (h) through (l) carry forward the current rule 5-320(A) through (C) and (E) through (l), with only minor changes to conform to this Commission’s style and formatting (e.g., “lawyer” for “member”).
- Pros: See General recommendation, at Section X.A.1, above.

⁴ Proposed Rule 1.0.1(m) provides:

(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.

⁵ An alternative definition considered but rejected by the 5-300 drafting team was the following:

(c) As used in this rule, “judge” and “judicial officer” means the presiding officer of a tribunal and shall include law clerks, research attorneys, or other court personnel who participate in the decision-making process, and neutral arbitrators.

- Cons: None identified.
7. In paragraph (g), supplement current rule 5-320(D) with the specific prohibitions set forth in Model Rule 3.5(c).
 - Pros: Model Rule 3.5(c) is an exception to the Model Rules' approach in that it identifies in detail the conduct that is prohibited. That detailed description is appropriately included in a disciplinary rule.
 - Cons: There is no evidence that current rule 5-320(D) has not been effective in regulating lawyer misconduct in interacting with jurors.
 8. Recommend adopting Comment [1], which provides examples of codes or standards of conduct referred to in paragraph (a).
 - Pros: The Comment clarifies what is intended by the term "applicable code of judicial ethics, code of judicial conduct, or standards governing" court employees by providing examples of such codes or standards.
 - Cons: The referenced term in paragraph (a) is sufficiently precise to not require further elaboration.
 9. Recommend adoption of Comment [2], which provides a cross reference to CCP § 206.
 - Pros: CCP § 206 provides specific guidance on what communications with jurors are permitted.
 - Cons: The Comment does not provide interpretive guidance that explains the meaning or application of a black letter provision. It is unnecessary.
 10. Recommend adoption of Comment [3] regarding when a lawyer may communicate with a discharged juror.
 - Pros: The Comment provides an important clarification that even after a juror is discharged, a lawyer may not communicate with the juror until the entire jury is discharged. This clarifies the duration of the prohibition on communications with such jurors.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Adopt Model Rule 3.5(d), which prohibits a lawyer from engaging "in conduct intended to disrupt a tribunal".
 - Pros: Including the provision will promote respect for the judicial system by requiring lawyers to maintain not only the impartiality and integrity of a tribunal

but also to preserve the decorum of a tribunal.

- Cons: The provision is vague and overbroad and, in any event, is unnecessary in light of proposed Rule 8.4(d) (providing it is misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.”)
2. In subparagraph (b)(4), (i) include the term “promptly” to modify the requirement under that all other counsel in a matter be provided with a copy of the ex parte communication with the judge, and (ii) define the term “promptly”.
- Pros: Any written ex parte communication should be provided to opposing counsel promptly. The Rule should so reflect that requirement.
 - Cons: Any such requirement would be in the rules of procedure or local court rules where the concept could be defined with precision. Discipline is appropriate for an improper ex parte contact. The Rule provides that an improper ex parte contact can be disciplined; there is no further need for such a qualifier.

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. The changes to paragraph (a) are substantive. (See Section X.A.3, above.)
2. All other changes are non-substantive. (See Section X.D, below.)

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term “lawyer” for “member”.
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.

2. Change the Rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rules. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. The change to paragraph (b), which expressly recognizes exceptions in a code of conduct, law, rule, or ruling of a tribunal, is a non-substantive clarifying change.
4. The change to paragraph (c), which incorporates language from the definition of tribunal, is a non-substantive clarifying change.
5. The change to paragraph (g), which specifies in detail the kinds of communications with jurors that are prohibited, is a non-substantive clarifying change. (See Section X.A.7, above.)
6. All of the proposed Comments are non-substantive changes. (See Sections X.A.8-10, above.)

E. Alternatives Considered:

None.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 3.5 [5-300][5-320] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 3.5 [5-310] [5-320] in the form attached to this Report and Recommendation.

**Proposed Rule 3.5 [5-300, 5-320] Contact with Judges, Officials,
Employees, and Jurors
Synopsis of Public Comments**

TOTAL = 4	A = 0
	D = 0
	M = 4
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-19	Association of California Water Agencies (Wiley) (01-09-17)	Y	M		<p>This rule should be amended to clarify potential uncertainty relating to how to comply with ethical obligations related to state proceedings. Specifically, representing clients before the State Water Resources Control Board where the Board concurrently holds proceedings which are quasi-adjudicatory and quasi-legislative.</p> <p>For example, presentations in the quasi-legislative Bay-Delta proceeding could be interpreted as “indirect” communications with Board members related to issues presented in the quasi-adjudicatory California WaterFix hearing.</p> <p>These issues are similar to concerns with the proposed rule’s effect on attorney contact with decision-makers in local proceedings.</p> <p>In the case of local agencies, commenter recommends that the rule be revised to state that the agencies’ decision-makers are not “administrative bodies” for</p>	<p>The Commission did not make the suggested revision. The Commission believes that the rules adopted and followed by local agencies regarding ex parte contacts with decision makers control and that Rule 3.5 rule does not supersede the ex parte contact rules adopted by those agencies.</p> <p>The Commission construes the example provided by the commenter as possibly indicating that an agency is uncertain about its own rules. If so, then stakeholders should seek to have the agency promulgate clear and understandable rules. A particular ambiguous agency rule cannot be fixed through an amendment to a lawyer disciplinary rule of general application.</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Proposed Rule 3.5 [5-300, 5-320] Contact with Judges, Officials,
Employees, and Jurors
Synopsis of Public Comments**

TOTAL = 4 **A = 0**
D = 0
M = 4
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					purposes of the rule. Instead, the State Bar should rely on the body of common law governing ex parte contact in such situations.	
Y-2016-30	California Special Districts Association (Hessabi) (01-23-17)	Y	M		<p>Agencies operating under the state Administrative Procedure Act currently have <i>ex parte</i> communication rules that prohibit anyone from having substantive contact with agency decision-makers while a proceeding is pending (See Gov. Code §§ 11430.10-11430.80; Cal. Code Regs., tit. 23, § 648, subd. (b).) Attorneys and all other participants in such administrative proceedings must obey those rules. Proposed Rule 3.5 should be amended to make clear that, if an attorney were to obey an agency's applicable <i>ex parte</i> rules, then that attorney would be in compliance with the Rules of Professional Conduct's requirements concerning contact with administrative decision-makers.</p> <p>We also recommend that the State Bar revise proposed Rule 3.5 to state that local agencies' decision-makers are not "administrative bodies" within the scope of the rule. The variety of</p>	

**Proposed Rule 3.5 [5-300, 5-320] Contact with Judges, Officials,
Employees, and Jurors
Synopsis of Public Comments**

TOTAL = 4 **A = 0**
D = 0
M = 4
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					local decision-making bodies, and forums in which they consider matters, is too broad to state [in] a single rule to establish an ethical rule to cover attorneys' interactions with all of them. Given the body of statutes and common law governing all parties' <i>ex parte</i> contacts in such situations, we recommend that the State Bar rely on that law to govern attorneys' interactions with those decision-makers.	
Y-2016-29	League of California Cities (Leary) (01-19-17)	Y	M		We join the comments to proposed Rule 3.5 submitted by the Association of California Water Agencies.	See response to the Association of California Water Agencies, provided above.
Y-2016-21w	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	M		OCTC supports rule but recommends that the rule also bar communications with a juror or prospective juror that are intended to prevent or encourage the juror from communicating with the other party or the court after discharge.	The Commission has not made the suggested change, given that a current rule provision, which has been carried forward in the proposed rule as paragraph (g)(3), has been held to apply to the situation described.

PROPOSED RULE OF PROFESSIONAL CONDUCT 3.6
(Current Rule 5-120)
Trial Publicity

EXECUTIVE SUMMARY

The Commission evaluated current rule 5-120 (Trial Publicity) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard. In addition, the Commission considered the national standard of ABA Model Rule 3.6 (Trial Publicity). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 3.6 (Trial Publicity).

Rule As Issued For 90-day Public Comment

Proposed rule 3.6 in context within the Rules of Professional Conduct.

Proposed rule 3.6 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The general content, framework and numbering scheme of this subset of the Rules is based on Chapter 3 of the ABA Model Rules, which is entitled "Advocate". Model Rules Chapter 3 corresponds to Chapter 5 of the current California Rules, entitled "Advocacy and Representation." The following table shows the Chapter 3 Model Rules and the corresponding California Rules:

Model Rule	California Rule
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. Rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. Rule counterpart.

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules.

Proposed rule 3.6 carries forward the substance of current rule 5-120. The few significant changes to the current rule include the following. In paragraph (a), the "knows or reasonably should know standard" is moved in front of two roman numerals that were added to clarify the knowledge standard is applicable to both the means of dissemination and the likelihood of

material prejudice. Paragraph (b) has been amended to place an outright condition that the subparagraphs of paragraph (b) are limited by the lawyer's duty of confidentiality. The change was made to avoid a misinterpretation that the rule's language provides an exception to the lawyer's overriding duty to maintain a client's confidential information. In paragraph (b)(6), language has been added to emphasize that the anticipated harm triggering this permissive category of information is harm to an individual or the public, and that dissemination of this information is limited to what is reasonably necessary to protect the individual or the public. This change also conforms paragraph (b)(6) to the limitation in current rule 3-100(D) [proposed rule 1.6(d)], which requires an attorney's disclosure of information must be no more than is necessary to prevent the harm. Paragraph (b)(7)(i) has been amended by deleting "family status" and adding reference to "general area of" residence and occupation. This change was made in order to balance an accused right to privacy while also providing enough information so that the accused is not either misidentified, or confused with someone else. Finally, paragraph (d) was added to extend compliance with the rule to other lawyers who are associated with the individual lawyer who is covered by paragraph (a).

There are two comments to the rule. Comment [1] adds cross references to relevant rules and adds clarifying changes to the language found in the second paragraph of the Discussion section of current rule. In comment [2], a cross reference is added to the special duties of prosecutors in proposed rule 3.8(f). Also, comment [2] retains language found in the current rule's Discussion section which expressly states that the rule applies equally to prosecutors and criminal defense counsel.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made non-substantive stylistic edits and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 3.6 [5-120]

Commission Drafting Team Information

Lead Drafter: Karen Clopton

Co-Drafters: Jeffrey Bleich, George Cardona, Joan Croker

I. CURRENT CALIFORNIA RULE

Rule 5-120 Trial Publicity

- (A) A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (B) Notwithstanding paragraph (A), a member may state:
- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (2) the information contained in a public record;
 - (3) that an investigation of the matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;
 - (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (a) the identity, residence, occupation, and family status of the accused;
 - (b) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;
 - (c) the fact, time, and place of arrest; and
 - (d) the identity of investigating and arresting officers or agencies and the length of the investigation.

- (C) Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Discussion

Rule 5-120 is intended to apply equally to prosecutors and criminal defense counsel.

Whether an extrajudicial statement violates rule 5-120 depends on many factors, including: (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d); (3) whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings); and (4) the timing of the statement.

Paragraph (A) is intended to apply to statements made by or on behalf of the member.

Subparagraph (B)(6) is not intended to create, augment, diminish, or eliminate any application of the lawyer-client privilege or of Business and Professions Code section 6068(e) regarding the member's duty to maintain client confidence and secrets.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 3.6 [5-120]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 3.6 [5-120]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 3.6 [5-120] Trial Publicity

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows* or reasonably should know* will (i) be disseminated by means of public communication and (ii) have a substantial* likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) Notwithstanding paragraph (a), but only to the extent permitted by Business and Professions Code § 6068(e) and Rule 1.6, lawyer may state:
 - (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons* involved;
 - (2) information contained in a public record;
 - (3) that an investigation of a matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;
 - (6) a warning of danger concerning the behavior of a person* involved, when there is reason to believe that there exists the likelihood of substantial* harm to an individual or to the public but only to the extent that dissemination by public communication is reasonably* necessary to protect the individual or the public; and
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (i) the identity, general area of residence, and occupation of the accused;
 - (ii) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;
 - (iii) the fact, time, and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable* lawyer would believe is required to protect a client from the substantial* undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be

limited to such information as is necessary to mitigate the recent adverse publicity.

- (d) No lawyer associated in a law firm* or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

[1] Whether an extrajudicial statement violates this Rule depends on many factors, including: (i) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (ii) whether the extrajudicial statement presents information the lawyer knows* is false, deceptive, or the use of which would violate Business and Professions Code § 6068(d) or Rule 3.3; (iii) whether the extrajudicial statement violates a lawful “gag” order, or protective order, statute, rule of court, or special rule of confidentiality, for example, in juvenile, domestic, mental disability, and certain criminal proceedings, (see Business and Professions Code § 6068(a) and Rule 3.4(f), which require compliance with such obligations); and (iv) the timing of the statement.

[2] This Rule applies to prosecutors and criminal defense counsel. See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

IV. COMMISSION’S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 5-120)

Rule 3.6 [5-120] Trial Publicity

- (Aa) A ~~member~~lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that ~~a reasonable person would expect to~~the lawyer knows* or reasonably should know* will (i) be disseminated by means of public communication ~~if the member knows or reasonably should know that it will~~and (ii) have a substantial* likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (Bb) Notwithstanding paragraph (Aa), ~~a member~~but only to the extent permitted by Business and Professions Code § 6068(e) and Rule 1.6, lawyer may state:
- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons* involved;
 - (2) ~~the~~information contained in a public record;
 - (3) that an investigation of ~~the~~a matter is in progress;
 - (4) the scheduling or result of any step in litigation;

- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person* involved, when there is reason to believe that there exists the likelihood of substantial* harm to an individual or to the public interest but only to the extent that dissemination by public communication is reasonably* necessary to protect the individual or the public; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (a) the identity, general area of residence, and occupation, ~~and family status~~ of the accused;
 - (b) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;
 - (c) the fact, time, and place of arrest; and
 - (d) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (C) Notwithstanding paragraph (A), a ~~member~~lawyer may make a statement that a reasonable* ~~member~~lawyer would believe is required to protect a client from the substantial* undue prejudicial effect of recent publicity not initiated by the ~~member~~lawyer or the ~~member's~~lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- (d) No lawyer associated in a law firm* or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

DiscussionComment

~~Rule 5-120 is intended to apply equally to prosecutors and criminal defense counsel.~~

[1] Whether an extrajudicial statement violates ~~rule 5-120~~this Rule depends on many factors, including: (i) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (ii) whether the extrajudicial statement presents information the ~~member~~lawyer knows* is false, deceptive, or the use of which would violate Business and Professions Code ~~section~~§ 6068(d) or Rule 3.3; (iii) whether the extrajudicial statement violates a lawful “gag” order, or protective order, statute, rule of court, or special rule of confidentiality ~~for~~for example, in juvenile, domestic, mental disability, and certain criminal proceedings, (see Business and Professions Code § 6068(a) and Rule 3.4(f), which require compliance with such obligations); and (iv) the timing of the statement.

[\[2\] This Rule applies to prosecutors and criminal defense counsel. See Rule 3.8\(f\) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.](#)

~~Paragraph (A) is intended to apply to statements made by or on behalf of the member.~~

~~Subparagraph (B)(6) is not intended to create, augment, diminish, or eliminate any application of the lawyer-client privilege or of Business and Professions Code section 6068(e) regarding the member's duty to maintain client confidence and secrets.~~

V. RULE HISTORY

The development of proposed rule 5-120 was mandated by former California Business and Professions Code § 6103.7,¹ which required the State Bar to submit to the Supreme Court for approval a rule of professional conduct governing trial publicity and extrajudicial statements made by attorneys concerning adjudicative proceedings. Business and Professions Code § 6103.7 required that the State Bar, as part of its rulemaking process, review and consider current American Bar Association Model Rule of Professional Conduct 3.6 (Trial Publicity) ("MR 3.6").²

¹ The text of former Business and Professions Code section 6103.7, which was added by Stats. 1994, ch. 868 and repealed by Stats. 2001, ch. 24, is as follows:

Section 1. No later than March 1, 1995, the State Bar of California shall submit to the Supreme Court for approval a rule of professional conduct governing trial publicity and extrajudicial statements made by attorneys concerning adjudicative proceedings.

Section 2. The legislature find and declares the following:

- (1) Recent legal proceedings have generated extraordinary media coverage and raise serious questions regarding the potentially prejudicial and otherwise harmful effect of some media coverage. Important constitutional issues of free speech, the right to a fair trial, and related questions are implicated and require thorough review by the State Bar.
- (2) In light of the fact that the American Bar Association has now reformed its rule on this subject, it is appropriate to require the State Bar to commence and complete its rulemaking process no later than March 1, 1995.
- (3) During the rulemaking process, the State Bar shall, among other materials, review and consider the American Bar Association's Model Rule 3.6, as modified.

Section 3. It is the intent of the Legislature in enacting this act to memorialize the Supreme Court expeditiously to review and, as appropriate, approve the rule adopted by State Bar pursuant to this section.

² ABA Model Rule 3.6 Trial Publicity states:

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or

ABA Model Rule 3.6 was similar to DR 7-107, except as follows: **First**, Rule 3.6 adopted the general criterion of “substantial likelihood of materially prejudicing an adjudicative proceeding” to describe impermissible conduct. **Second**, Rule 3.6 made clear that only attorneys who are, or have been involved in a proceeding, or their associates, are subject to the Rule. **Third**, Rule 3.6 omitted the particulars in DR 7-107(b), transforming them instead into an illustrative compilation as part of the Rule's commentary that is intended to give fair notice of the kinds of statements that are generally thought to be more likely than other kinds of statements to pose unacceptable dangers to the fair administration of justice. Whether any statement would have a substantial likelihood of materially prejudicing an adjudicatory proceeding depends upon the facts of each case. The particulars of DR 7-107(C) were retained in Rule 3.6(b), except DR 7-107(C)(7), which provided that a lawyer may reveal “[a]t the time of seizure, a description of the physical evidence seized, other than a confession, admission or statement.” Such revelations may be substantially prejudicial and are frequently the subject of pretrial

reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

- (b) Notwithstanding paragraph (a), a lawyer may state:
- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (2) the information contained in a public record;
 - (3) that an investigation of the matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;
 - (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

suppression motions whose success would be undermined by disclosure of the suppressed evidence to the press. **Finally**, Rule 3.6 authorized a lawyer to protect a client by making a limited reply to adverse publicity substantially prejudicial to the client.

On October 11, 1994, following consideration of draft versions of proposed rule 5-120 prepared by the State Bar Standing Committee on Professional Responsibility and Conduct and State Bar staff, the Board Committee on Admissions and Competence published draft rule 5-120 for a 90-day public comment period. Draft rule 5-120 was patterned on MR 3.6 and prohibited a lawyer who is participating or has participated in the investigation or litigation of a matter from directly or indirectly making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it would have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. Based on the United States Supreme Court's analysis of Nevada's trial publicity "substantial likelihood" standard in Gentile v. State Bar of Nevada (1991) 501 U.S. 1030 [111 S. Ct. 2720], it was believed that this standard was constitutional and would be an appropriate standard for rule 5-120. The ABA had used this standard as well as the vast majority of jurisdictions.

Draft rule 5-120 also contained the "safe harbor" provisions found in then Model Rule 3.6(b). Although safe harbor provisions are intended to provide guidance to attorneys, the problems inherent in safe harbor provisions were illustrated in *Gentile*. Safe harbor provisions can be subject to many interpretations. No matter how well crafted, they cannot always address the nuances of each individual case. Based on these concerns, some commenters argued that it was better to promulgate a single prohibition/standard without safe harbor provisions placed in the rule and with relevant factors instead enumerated in the rule Discussion.

On the other hand, where the rule itself did not expressly clarify statements that a lawyer may make without fear of discipline, lawyers would be forced to guess which extrajudicial statements may cross the line. Without the addition of safe harbor provisions, the rule prohibition, standing alone, could have a chilling effect on lawyers' speech. This was because virtually any extrajudicial statement made by a lawyer could raise a complaint to the State Bar. Although the rule prohibition set forth an objective standard, an individual's perception of whether a particular extrajudicial statement is materially prejudicial can be highly subjective, especially when that individual has an interest in the case, such as where the individual is a party, counsel, or even a close observer in the case.

Additionally, if a lawyer were afraid to defend a client in the court of public opinion for fear of discipline, the client could be severely prejudiced. Justice Kennedy, in his plurality decision in *Gentile*, acknowledged that an attorney "...may pursue lawful strategies to... attempt to demonstrate in the court of public opinion that the client does not deserve to be tried." (*Gentile, supra*, 111 S.Ct. at p. 2729)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule.

Commission Response: No response required.

2. OCTC is concerned with the use of the term “knows” in regards to section (ii) of Comment 1 for the reasons expressed in OCTC’s comments to proposed Rules 1.9 and 3.3 and the General Comments sections of this letter.

Commission Response: The Commission disagrees that “knows” is an inappropriate standard for this rule. Under proposed Rule 1.0.1(f), although “knows” means actual knowledge of the fact in question, that knowledge may be inferred from the specific circumstances.

3. OCTC is also concerned that section (ii) of Comment [1] may allow misleading statements. (See OCTC comments to proposed Rule 3.3; *In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370, 376 [interpreting Canon 5 of the Judicial Code of Ethics to apply only to factual misrepresentations, but not to statements that may be misleading or true statements that might imply or suggest through innuendo false conclusions. The Review Department concluded that on its face the language of Canon 5 only reached factual misrepresentations.].) California law has long held that an attorney is required to refrain from misleading and deceptive acts without qualification. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 315.) No distinction is made among concealment, half-truth, and false statement of fact. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.)

Commission Response: Comment 1 enumerates factors to consider in applying the rule and does not limit the scope of the rule to false statements. In addition, the Comment incorporates by reference Bus. & Prof. Code § 6068(d) that imposes a duty to use means consistent with truth and not seek to mislead a tribunal by an artifice.

4. OCTC supports Comment [2].

Commission Response: No response required.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, three public comments were received. All three comments agreed with the proposed Rule. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. California Civil Code § 47(d)(2)(A)

Civil Code § 47 provides that a statement made in a judicial proceeding is a privileged communication. However, subdivision (d)(2)(A) states that this privilege does not apply to a statement that “[v]iolates Rule 5-120 of the State Bar Rules of Professional Conduct.”

2. Business and Professions Code § 6068(b)

This duty of an attorney requires an attorney to “maintain the respect due to the courts of justice and judicial officers.”

3. Attorney Speech Prejudicial to the Administration of Justice in California

In California, speech otherwise entitled to full constitutional protection may nonetheless be sanctioned if it obstructs or prejudices the administration of justice. (See *Standing Committee on Discipline of U.S. Dist. Court for Cent. Dist. of California v. Yagman* (9th Cir.1995) 55 F.3d 1430, 1442.

4. Guidelines for the Operation of Family Law Information Centers and Family Law Facilitator Offices

Appendix (C) to the California Rules of Court sets forth guidelines for attorneys who serve in Family Law Information centers or Family Law Facilitators offices. Guideline #8 addresses public statements and provides that:

An attorney working in a family law information center or family law facilitator office and his or her staff must at all times comply with Family Code section 10014, and must not make any public comment about the litigants or about any pending or impending matter in the court.

B. ABA Model Rule Adoptions

Model Rule 3.6 is the ABA counterpart to rule 5-120. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 3.6: Trial Publicity,” revised September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_6.authcheckdam.pdf [last checked 2/7/17]
- Twenty-four jurisdictions have adopted Model Rule 3.6 verbatim.³ Ten jurisdictions have adopted a slightly modified version of Model Rule 3.6.⁴ Seventeen jurisdictions have adopted a version of the rule that is substantially different from Model Rule 3.6.⁵

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

A. Concepts Accepted (Pros and Cons):

1. In paragraph (a), clarify the applicability of the knowledge standard to both clauses of the rule. Paragraph (a) continues to incorporate the “knows or reasonably should know” standard. The proposed rule adds roman numerals to assure that the rule will not be misread, and to clarify that the knowledge standard is applicable to both the means of dissemination and the likelihood of material prejudice.
 - Pros: In accordance with the Commission’s Charter, this change eliminates a possible ambiguity in the language of the current rule (and in Model Rule 3.6) and promotes lawyer understanding and compliance.
 - Cons: The existing language may not be deficient as there are no published disciplinary cases in California interpreting current paragraph (A).
2. In paragraph (b), condition permitted statements on compliance with the duty of confidentiality. The subparagraphs of paragraph (b) identify categories of information that may be publicly disseminated. However, some of the specific categories could include information protected by the duty of confidentiality. For

³ The twenty-four jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Delaware, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maryland, Missouri, Montana, Nebraska, Nevada, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wyoming.

⁴ The ten jurisdictions are: California, Illinois, Indiana, Iowa, Massachusetts, North Carolina, Ohio, Oregon, Vermont, and Wisconsin.

⁵ The seventeen jurisdictions are: Alabama, Connecticut, District of Columbia, Florida, Georgia, Maine, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Texas, Virginia, and Washington.

example, subparagraph(b)(1) refers to “the identity of persons involved” and depending on the circumstances and timing of the particular case, this information might be protected by the duty of confidentiality.

- Pros: Absent this change, the current language might be misinterpreted as an exception to a lawyer’s overriding duty to maintain a client’s confidential information.
 - Cons: The categories of information listed in the subparagraphs of paragraph (b) generally appear to be public information (see, e.g., subparagraph (b)(2) referring to “the information contained in a public record”). In addition, lawyers should be expected to honor client confidentiality and not ascribe implied rule exceptions to a duty that resides in a statute rather than the rules.
3. In paragraph (b)(6), add language emphasizing that the anticipated harm triggering this permissive category of information is harm to an individual or the public, and that dissemination of this information is limited to what is reasonably necessary to protect the individual or the public. This change deletes the term “public interest.” This change also conforms subparagraph (b)(6) to the limitation in rule 3-100(D) [proposed Rule 1.6(d)] (limiting disclosure to information “no more than necessary”).
- Pros: In accordance with the Commission’s Charter, this revision eliminates an ambiguous reference to the “public interest.” It places an emphasis on protecting health and safety rather than vague, unspecified interests of the public.
 - Cons: If the precatory language of paragraph (b) is revised to refer to the duty of confidentiality, then the change in subparagraph (b)(6) is unnecessary and redundant because the only express exception to confidentiality is disclosure of information reasonably necessary to prevent a threat of death or great bodily harm (current rule 3-100 and Business and Professions code § 6068(e)(2)).
4. Add a new paragraph (d) extending compliance with the rule to other lawyers who are associated with the individual lawyer who is covered by paragraph (a). Under the current rule (see the fourth paragraph of the rule 5-120 Discussion section), the prohibition in paragraph (a) extends to “statements made by or on behalf of the member.” The proposed revision instead substitutes new black letter text based on MR 3.6(d) that expressly imposes a compliance obligation on other associated lawyers.
- Pros: A lawyer should be answerable for the violation of the rule if improper trial publicity statements are made by an associated lawyer. Further, if such statements are made by non-lawyers, then proposed Rule 5.3 (re responsibilities regarding nonlawyer assistants) should address most situations.

- Cons: Although the existing Discussion section language does not expressly hold other associated lawyers accountable for improper statements, the current approach may be preferable because it extends the prohibition to statements made by nonlawyers acting on behalf of the lawyer subject to paragraph (a). By its terms, the proposed new black letter text only protects against statements made by other lawyers.

B. Concepts Rejected (Pros and Cons):

1. Repeal the entire rule. Repealing the current rule would permit this area of lawyer conduct to be governed by judicial oversight through gag orders and other similar mechanisms, which would not have the same chilling effect on lawyer advocacy and speech as the rule's threat of discipline.
 - Pros: When this rule was first considered by the State Bar it did not receive majority support by the State Bar Board. In part, there were concerns that the Nevada version of the original ABA Model Rule had recently been found to be unconstitutional and it was not certain that the revised version would survive scrutiny.
 - Cons: The current language has withstood constitutional challenge on vagueness grounds (see *Commonwealth of Pennsylvania v. Lambert* (1998) 723 A.2d 684 [the Supreme Court of Pennsylvania held that Pennsylvania's Rule 3.6 was not unconstitutionally vague and that discriminatory enforcement was not a realistic possibility]).
2. Repeal the right of response provision. As a policy matter, rule 5-120(C) provides for a right of response to permit a lawyer to make an otherwise prohibited statement when such statement is necessary to protect the lawyer's client from substantial undue prejudice arising from recent publicity not initiated by the lawyer. Omitting current paragraph (C) from the Commission's proposed rule would eliminate what is viewed by some as a controversial aspect of the rule.
 - Pros: This provision has been criticized as a proverbial "exception that swallows the rule" that perpetuates a policy position that "two wrongs can make a right." It is perceived by some critics as undermining the rule's intended public protection and harming public confidence in lawyers and the administration of justice.
 - Cons: Lawyer advocacy and protection of client's interest include taking steps to correct false and misleading trial publicity initiated by others. The right of response component in this area of lawyer regulation is a necessary provision especially in the modern information age.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together

with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. The changes to paragraph (a) are substantive. (See Section IX.A.1, above.)
2. The changes to paragraph (b)(6) are substantive. (See Section IX.A.3, above.)
3. Proposed new paragraph (d) is a substantive change. (See Section IX.A.4, above.)

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member."
 - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. In the precatory language of paragraph (b), adding an explicit reference to the duty of confidentiality is a non-substantive clarifying change. Nothing in current

rule 5-120 states that a lawyer is relieved of the duty of confidentiality when engaged in trial publicity. (See Section IX.A.2, above.)

4. The addition of a new sentence at the end of paragraph (b) is a non-substantive clarifying change. Nothing in current rule 5-120 states that the list of categories of information in paragraph (b) is a comprehensive list. (See Section IX.A.4, above.)
5. Proposed revisions to the Comments are non-substantive clarifying changes. In proposed Comment [1], the changes add cross references and clarify the language of the current second paragraph of the Discussion section. In proposed Comment [2], a cross reference is added to the special duties of prosecutors in proposed Rule 3.8(f). Also in Comment [2], current Discussion language is retained to state expressly that the rule applies equally to prosecutors and criminal defense counsel. The last paragraph of the current rule Discussion section addresses the duty of confidentiality and has been relocated to the black letter text in proposed paragraph (b). (See Section IX.A.2, above.)

E. Alternatives Considered:

1. (See Section IX.B, above.)

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 3.6 [5-120] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 3.6 [5-120] in the form attached to this Report and Recommendation.

**Proposed Rule 3.6 [5-120] Trial Publicity
Synopsis of Public Comments**

TOTAL = 3 **A = 3**
D = 0
M = 0
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						A = 12 NI = 0
x-2016-43y	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-22-16)	Yes	A	3.6	COPRAC supports the adoption of proposed Rule 3.6.	No response required.
X-2016-93j	Los Angeles County Public Defender (Brown) (09-27-16)	Yes	A	3.6	The Los Angeles County Public Defender supports this proposed rule.	No response required.
X-2016-104an	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A	3.6	1. OCTC supports this rule.	1. No response required.
				Cmt.[1]	2. OCTC is concerned with the use of the term “knows” in regards to section (ii) of Comment 1 for the reasons expressed in OCTC’s comments to proposed Rules 1.9 and 3.3 and the General Comments sections of this letter.	2. The Commission disagrees that “knows” is an inappropriate standard for this rule. Under proposed rule 1.0.1(f), although “knows” means actual knowledge of the fact in question, that knowledge may be inferred from the specific circumstances.
X-2016-104an	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A	Cmt.[1]	3. OCTC is also concerned that section (ii) of Comment 1 may allow misleading statements. No distinction should be made among concealment, half-truth, and false statement of fact.	3. Comment 1 enumerates factors to consider in applying the rule and does not limit the scope of the rule to false statements. In addition, the Comment incorporates by reference Bus. & Prof. Code § 6068(d) that imposes a duty to use means consistent with truth and not seek to mislead a

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Proposed Rule 3.6 [5-120] Trial Publicity
Synopsis of Public Comments**

TOTAL = 3	A = 3
	D = 0
	M = 0
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response A = 12 NI = 0
						tribunal by an artifice.

PROPOSED RULE OF PROFESSIONAL CONDUCT 3.7
(Current Rule 5-210)
Lawyer as Witness

EXECUTIVE SUMMARY

The Commission evaluated current rule 5-210 (Member as Witness) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 5.6 (Restrictions On Right To Practice). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of this evaluation is proposed rule 3.7 (Lawyer as Witness).

Rule As Issued For 90-day Public Comment

Proposed rule 3.7 in context within the Rules of Professional Conduct.

Proposed rule 3.7 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The general content, framework and numbering scheme of this subset of the Rules is based on Chapter 3 of the ABA Model Rules, which is entitled “Advocate”. Model Rules Chapter 3 corresponds to Chapter 5 of the current California Rules, entitled “Advocacy and Representation.” The following table shows the Chapter 3 Model Rules and the corresponding California Rules:

Model Rule	California Rule
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. Rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. Rule counterpart.

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules.

Proposed rule 3.7 carries forward the substance of current rule 5-210 that sets the requirements when a lawyer acts as a witness in a client's matter pending before jury. The main issue was whether to provide broader public protection by expanding the scope of the rule beyond matters before a jury to other proceedings, such as a proceeding before a trial judge, an administrative law judge or an arbitrator. The Commission is recommending that this change be implemented in the proposed rule. The Commission believes that the intended public protection afforded by

the current rule applies equally to bench trials. A client's interest is promoted by requiring lawyers to obtain the client's informed written consent where required by the rule. The nature and extent of the disclosure might vary between a bench and jury trial setting, but that does not alter the benefits of requiring client consent. In addition, the rule's application to jury trials is the standard in the majority of jurisdictions that have adopted Model Rule 3.7. This substantive change is incorporated in proposed paragraph (a).

Paragraph (b) permits a lawyer to act as an advocate when another lawyer in the same firm is likely to be called as a witness, unless precluded by a conflict of interest.

Comment [1] clarifies that paragraph (a) only applies to trials before a jury, judge, administrative law judge or arbitrator and does not encompass other adversarial proceedings or non-adversarial proceedings. One example of a situation excluded from the ambit of the rule would be a client's matter where a lawyer will testify in a hearing before a legislative body.

Comment [2] explains that a client's "informed written consent" might be documented by a recital on the record that is thereafter included in a transcript. Comment [2] also includes a reference to the definition of "written" in proposed rule 1.0.1(n).

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Comment [3] reaffirms a court's discretion to take action despite a lawyer's compliance with this rule (e.g., a lawyer who complies might nevertheless be subject to a disqualification motion). See *Comden v. Superior Court* (1978) 20 Cal.3d 906, *Smith, Smith & Kring v. Superior Court* (Oliver) (1997) 60 Cal.App.4th 573, 579-582 and *Colyer v. Smith* (1999) 50 F.Supp.2d 966.) Compare *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197 [135 Cal.Rptr.3d 545] (Applying Model Rule 3.7 rather than rule 5-210 in support of court's decision to disqualify lawyer-witness).

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 3.7 [5-210]

Commission Drafting Team Information

Lead Drafter: George Cardona

Co-Drafters: Danny Chou, Tobi Inlender, Dean Stout

I. CURRENT CALIFORNIA RULE

Rule 5-210 Member as Witness

A member shall not act as an advocate before a jury which will hear testimony from the member unless:

- (A) The testimony relates to an uncontested matter; or
- (B) The testimony relates to the nature and value of legal services rendered in the case; or
- (C) The member has the informed, written consent of the client. If the member represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the member is employed and shall be consistent with principles of recusal.

Discussion:

Rule 5-210 is intended to apply to situations in which the member knows or should know that he or she ought to be called as a witness in litigation in which there is a jury. This rule is not intended to encompass situations in which the member is representing the client in an adversarial proceeding and is testifying before a judge. In non-adversarial proceedings, as where the member testifies on behalf of the client in a hearing before a legislative body, rule 5-210 is not applicable.

Rule 5-210 is not intended to apply to circumstances in which a lawyer in an advocate's firm will be a witness.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 3.7 [5-210]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 3.7 [5-210]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)**Rule 3.7 [5-210] Lawyer as Witness**

- (a) A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a witness unless:
 - (1) the lawyer's testimony relates to an uncontested issue or matter;
 - (2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or
 - (3) the lawyer has obtained informed written consent* from the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm* is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

[1] This Rule applies to a trial before a jury, judge, administrative law judge or arbitrator. This Rule does not apply to other adversarial proceedings. This Rule also does not apply in non-adversarial proceedings, as where a lawyer testifies on behalf of a client in a hearing before a legislative body.

[2] A lawyer's obligation to obtain informed written consent* may be satisfied when the lawyer makes the required disclosure, and the client gives informed consent* on the record in court before a licensed court reporter or court recorder who prepares a transcript or recording of the disclosure and consent. See definition of "written" in Rule 1.0.1(n).

[3] Notwithstanding a client's informed written consent,* courts retain discretion to take action, up to and including disqualification of a lawyer who seeks to both testify and serve as an advocate, to protect the trier of fact from being misled or the opposing party from being prejudiced. See, e.g., *Lyle v. Superior Court* (1981) 122 Cal.App.3d 470 [175 Cal.Rptr. 918].

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 5-210)

Rule 3.7 [5-210] MemberLawyer as Witness

- (a) A memberlawyer shall not act as an advocate ~~before a jury which will hear testimony from the member~~ in a trial in which the lawyer is likely to be a witness unless:
- (A) ~~The~~ (1) the lawyer's testimony relates to an uncontested issue or matter; ~~or~~
 - (B) ~~The~~ (2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or
 - (C) ~~(3) The member has~~ (3) the lawyer has obtained informed, written consent* ~~off from~~ the client. If the memberlawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the memberlawyer is employed ~~and shall be consistent with principles of recusal.~~
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm* is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

~~Discussion:~~ Comment

~~Rule 5-210 is intended to apply to situations in which the member knows or should know that he or she ought to be called as a witness in litigation in which there is a jury. This rule is not intended to encompass situations in which the member is representing the client in an adversarial proceeding and is testifying before a judge. In non-adversarial proceedings, as where the member testifies on behalf of the client in a hearing before a legislative body, rule 5-210 is not applicable.~~

~~Rule 5-210 is not intended to apply to circumstances in which a lawyer in an advocate's firm will be a witness.~~

[1] This Rule applies to a trial before a jury, judge, administrative law judge or arbitrator. This Rule does not apply to other adversarial proceedings. This Rule also does not apply in non-adversarial proceedings, as where a lawyer testifies on behalf of a client in a hearing before a legislative body.

[2] A lawyer's obligation to obtain informed written consent* may be satisfied when the lawyer makes the required disclosure, and the client gives informed consent,* on the record in court before a licensed court reporter or court recorder who prepares a transcript or recording of the disclosure and consent. See definition of "written" in Rule 1.0.1(n).

[\[3\] Notwithstanding a client's informed written consent,* courts retain discretion to take action, up to and including disqualification of a lawyer who seeks to both testify and serve as an advocate, to protect the trier of fact from being misled or the opposing party from being prejudiced. See, e.g., *Lyle v. Superior Court* \(1981\) 122 Cal.App.3d 470 \[175 Cal.Rptr. 918\].](#)

V. RULE HISTORY

Prior to current rule 5-210, the issue of an attorney acting as a witness was first included in the 1975 rule concerning a lawyer's withdrawal from employment.

Operative January 1, 1975, rule 2-111(A)(4) and (5) provided as follows:

Rule 2-111. Withdrawal from Employment

(A) In general.

* * * * *

(4) If upon or after undertaking employment, a member of the State Bar knows or should know that he or a lawyer in this firm ought to be called as a witness on behalf of his client in litigation concerning the subject matter of such employment he shall withdraw from the conduct of the trial and his firm may continue the representation and he or a lawyer in his firm may testify in the following circumstances:

(a) If the member's testimony will relate solely to an uncontested matter;
or

(b) If the member's testimony will relate solely to a matter of formality and there is not reason to believe that substantial evidence will be offered in opposition to the testimony; or

(c) If the member's testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client;
or

(d) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

(5) If, after undertaking employment in contemplated or pending litigation, a member of the State Bar learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

The 1975 rule appears to be derived from the ABA Model Code of Professional Responsibility, DR 5-102 (A) and (B). Although the 1972 final report of the State Bar's Special Committee to Study the ABA Code of Professional Responsibility lists those Model Code sections as provisions that the special committee was not recommending for adoption, rule 2-111(A)(4) and (5) were a part of the rules adopted by the State Bar Board of Governors on June 22, 1974 and submitted to the Supreme Court for approval on August 15, 1974. (See *In re Proposed New Rules of Professional Conduct*, Supreme Court case number BM3664, order approving proposed rules filed December 31, 1974.)

Operative November 1, 1979, former rule 2-111 was revised. There were various revisions but two main changes in duties. The first one was to strike all references to "a lawyer in the member's firm," leaving the rule to regulate only the conduct of the member who was representing the client. The explanation for this revision was as follows:

During a trial before a jury, the danger to the appearance of impropriety or confusion is minimal where one member of the firm is called to testify on behalf of the client and another member conducts the trial. Our adversary system and rule of evidence providing for testing the credibility of witnesses and for impeaching a witness for interest in the outcome of litigation protect against any such abuse. Any confusion on the part of the jury can be cured by instructions.

(See Supplemental Report and Recommendation of the Board Committee on Lawyer Services – Proposed Amendments to Rule 2-111(A)(4), Rules of Professional Conduct (Withdrawal from Employment – Lawyer Acting as Witness), February 5, 1979, Appendix A, at p. 1. A copy is on file with the State Bar's Office of Professional Competence.)

The second main amendment operative in 1979 was to require that the member obtain the "written consent of the client" after the client has been fully advised about the implications of the lawyer's dual role and after the client has been afforded a "reasonable opportunity to seek the advice of independent counsel on the matter." These changes further provided that the written consent in a civil case should be filed with the court no later than the commencement of trial and in a criminal case, the consent need not be filed with the court but the attorney has the duty, before testifying, of satisfying the court that the consent has been obtained. Also regarding criminal matters, a new paragraph (D) was added providing that a member who is "representing the People" may obtain requisite consent from the "head of the particular office representing the People" and so long as continued representation is "not inconsistent with principles of recusal." These amendments were made in response to the Supreme Court's decision in *Comden v. Superior Court* (1978) 20 Cal.3d 906. In this case, the Supreme Court cited rule 2-111(A)(4) and held that the authority of a trial court to disqualify an attorney where the attorney knows or should know that the attorney ought to be called as a witness on behalf of the attorney's client is not limited to the breaches of standards of conduct for which discipline may be imposed. The written consent protocol was intended to protect a client's right to choice of counsel and to mitigate the potential for tactical use of a motion to disqualify notwithstanding the lawyer's

compliance with the rule. (See Supplemental Report and Recommendation of the Board Committee on Lawyer Services – Proposed Amendments to Rule 2-111(A)(4), Rules of Professional Conduct (Withdrawal from Employment – Lawyer Acting as Witness), February 5, 1979, Attachment 8. A copy is on file with the State Bar’s Office of Professional Competence.)

Operative May 27, 1989, former rule 2-111 was renumbered as rule 3-700 and the issue of an attorney as a witness in a client’s matter was placed in a new standalone rule, rule 5-210 (Member as Witness). The provisions of this new rule were streamlined and two discussion paragraphs were added. There were two main changes in duties. First, the scope of the rule was narrowed to only those situations in which the attorney acts as a witness before a jury. Second, the distinction as to whether the attorney would be testifying on behalf of the client or other than on behalf of the client was deleted. In either situation, as revised, the attorney was permitted to continue in the representation and testify if the rule’s requirements were satisfied. The explanation of these changes was as follows:

Proposed rule 5-210 specifies the member’s duties when called upon to testify while acting as an advocate in the same proceeding. As this is a distinct topic, it was determined to remove it from current rule 2-111, which deals with withdrawal from and termination of employment, and to create a separate rule which deals only with the member as witness. This division will make it easier to locate the rule.

Rule 5-210 removes the distinction found in rule 2-111(A)(4) and (5) as to whether the member is testifying on behalf of the client or other than on behalf of the client. Here, in either case, the member may continue the representation and testify if the client gives an informed written consent, if the testimony relates to an uncontested matter or if the testimony relates to the nature and value of legal services in the case.

Rule 5-210 is limited to those situations in which the member acts as an advocate and testifies before a jury. Historically, the harm sought to be prevented by rules of this type is that it will be difficult or impossible for the trier of fact to be able to differentiate between the roles of advocate and of witness. Concern about this potential problem is well-founded when the advocacy and testimony are before a jury. The potential for this harm is not present if the advocacy and testimony are before a judge. Presumably, a judge is able to accommodate the various roles the attorney will play. The rule as proposed reflects this view.

(See of Bar Misc. No. 5626, “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” December 1987 at pp. 31-32.)

Rule 5-210 was last revised operative September 14, 1992. No substantive changes were made. A comma was deleted in paragraph (C) and the discussion paragraphs were conformed to the use of defined terms for “member” and “lawyer.” (See “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” December 1991, Supreme Court number 24408, at pp. 19 - 20.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule and its Comments.

RRC Response: No response required.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, six public comments were received. All six comments agreed with the proposed Rule. A public comment synopsis table, with the Commission’s responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. A client’s right to choice of counsel.

The restrictions imposed by rule 5-210 reflects a strong interest in the fair administration of justice. (See e.g., *United States v. Prantil* (9th Cir.1985) 764 F.2d 548, 553.) However, this public policy should be balanced against the important right of a client to be represented by counsel of choice. (See e.g., *Fracasse v. Brent* (1972) 6 Cal. 3d 784, 790; and *Comden v. Superior Court* (1978) 20 Cal.3d 906, 917–918 (dissenting opinion of Justice Manual.)

2. Case law re disqualification and special circumstances for prosecutors.

See Section V above, discussion of potential deficiencies and the cases cited therein.

B. ABA Model Rule Adoptions

The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 3.7: Lawyer as Witness,” revised September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_7.authcheckdam.pdf [Last visited 2/7/17]
- ABA Model Rule 3.7 is the counterpart to current rule 5-210. There are two key differences between the current California rule and the Model Rule. First, rule 5-210 provides that the lawyer may obtain the client’s informed written consent to act as a witness. Second, rule 5-210 is limited to cases presented to a jury while Model Rule 3.7 applies to any trial.
- Thirty-seven jurisdictions have adopted Model Rule 3.7 verbatim.¹ Twelve jurisdictions have adopted a slightly modified version of Model Rule 3.7.² Two jurisdictions have adopted a substantially different version of Model Rule 3.7.”³

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

A. Concepts Accepted (Pros and Cons):

1. Expand the scope of the current rule to encompass bench trials. The current rule is limited by its terms to lawyer conduct in connection with a jury trial. The proposed rule would apply to both bench and jury trials. It would not apply to other adversarial proceedings or non-adversarial proceedings.
 - Pros: The public protection the rule is intended to foster applies equally to bench trials. A client’s interest is promoted by requiring lawyers to obtain the client’s informed written consent where required by the rule. The nature and extent of the disclosure might vary between a bench and jury trial setting, but that does not alter the benefits of requiring client consent. Comments from OCTC and the group of law professors support this broader public protection. In addition, the rule’s application to both jury and non-jury trials is the standard in the majority of jurisdictions that have adopted Model Rule 3.7.

¹ The thirty-seven jurisdictions are: Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

² The twelve jurisdictions are: Arkansas, District of Columbia, Florida, Georgia, Mississippi, New York, North Dakota, Ohio, Oregon, South Dakota, Virginia, and Washington.

³ The two jurisdictions are: California and Texas.

- Cons: Judges should be presumed to be sufficiently experienced and sophisticated to distinguish the various roles that a lawyer might play in a trial. There is no evidence that in the case of bench trials, clients have not been adequately protected by the lawyer's duty to communicate a significant development. Mandating informed written consent for bench trials might lead to potential time-consuming tactical disqualification motions where the consent was not obtained despite there being no evidence of the client being prejudiced.
2. Clarify the trigger for rule. The current rule merely refers to situations where testimony will be heard from a member. The proposed rule would, instead, refer to situations where a lawyer is "likely to be a necessary witness."
- Pros: The revised language is clearer than the current language by focusing on the likelihood and necessity of a lawyer acting as a witness. This formulation also promotes foresight in recognizing and, responding to, an attorney as witness issue. In addition, this recommended standard is the rule in the majority of jurisdictions that have adopted Model Rule 3.7.
 - Cons: There appears to be no known problem with the language used in the current rule.
3. Clarify that both an "uncontested matter" and an "uncontested issue" fall within one of the limited exceptions. In describing one of the permitted circumstances for a lawyer to act as a witness, the current rule refers to an "uncontested matter," while Model Rule 3.7 refers to an "uncontested issue."
- Pros: Revising the rule language to include both terms should avoid an overly narrow interpretation of this exception. Using both terms is preferable in part because "uncontested issue" alone might be read to exclude a lawyer's uncontested testimony about a different or related legal case or transaction. The revised language clarifies that a discrete uncontested issue as well as an uncontested matter are within the exception.
 - Cons: The broader interpretation appears to be implied in the use of the current term "uncontested matter" so there is no compelling need for this change.
4. Address the concept of testimony by other lawyers in the advocate's firm in the black letter of the rule, rather than in a Comment. The current rule has two Discussion paragraphs, one of which is a single sentence stating that the rule "is not intended to apply to circumstances in which a lawyer in an advocate's firm will be a witness." The proposed rule would relocate this concept to be a part of the black letter text.
- Pros: Placing the concept in the black letter text highlights the limited scope of the rule. In addition, placing the concept in the text is the standard in the majority of jurisdictions that have adopted Model Rule 3.7.

- Cons: There is no reason to change the approach of the current rule, which includes this limitation on the rule's intended scope in its Discussion paragraphs.
5. Include a Comment clarifying that the rule is limited to discipline and does not also govern civil disqualification. Current rule 5-210 does not address the authority of a judicial officer to disqualify a lawyer for acting as a witness in a client's matter. Case law on this issue is not necessarily coextensive with the rule. (See *Comden v. Superior Court* (1978) 20 Cal.3d 906, *Smith, Smith & Kring v. Superior Court (Oliver)* (1997) 60 Cal.App.4th 573, 579-582 and *Colyer v. Smith* (1999) 50 F.Supp.2d 966.) Compare *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197 [135 Cal.Rptr.3d 545] (Applying Model Rule 3.7 rather than rule 5-210 in support of court's decision to disqualify lawyer-witness).
- Pros: The rules are minimum standards of lawyer discipline. Courts have discretion in considering the rules when resolving public policy issues relating to disqualification, but a rule should not purport to bind a court's discretion in this area. The proposed Comment is consistent with current case law, which does not limit disqualification to situations falling within the scope of the disciplinary rule. Including the proposed Comment provides notice that, in connection with disqualification, lawyers need to look at relevant case law as well as the rule.
 - Cons: That disqualification case law and the rule are not coextensive may lessen lawyer understanding of, and compliance with, the rule, and lessen the predictability of disqualification rulings. There is no reason lawyers or Courts should have to look beyond a rule adopted by the Board and approved by the Supreme Court.

B. Concepts Rejected (Pros and Cons):

1. Include a statement that the rule represents a public policy determination in this area of lawyer conduct and governs civil disqualification as well as disciplinary issues. See discussion under "Concepts Accepted," Section IX.A.5.
 - Pros: See Cons under "Concepts Accepted," Section IX.A.5.
 - Cons: See Pros under "Concepts Accepted," Section IX.A.5.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. The changes to paragraph (a) are substantive. (See Section IX.A, above.)

2. All other changes are non-substantive. (See Section IX.D, below.)

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term “lawyer” for “member”.
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. Moving the concept of testimony by other lawyers in the advocate’s firm to the black letter text is a non-substantive clarifying change. (See Section IX.A.4, above.)

E. Alternatives Considered:

1. The main alternative considered was retaining the scope of the current rule that is limited to jury trials. (See Section IX.A.1, above.)

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 3.7 [5-210] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 3.7 [5-210] in the form attached to this Report and Recommendation.

Proposed Rule 3.7 [5-210] Lawyer as Witness
Synopsis of Public Comments

TOTAL = 6 **A = 6**
D = 0
M = 0
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-32i	Law Professors (Zitrin) (07-25-16)	Yes	A	3.7	Agree that lawyers should be allowed to testify on behalf of their clients with the clients' informed consent.	No response required.
X-2016-43z	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-18-16)	Yes	A	3.7	COPRAC supports the adoption of proposed Rule 3.7.	No response required.
X-2016-52i	Law Professors (Zitrin) (08-24-16)	Yes	A	3.7	See X-2016-32i Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-32i for the Commission's response to the Law Professors' comments.
X-2016-66r	San Diego County Bar Association (SDCBA) (Riley) (09-21-16)	Yes	A	3.7	We support and approve the broader prohibition of the lawyer/advocate as witness than in current Rule 5-210 and believe it should apply as well to trials before a judge, administrative law judge or arbitrator as well as a jury (the current rule).	No response required.
X-2016-68i	Law Professors (Zitrin) (09-21-16)	Yes	A	3.7	See X-2016-32i Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-32i for the Commission's response to the Law Professors' comments.
X-2016-ao	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A	3.7	OCTC supports this rule and its Comments.	No response required.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**PROPOSED RULE OF PROFESSIONAL CONDUCT 3.8
(Current Rule 5-110)
Special Responsibilities of a Prosecutor**

EXECUTIVE SUMMARY

Proposed new rule 3.8 (Special Responsibilities of a Prosecutor) amends current rule 5-110 (Performing the Duty of a Member in Government Service) and addresses the duties of government lawyers, including a criminal prosecutor. In particular, the proposed rule states that it is the responsibility of a criminal prosecutor to make timely disclosure to the defense of exculpatory information.

Rule As Issued For 90-day Public Comment

At its November 20, 2015 meeting, the Board considered and granted a Commission request to authorize proposed amendments to current rules 5-110 and 5-220 (Suppression of Evidence) for a 90-day public comment period, and that the processing of these proposed amendments be prioritized and handled separately from the Commission's comprehensive proposed amendments to the rules. After the conclusion of the 90-day public comment period, which included a public hearing on February 3, 2016, the Commission met on March 31 and April 1, 2016 to consider all of the public comments received. In response to the public comments, the Commission further revised proposed rule 5-110¹ and, at the Board's May 13, 2016 meeting, the Board authorized an additional 45-day public comment period to seek input on these changes.

The 45-day public comment period ended on July 1, 2016. The Commission considered the public comments received at its meeting on August 26, 2016. Following discussion, no changes were made to the proposal and the Commission voted to recommend Board adoption. The Board considered the Commission's recommendation at the Board's meeting on October 1, 2016. After a presentation by the Commission and oral comments from interested persons who attended the Board's meeting, the Board voted to adopt the Commission's proposed rules as recommended. State Bar staff also was directed to prepare a petition for submitting the proposed rules to the Supreme Court of California for approval. Board adopted amendments to the rules do not be binding and operative unless and until they are approved by the Supreme Court of California. (See Business and Professions Code sections 6076 and 6077.) State Bar staff submitted the proposed amended rules to the Supreme Court on January 9, 2017 (Supreme Court case number S239387).

The Board's action to adopt proposed amended rules 5-110 and 5-220 on an expedited basis as rule revisions that fit the framework of the current rules does not obviate the need for the Commission to prepare versions of those rules for inclusion in the Commission's recommendation for comprehensive amendments to the entire rules because the Commission is recommending a new rule numbering system patterned on the Model Rules as well as other formatting and style changes that impact the entire rules.

In addition, the final decision to approve and implement proposed amended rules 5-110 and 5-220 rests with the Supreme Court. The Supreme Court might determine that the proposed

¹ Proposed amended rule 5-220 was not modified by the Commission following consideration of public comment. That proposal would remain simply the addition of a Discussion section sentence stating: "See rule 5-110 for special responsibilities of a prosecutor."

amendments to rule 5-110 should be implemented together with the comprehensive rule revisions and not on a separate expedited basis. Accordingly, the Commission has prepared a version of proposed amended rule 5-110 formulated as a proposed rule 3.8 that could be acted on by the Supreme Court and implemented as a part of the State Bar's comprehensive revisions that are presently under consideration. Proposed rule 3.8 is substantively identical to proposed amended rule 5-110 and is summarized in the Board materials at the State Bar website link below.

<http://board.calbar.ca.gov/Agenda.aspx?id=11335&tid=0&show=100011596&s=true#10018785>

Finally, even if the Supreme Court determines to implement amendments on an expedited basis, at the subsequent time when the State Bar's comprehensive revisions are considered by the Court, a version of amended rule 5-110 renumbered as rule 3.8 (and conformed to the format and style of the new rules) would be appropriate for consideration by the Court.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made non-substantive stylistic edits and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 3.8 [5-110]

Commission Drafting Team Information

Lead Drafter: Toby Rothschild

Co-Drafters: George Cardona, Karen Clopton, Joan Croker, Mark Tuft

I. CURRENT ABA MODEL RULE

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting 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, such as the right to a preliminary hearing;
- (d) 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 and to the tribunal all unprivileged mitigating information known to the prosecutor, 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;
 - (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) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent 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 or this Rule.

- (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.

Comment

[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. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] 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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard 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. Consistent with the objectives of Rules 4.2 and 4.3, 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.

[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. Necessary steps may

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 sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 3.8 [5-110]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 3.8 [5-110]

Vote: 11 (yes) – 1 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 3.8 [5-110] Special Responsibilities of a Prosecutor

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.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 5-110)

Rule 3.8 [5-110] ~~Performing the Duty of Member in Government Service~~ Special Responsibilities of a Prosecutor

~~A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.~~

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.

V. RULE HISTORY

Rule 5-110 originated as rule 7-102 and was adopted effective January 1, 1975. Rule 7-102, titled "Performing the Duty of Member of the State Bar in Government Service," was based on ABA DR 7-103. Rule 7-102, as adopted, provided:

A member of the State Bar in government service shall not institute or cause to be instituted criminal charges when he knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, a member of the State Bar in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, he shall promptly so advise the court in which the criminal matter is pending.

In 1986, the State Bar Committee on Professional Responsibility and Conduct ("COPRAC") rules subcommittee studied ABA Model Rule 3.8 but did not recommend it for adoption by the Board. COPRAC noted that California's rule 7-102 already addressed the concept in paragraph (a) of Model Rule 3.8, which prohibits a prosecutor from prosecuting an accused without probable cause. It was also COPRAC's position that the remainder of Model Rule 3.8 addressed the legal and procedural relationship between a prosecutor and the accused. Because this relationship is subject to constant refinement as a result of legislation and constitutional decisions which serve to define it, COPRAC did not recommend adoption of these other provisions.

As part of the comprehensive revision of the Rules of Professional Conduct, rule 7-102 was renumbered 5-110 and became operative on May 27, 1989. No substantive amendments were recommended at that time. The Commission also considered ABA Model Rule 3.8 and again determined that rule 5-110 was preferable to the ABA Model Rule, as it was much broader (the conduct of a member who knows that criminal charges are not supported by probable cause, as well as the conduct of a member who should know such charges are not supported by probable cause, are encompassed by

the proposed rule). In addition, rule 5-110 required a member to advise the court of the lack of probable cause after the case was filed, whereas Model Rule 3.8(a) speaks only of prosecuting a charge, which is ambiguous as to a prosecutor's duty if evidence subsequently shows that probable cause no longer exists. The amendments made in 1989 conformed the revised rule to the definition of a "member" in rule 1-100 and removed references to gender.

A member of the ~~State Bar~~ in government service shall not institute or cause to be instituted criminal charges when ~~he~~ the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, a ~~the member of the State Bar~~ in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, ~~he~~ the member shall promptly so advise the court in which the criminal matter is pending.

(See enclosure 2, "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1987.)

The 1987 amendment was the last revision of rule 5-110.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

OCTC refers the Commission to its prior comments to the Commission and the Board of Trustees about this rule. This rule is currently being considered by the Board of Trustees.

OCTC's foremost concerns regarding any revisions to the Rules of Professional Conduct are that the rules protect the public and are clearly written so as to be understood by the membership and enforceable by OCTC. This comment is offered with those goals in mind.

The proposed rule essentially tracks ABA Model Rule 3.8 and is consistent with established California discipline law. Additional clarification within the proposed Rule would enhance notice to the membership and enforcement by this office.

1. 5-110(B) [3.8(b)] should specify when a prosecutor is obligated to make reasonable efforts to assure that an individual has been advised of his or her right to counsel. In many instances, this responsibility is addressed by police officers at the time of an arrest. A prosecutor may not have knowledge, let alone control, of these events. Police departments in California are generally independent of prosecutors' offices.

Commission Response: The Commission has not made the suggested change. As the commenter notes, the responsibility is typically addressed by police officers at the time of arrest.

2. Regarding 5-110(D) [3.8(d)], the requirement that disclosures be made “timely” is addressed in discussion point 3 which states that a “disclosure’s timeliness will vary with the circumstances: and the rule “is not intended to impose timing requirements different from those established” by law. It may be advisable to clarify and state this concept in the text of the rule.

Commission Response: The Commission has not made the suggested change. The purpose of the comment is to clarify the application of the rule. That is precisely what Comment [3] does.

3. 5-110(D) [3.8(d)] requires disclosure of all information that “tends to negate” guilt or mitigate an offense. Discussion point number 3 then states that the disclosure obligation is “not limited to evidence or information that is material as defined by Brady . . . and its progeny.” The discussion item notwithstanding, language similar to that recommended in the proposed section has been interpreted differently in some jurisdictions. Consequently, it may be advisable to state the Commission’s intention within the text of the rule itself, namely, that a prosecutor’s duty to disclose is broader than that which is material as defined in *Brady*. Additionally, the section should address whether the evidence and information to be disclosed includes that which may impeach or discredit a witness for the prosecution.

Commission Response: The Commission has not made the suggested change. As noted in the response to comment #2, above, the purpose of the comment is to clarify the application of the rule. That is precisely what Comment [4] does. It is not necessary to provide the clarification in the black letter, as the black letter does not state the “materiality” standard in *Brady* and its progeny.

4. Finally, section 5-110(D) states that a prosecutor must disclose all evidence or information “known to the prosecutor.” It is not clear if this language refers to knowledge of the existence of evidence and information, or knowledge that the evidence and information tends to negate the guilt of the accused. Moreover, the section does not address a prosecutor’s duty to search for exculpatory evidence or whether a failure to comply with the section based upon reckless conduct or gross negligence is a basis to find a violation for disciplinary purposes.

Commission Response: The Commission addressed this issue in a previous draft of the Rule.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, fourteen public comments were received. Eight comments agreed with the proposed Rule, three comments disagreed, and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was in support of the proposed rule. That testimony and the Commission's response is also in the public comment synopsis table.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

See Section V on the history of the current rule. In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171; *Price v. State Bar* (1982) 30 Cal.3d 537
- *In the Matter of Brooke P. Halsey, Jr.* (2007), case No. 02-O-10196 [hearing department decision], Supreme Court case No. S181620
- *In the Matter of Jon Michael Alexander* (2014) case No. 11-O-12821, [Review Department Opinion, not published], Supreme Court case No. S219597]
- *Kyles v. Whitley* (1995) 514 U.S. 419, 437
- *In re Brown* (1998) 17 Cal.4th 873, 879
- *United States v. Hanna* (9th Cir. 1995) 55 F.3d 1456, 1461
- *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952
- *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 431 [an act of violating professional standards of behavior is not excused merely because the client or a third party suffers no loss]
- *In re Kline* (2015) 113 A.3d 202
- *In re Feland* (N.D. 2012) 820 N.W.2d 672, 678

See also, Reports and Recommendations of the California Commission for the Fair Administration of Justice, posted at: <http://www.ccfaj.org/rr-pros-official.html> [last visited June 16, 2015].

- Official Report and Recommendations on Reporting Misconduct (October 18, 2007).
- Official Report and Recommendations on Prosecutorial Duty To Disclose Exculpatory Evidence (March 6, 2008).

Regarding statistics cited by the Innocence Project, see Kathleen Ridolfi, Tiffany M. Joslyn & Todd Fries, *Material Indifference: How Courts Are Impeding Fair Disclosure In Criminal Cases*, National Association of Criminal Defense Lawyers (2014), posted at: <http://www.nacdl.org/discoveryreform/materialindifference/>.

B. ABA Model Rule Adoptions

Model Rule 3.8(a), (b), (c) & (f) Adoptions. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 3.8: Special Responsibilities of a Prosecutor,” revised May 6, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8.pdf [Last accessed on 2/7/17].
- Twenty-eight states have adopted Model Rule 3.8, paragraphs (a), (b), (c) and (f) verbatim.¹ Seventeen jurisdictions have adopted a slightly modified version of Model Rule 3.8, paragraphs (a), (b), (c), (d), and (f).² Six states have adopted a version of the rule that is substantially different from Model Rule 3.8, paragraphs (a), (b), (c), (d), and (f).³

Model Rule 3.8(d) Adoptions. Model Rule 3.8(d), which requires a prosecutor to timely disclose to the defense evidence or information that the prosecutor knows “tends to negate the guilt of the accused or mitigate the offense,” is of special concern to the Study Group and so is treated separately in this subpart.

- Forty jurisdictions have adopted Model Rule 3.8, paragraph (d) verbatim.⁴ Eight jurisdictions have a provision that closely tracks the Model Rule language with non-substantive variations.⁵ Two jurisdictions have provisions that employ different language but contain the same substance, or include only part of Model Rule

¹ The twenty-eight states are: Arizona, Colorado, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, West Virginia, and Wyoming.

² The seventeen jurisdictions are: Alabama, Alaska, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Kentucky, Massachusetts, New Jersey, North Dakota, Ohio, Tennessee, Texas, and Vermont.

³ The six states are: California, Georgia, Maine, New York, Oregon, and Wisconsin.

⁴ The forty jurisdictions are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

⁵ The eight jurisdictions are Alabama, Maine, New Jersey, New York, North Dakota, Ohio, South Dakota and Virginia.

3.8(d).⁶ Only California lacks a counterpart to Model Rule 3.8(d). Attached as Attachment 1 is a document showing the variations in the ten jurisdictions that have diverged from the Model Rule.

Model Rule 3.8(e) Adoptions. Model Rule 3.8(e) prohibits a prosecutor from subpoenaing a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless three enumerated conditions are satisfied. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 3.8(e),” revised May 6, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_e.pdf [Last visited 2/7/17]
- Twenty-four jurisdictions have adopted Model Rule 3.8, paragraph (e) verbatim.⁷ Nine jurisdictions have adopted a slightly modified version of Model Rule 3.8, paragraph (e).⁸ Seventeen jurisdictions have not adopted any version of paragraph (e) of the Model Rule.⁹ California also has not adopted any version of paragraph (e).

⁶ The two jurisdictions are D.C. and Georgia. D.C. Rule 3.8(d) and (e) provide that a prosecutor shall not:

(d) Intentionally avoid pursuit of evidence or information because it may damage the prosecution’s case or aid the defense;

(e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

Georgia Rule 3.8(d) is identical to the first clause of Model Rule 3.8(d) but deletes the remainder. It provides that a lawyer shall:

(d) 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.

⁷ The twenty-four jurisdictions are: Alaska, Arizona, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, South Carolina, Tennessee, Washington, and West Virginia.

⁸ The nine jurisdictions are: Massachusetts, Minnesota, New Jersey, North Carolina, Ohio, Rhode Island, South Dakota, Vermont, and Wisconsin.

⁹ The seventeen jurisdictions are: Alabama, Arkansas, Connecticut, District of Columbia, Florida, Hawaii, Maine, Maryland, Michigan, Mississippi, New York, Oregon, Pennsylvania, Texas, Utah, Virginia, and Wyoming.

Model Rule 3.8(g) & (h) Adoptions. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 3.8(g) (h),” revised May 6, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_g_h.pdf
- Two jurisdictions have adopted Model Rule 3.8, paragraphs (g) and (h) verbatim.¹⁰ Eleven jurisdictions have adopted a slightly modified version of Model Rule 3.8, paragraphs (g) and (h).¹¹ Six jurisdictions are studying Model Rule 3.8, paragraphs (g) and (h).¹²

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

A. Concepts Accepted (Pros and Cons):

1. In paragraph (a), provide that a duty of a prosecutor in a criminal case not to prosecute without probable cause includes both a duty not to institute a prosecution as well as not to continue to prosecute.
 - Pros: Paragraph (a) clarifies the scope of prohibited conduct under paragraph (a) and carries forward but streamlines similar language in current rule 5-110. The first Commission proposed similar language. Although the term “prosecutor in a criminal case” is arguably narrower than the current rule’s term “member in government service,” no change in the rule’s scope of coverage should result because only a government lawyer who has prosecutorial powers can institute criminal charges.
 - Cons: The change to the Model Rule language is unnecessary; the word “prosecute” includes both initiating and maintaining a prosecution.
2. In paragraph (a), recommend adoption of a knowledge standard, i.e., the prosecutor must know that the prosecution is not supported by probable cause before the duty to refrain from prosecution is triggered.
 - Pros: The knowledge standard, which is found in the Rule 3.8 counterpart in every other jurisdiction is the appropriate standard for imposing discipline on a prosecutor. “Know” is defined in Model Rule 1.0(f) as “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” By providing that knowledge can be inferred from the circumstances, the

¹⁰ The two jurisdictions are: Idaho and West Virginia.

¹¹ The eleven jurisdictions are: Alaska, Arizona, Colorado, Delaware, Hawaii, New York, North Dakota, Tennessee, Washington, Wisconsin, and Wyoming.

¹² The six jurisdictions are: California, District of Columbia, Nebraska, New Hampshire, Pennsylvania, and Vermont.

intent is to prevent a lawyer from putting his or her head in the sand and claiming not to have known of the facts when the facts would have been obvious given the surrounding circumstances. That would appear to be a sufficiently rigorous standard for Rule 3.8(a). The same definition was recommended by the first Commission and adopted by the Board, and it is anticipated that this Commission will make a similar recommendation. (See, e.g., Report & Recommendation for Proposed Rule 4.2 [2-100], which also contemplates a similar definition.) The standard in current rule 5-110, “knows or should know,” is unnecessary for the same reasons that a “grossly negligent” or “reckless” standard is unnecessary. (See Section IX.B.1, below.)

- Cons: Current rule 5-110, which similarly addresses a prosecutor’s duty not to prosecute criminal charges when probable cause is absent, has a “knows or should know” standard. There is no compelling reason to change that standard.
- Note: See also Section IX.B.1, below, concerning the recommended rejection of a “reckless” or “gross negligence” standard.

3. Recommend adoption of Model Rule 3.8(b).

- Pros: The revision accurately describes the law, i.e., that the prosecutor’s obligation applies when a person has a right to counsel under the Sixth Amendment (when adversary judicial criminal proceedings have been initiated by way of formal charge, preliminary hearing, indictment, information, or arraignment) or (as Texas and Wyoming have made clear) under *Miranda*’s prophylactic procedures derived from the Fifth Amendment (when conducting a custodial interrogation). (See Niki Kuckes, *Appendix A: Report to the ABA Commission on Evaluation of the Rules of Professional Conduct Concerning Rule 3.8 of the ABA Model Rules of Professional Conduct: Special Responsibilities of A Prosecutor the State of Rule 3.8*, 22 Geo. J. Legal Ethics 463, 477-79 (2009).) Limiting the paragraph as indicated is appropriate in a disciplinary rule.
- Cons: None identified.

4. Recommend adoption of Model Rule 3.8(c), modified to delete a reference to preliminary hearings, and to add a qualification where a court has approved the accused’s pro per appearance. This recommendation also includes the recommended adoption of proposed Comment [2], which is based on Model Rule Comment [2], modified to reflect the proposed changes to the black letter.

- Pros: The *pro per* qualifying language appears in a Comment to the Model Rule; similar to the first Commission, this Commission determined it is an appropriate limitation that belongs in the black letter and not a Comment. Deleting the reference to preliminary hearings is necessary because waiver of a preliminary hearing by an unrepresented accused conflicts with Penal Code

§ 860, as interpreted in *In re Jones* (1968) 265 Cal.App.2d 376, 381. The court in *Jones* held that an accused can only waive a preliminary hearing if represented by counsel.

- Cons: None identified.

5. Recommend adoption of Model Rule 3.8(d), which provides a prosecutor must timely disclose to the defense all evidence and information known to the prosecutor that tends to negate guilt or mitigate the offense. In addition to the recommended adoption of the substance of Model Rule 3.8(d), the Commission recommends that the provision include an express knowledge standard that applies not only to the prosecutor's "knowledge" of the *existence* of evidence, but also to the prosecutor's "knowledge" of the *legal consequences* such evidence would have on the proceeding as to guilt or sentencing of the accused. This recommendation also includes the recommended adoption of proposed Comment [2], which is intended to clarify that paragraph (d)'s scope is intended to be broader than *Brady's* obligations.

- Pros: The Model Rule language is intended to impose a duty on prosecutors that is broader than *Brady's* materiality standard. The provision is arguably more closely aligned with the current position of OCTC, which has informed the Commission that it can discipline a prosecutor for failure to disclose exculpatory evidence without proving materiality:

If a goal of a new rule is to ensure disclosure of all potentially exculpatory or impeachment material, OCTC submits that a new rule should not require proof that the failure to disclose potentially exculpatory or impeachment information impacted the fairness of the criminal proceedings to a degree sufficient to constitute a *Brady* violation. Requiring a level of unfair prejudice is commonly understood as that which is "material" to the outcome of a trial and, consequently, a "materiality" component to a new rule would be irrelevant. Consistent with disciplinary case law, the issue is whether the prosecutor complied with his or her ethical obligations, not whether a failure to do so caused significant harm.¹³ (See *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 431 [an act of violating professional standards of behavior is not excused merely because the client or a third party suffers no loss].) Some, but not all, jurisdictions share this view. (See *In re Kline* (2015) 2015 A.3d ___, 2015 WL 1638151 and *In re Feland* (N.D. 2012) 820 N.W.2d 672, 678.)

See OCTC April 20, 2015 Memo to Commission, Section H., at p. 4.

Further, the Model Rule language also aligns with the position taken by

¹³ The nature and extent of the impact of a failure to disclose required material would remain an issue affecting the level of discipline to be imposed for a violation.

the Innocence Project in its submissions to the Commission, the concept being that a prosecutor's determination of whether evidence or information is exculpatory or mitigating should not depend on its materiality under the Constitutional *Brady* standard because materiality often can only be determined after the fact. Instead, the disclosure should occur at the trial court level before a falsely accused defendant suffers the harm of a wrongful conviction. The Model Rule standard, which requires disclosure of evidence and information "that tends to negate the guilt of the accused or mitigate the offense" is intended to accomplish that objective.¹⁴

The inclusion of an express knowledge standard that applies not only to the prosecutor's "knowledge" of the *existence* of evidence, but also to the prosecutor's "knowledge" of the *legal consequences* such evidence would have on the proceeding as to guilt or sentencing of the accused should facilitate a prosecutor's appreciation of the rule's obligations and to respond to concerns that a prosecutor might face disciplinary charges without having a culpable mental state.

Finally, the provision provides for an exception when the prosecutor believes a protective order is required, for example, to protect a witnesses or the public interest. (See also Comment [4], below.)

- Cons: Although the ABA has opined that the Model Rule language is intended to be broader than *Brady*, the jurisdictions that have addressed the issue are split on whether the provision is broader than,¹⁵ or coextensive with *Brady*.¹⁶

¹⁴ See April 10, 2015 Letter from Professors Laurie Levenson and Barry Scheck to Commission, at page 2 ("Rule 3.8(d) was enacted by the American Bar Association to obviate the cognitively difficult problem prosecutors face in complying with the *Brady v. Maryland* standard which requires them to determine *before* a trial has been held whether undisclosed information will be considered "material" by an appellate court many years later. Rule 3.8(d) is designed to be broader and independent of *Brady*, requiring "timely" and prophylactic disclosure of all information that *could be Brady* or impeachment evidence (anything that "tends to negate guilt or mitigate punishment") in order to make sure *Brady* violations do not occur.")

¹⁵ The District of Columbia, North Dakota, and the U.S. District Court for the District of Nevada have evaluated the scope of the pertinent ethical rule in their jurisdiction and concluded it is broader than *Brady*. (See *In re Kline*, 113 A.3d 202, 213 (D.C. 2015) [holding that Rule 3.8(e) requires a prosecutor to disclose all potentially exculpatory information in his or her possession regardless of whether that information would meet the materiality requirements of *Bagley*, *Kyles*, and their progeny]; *In re Disciplinary Action Against Feland* (N.D.2012) 820 N.W.2d 672, 678 [holding that a prosecutor's ethical obligation to disclose evidence to the defense is broader than the duty under *Brady* or the criminal discovery rule]; *United States v. Acosta* (D. Nev. 2005) 357 F.Supp.2d 1228 [ordering the government, over objection, to disclose to the defense 60 days before trial all evidence that negates guilt or mitigates the crime, and concluding that the *Brady* standard of materiality makes sense only in the context of appellate review].) Virginia has issued an ethics opinion to the same effect. (See Virginia Legal Ethics Comm. Op. 1862 (2012) ("Timely Disclosure of Exculpatory Evidence and Duties to Disclose Information in Plea

In addition, the Commission is unaware of any case in which a prosecutor has been disciplined absent a showing of materiality. It is questionable whether Rules of Professional Conduct that are intended to function as minimum standards for discipline should include what is arguably an aspirational standard for the breach of which discipline is not imposed. In addition, as several public comments to the first Commission asserted, an ethical rule that effectively imposes on prosecutors discovery obligations beyond those imposed by statutory and constitutional requirements may conflict with statutory provisions adopted by California Prop. 115, which added Penal Code Chapter 10, commencing with Section 1054, which defines discovery obligations in criminal cases, and which begins with a section (Section 1054)

Negotiations”).) The New York State District Attorney’s Association has issued a best practices manual that clarifies that 3.8(d) disclosure is independent and broader than “materiality.” (See *The Right Thing: Ethical Guidelines for Prosecutors*, DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK at 12 (2012), available at <http://www.daasny.com/wp-content/uploads/2014/08/Ethics-Handbook-9.28.2012-FINAL1.pdf>.) 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).

¹⁶ Courts that have found Model Rule 3.8(d) coextensive with *Brady* are: *In re Attorney C* (Colo. 2002) 47 P.3d 1167 [holding that Rule 3.8(d) contains a “materiality standard” and rejecting the hearing board’s conclusion that the rule incorporates a “broader and more encompassing” standard]; *In re Riek* (Wis. 2013) 834 N.W.2d 384 [rejecting the Office of Lawyer Regulation’s argument that “SCR 20:3.8(f)(1) requires disclosure of favorable evidence or information without regard to its ‘materiality’” and instead construing the rule “in a manner consistent with the scope of disclosure required by the United States Constitution, federal or Wisconsin statutes, and court rules of procedure”]; *Disciplinary Counsel v. Kellogg-Martin* (Ohio 2010) 923 N.E.2d 125 [holding that “DR 7-103(B) imposes no requirement on a prosecutor to disclose information that he or she is not required to disclose by applicable law, such as *Brady v. Maryland* or Crim.R. 16”]; *State ex rel. Okla. Bar Ass’n v. Ward* (Okla. 2015) 2015 OK 48 [construing ORPC Rule 3.8(d) “in a manner consistent with the scope of disclosure required by applicable law”]; *United States v. Weiss* (D. Colo 2006) 2006 U.S. Dist. LEXIS 45124 [rejecting defendants’ argument that the rules of professional conduct mandate “that the Government’s disclosure obligation is higher than the standards set in *Brady* and *Giglio* and holding that disclosure “is only necessary for information that is material”].

See also *In re Jordan* (La. 2005) 913 So. 2d 775 [holding that Respondent violated Rule 3.8(d) by “fail[ing] to produce evidence which was clearly exculpatory” and that Respondent “should have resolved this issue in favor of disclosure”]. *Jordan* case has been cited by courts both for the proposition that a prosecutor’s ethical are broader than those imposed by law and that a prosecutor’s duty merely parallels that laid out in *Brady* and its progeny. (See *Riek*, *supra* at pp. 390, citing *Jordan*, *Kellogg-Martin*, and *Attorney C* for the proposition that “several jurisdictions rendered decisions construing their equivalent of SCR 20:3.8(f) consistent with the requirements of *Brady* and its progeny.”) (Compare *In re Kline*, *supra*, 113 A.3d at p. 211 [disagreeing “that a fair reading of [Jordan] supports the [Riek] court’s decision”].)

See also Steven Koppell, *An Argument Against Increasing Prosecutors’ Disclosure Requirements Beyond Brady*, 27 Geo. J. Legal Ethics 643 (2014) [arguing that ABA Formal Ethics Opinion 09-454 (Prosecutor’s Duty to Disclose Evidence and Information Favorable to the Defense) “is in conflict with *Brady* and should not be implemented in any state.”].

which states that the chapter “shall be interpreted” to, among other things, “provide 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.” (Penal Code Section 1054(e).) Penal Code Section 1054.1(e) requires prosecutors to disclose to the defense “any exculpatory evidence” that is “in the possession of the prosecuting attorney or if the prosecutor knows it to be in the possession of the investigating agencies.” Penal Code Section 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.”

6. Recommend adoption of Model Rule 3.8(e).

- Pros: It is an important public policy to protect the lawyer-client relationship. (Compare proposed Rule 4.2 [2-100].) Subpoenaing a lawyer to present evidence in a criminal matter about a client will necessarily drive a wedge between them and destabilize the relationship.
- Cons: First, California has not had a rule similar to this, but to the knowledge of the Commission unwarranted subpoenas to attorneys have not posed a significant issue, either in civil or criminal cases. Second, the ability to issue subpoenas to attorneys, and the issues posed by such subpoenas are not unique to prosecutors and do not flow from the special obligations or responsibilities of prosecutors, making this an unusual addition to a rule supposedly unique to prosecutors. Third, subparagraphs (2) and (3) of Model Rule 3.8(e) create a unworkable standard that would be virtually impossible to satisfy: the information must be “essential” to the investigation and there must be “no other feasible alternative.”

7. Recommend adoption of Model Rule 3.8(f), which imposes certain additional duties on a prosecutor with respect to extrajudicial statements, but modify the paragraph to eliminate an imprecise description of duties in Rule 3.6 (Trial Publicity) and limit the prosecutor’s duty to monitoring statements of persons under the prosecutor’s supervision or direction.

- Pros: Extrajudicial statements made by the prosecutor’s subordinates could prove as damaging as a prosecutor’s statements to an accused’s ability to obtain a fair trial. This provision recognizes that and requires that a prosecutor exercise reasonable care to prevent such statements.
- Cons: A specific provision in this rule is unnecessary. A prosecutor’s statements would be regulated under Rule 3.6 [current rule 5-120] and the prosecutor’s obligation to ensure that subordinates’ conduct conform to those

obligations is contained in Rule 5.1 (Responsibilities of a Partner or Supervisory Lawyer) and 5.3 (Responsibilities Regarding Nonlawyer Assistance).

8. Recommend adoption of Model Rule 3.8(g) and (h), which impose certain obligations on a prosecutor with respect to post-conviction disclosures. This recommendation also includes the recommended adoption of proposed Comments [7], [8], and [9].

- Pros: Paragraph (g) and all of its subparagraphs are identical to Model Rule 3.8(g). The ABA amended Model Rule 3.8 in February 2008 by adding paragraphs (g) and (h) to impose on prosecutors a duty to take certain steps when they know of “new, credible and material evidence” that indicates a convicted defendant was innocent of the crime for which the defendant was convicted. As to the contention that paragraph (g) presents a trap for an unwary prosecutor, the “new, credible and material” modifier was specifically added to the proposed New York rule on which paragraph (g) is based to create a higher standard for triggering the prosecutor’s duty of disclosure. Similar to the language in paragraph (d), the language used in paragraph (g) encourages prosecutors to err on the side of disclosure in close cases, but does not require the disclosure of all exculpatory information of which the prosecutor might become aware.
- Cons: Model Rule 3.8(g)(1) should not be included because it is unclear how a prosecutor whose jurisdiction did not obtain the conviction would know if the information is “new, credible and material creating a reasonable likelihood....” The way the rule is drafted suggests that if a prosecutor knows of information and it turns out later on that the information was “new, credible and material information creating a reasonable doubt,” the prosecutor may be subject to discipline unless the prosecutor always discloses to a court or appropriate authority *any* information he or she receives.

9. Recommend adoption of Comment [1], which is derived from MR 3.8, Cmt. [1] and sets forth the foundational policy underlying the proposed Rule: a prosecutor’s special duty to seek justice and also provides relevant cross-references.

- Pros: Including the foundational policy provides interpretative guidance for the application of the proposed rule. The cross-references to proposed rules 3.1 and 3.4 clarify that all government lawyers remain subject to those rules. (See paragraph 1, “Pros,” above.)
- Cons: None identified.

10. Recommend adoption of Comment [2] concerning paragraph (c).

- Pros: Proposed Comment [2] is based on Model Rule 3.8, Cmt. [2], with several changes, and provides guidance on how paragraph (c) should be applied. As to the changes, the first two sentences to the Model Rule comment have been deleted because they explain language in the Model Rule that has been deleted because the language conflicts with California law. (See paragraph 4, above.) In addition, the Model Rule exception governing an accused who is appearing *in propria persona* with approval of the tribunal has been moved into the black letter rule. (*Id.*) Finally, the last sentence has been added to clarify the application of paragraph (c), i.e., that while a complete waiver of an unrepresented accused right to a preliminary hearing is prohibited under California, a reasonable waiver *of time* for a preliminary hearing is not.
- Cons: None identified.

11. Recommend adoption of proposed Comment [3], which clarifies the scope of paragraph (d).

- Pros: Several jurisdictions have interpreted the language of Model Rule 3.8(d) to be coextensive with *Brady*. If the recommended adoption of Model Rule 3.8(d) is intended to broaden a prosecutor's disclosure obligations beyond those required by *Brady*, proposed Comment [3] is a necessary clarification to ensure the provision is so interpreted.
- Cons: If the intent of paragraph (d) is to broaden a prosecutor's disclosure duties, that concept belongs in the black letter of the rule itself.

12. Recommend adoption of Comment [4], which is derived from MR 3.8, Cmt. [3].

- Pros: Comment [4], added in response to public comment, clarifies the conditions under which a prosecutor might seek a protective order from a tribunal as provided in paragraph (d).
- Cons: None identified.

13. Recommend adoption of Comment [5], which is derived from MR 3.8, Cmt. [5], as modified, to clarify the application of paragraph (f).

- Pros: The comment provides guidance for applying paragraph (f) by noting the paragraph merely supplements but does not supersede a lawyer's general duties under Rule 3.6 [5-120] with respect to extrajudicial statements, and clarifies that paragraph (f) is not intended to prohibit statements by a prosecutor that comply with paragraphs (b) or (c) of Rule 3.6 [two provisions that identify with specificity extrajudicial statements that a lawyer is permitted

to make]. The second and third sentences of the Model Rule have been deleted because they provide only a vague description of the Rule 3.6 duties.

- Cons: None identified.

14. Recommend adoption of Comment [6], which is derived from MR 3.8, Cmt. [6], as modified, to further clarify the application of paragraph (f).

- Pros: Proposed Comment [6] clarifies that prosecutors are subject to Model Rule 5.1 and 5.3, which impose a duty to supervise subordinate lawyers and nonlawyers, respectively. The last sentence provides guidance on how to comply with the duty to exercise reasonable care to prevent extrajudicial statements of subordinates.
- Cons: None identified.

15. Recommend adoption of Comment [7], which is identical to MR 3.8, Cmt. [7], concerning paragraph (g).

- Pros: Proposed Comment [7] provides guidance on how paragraph (g) should be interpreted and how a prosecutor can comply with its requirements. In particular, it provides a valuable cross-reference to the prosecutor's duties under Rules 4.2 and 4.3 when communicating with a represented and unrepresented person, respectively.
- Cons: None identified.

16. Recommend adoption of Comment [8], which is derived from MR 3.8, Cmt. [8], as modified, concerning paragraph (h).

- Pros: Proposed Comment [8] provides guidance and examples concerning how a prosecutor can comply with his or her duties under paragraph (g). The second sentence of MR 3.8, Cmt. [8] has been revised to delete the term “necessary” on the following grounds: (1) if the steps are “necessary,” then the described steps should be in the blackletter of the rule; (2) the use of the word “necessary” with the conjunction “and” suggests that a prosecutor must at a minimum take each step, not all of which would be necessary under every set of circumstances, i.e., a prosecutor should not have to take every listed step under every possible set of circumstances; (3) using the word “necessary” with the permissive “may” is confusing.
- Cons: The word “necessary” should be retained because a wrongful conviction raises questions about the integrity of the justice system, diminishing confidence in the system. A strong message concerning the “necessary” steps to be taken to remedy such consequences is warranted.

17. Recommend adoption of Comment [9], which is derived from MR 3.8, Cmt. [9].

- Pros: Proposed Comment [9] holds harmless a prosecutor who has determined in good faith paragraphs (g) and (h) are not applicable, even if the determination is subsequently shown to have been in error. Good faith is the appropriate standard for determining whether the safe harbor should be available to a prosecutor who has attempted to comply with the duties imposed under paragraphs (g) and (h).
- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Include a provision that would specify that reckless or grossly negligent failures to comply with the Rule's proscriptions will support a finding of a violation.

- Pros: A criminal prosecutor's duty to disclose exculpatory evidence includes the duty to search for exculpatory evidence. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 437; *In re Brown* (1998) 17 Cal.4th 873, 879; and *United States v. Hanna* (9th Cir. 1995) 55 F.3d 1456, 1461.) Expressly including acts or omissions involving recklessness and grossly negligent behavior will illuminate the duty to search for exculpatory evidence. In addition, this standard would be consistent with the enforcement of most of the Rules of Professional Conduct. As a general rule, a willful violation of the rules occurs when the attorney acted or omitted to act purposefully. That is, he or she knew what he or she was doing or not doing and intended whether to commit the act or to abstain from committing it. (See *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952.) Mere negligence or inadvertence should not be disciplinable. (See 4/20/15 OCTC Memo, at p. 4 which is available upon request.)
- Cons: The appropriate standard is "knowledge," not reckless or gross negligence. (See Section IX.A.1, concerning paragraph (a), above.) It is not accurate that a prosecutor has a "duty to search for exculpatory evidence." Rather, the prosecutor has a duty not to ignore evidence that has been revealed during the criminal investigation. A knowledge standard, which recognizes that knowledge can be inferred from the surrounding circumstances, provides the requisite incentive for a prosecutor to pursue an evidentiary thread that could lead to discovery of exculpatory or mitigating evidence.

2. Include a statement in paragraph (d), that the disclosure obligations in paragraph (d) are not limited to those disclosures required by an accused's constitutional rights.

- Pros: This explanatory provision that delimits the intended scope of proposed paragraph (d), which has been included as proposed Comment [3], belongs in the blackletter.

- Cons: A provision that explains the intended scope of a blackletter rule provision is more appropriately placed in a Comment.
3. Include in paragraph (e) the first Commission’s proposed addition of a “civil proceeding related to a civil matter.”
- Pros: Habeas corpus proceedings are technically civil proceedings that are related to criminal matters.
 - Cons: A habeas proceeding often involves an allegation of ineffective assistance of counsel that would typically require the necessity to take testimony of the defense lawyer in the criminal proceeding. The defense lawyer may not always be willing to cooperate and a subpoena will be necessary. A rule of professional conduct should not interfere with that process.
4. Include as a second sentence in proposed Comment [2] the second sentence in the first Commission’s Comment [2A]: “The disclosure obligations in paragraph (d) apply even if the defendant is acquitted or is able to avoid prejudice on grounds unrelated to the prosecutor’s failure to disclose the evidence or information to the defense.”
- Pros: Clarifies that subsequent events will not excuse a failure of the prosecutor to satisfy the prosecutor’s express obligations under paragraph (d) to disclose exculpatory or mitigating evidence or information.
 - Cons: The sentence, which is not found in either the Model Rule or the rules of any of the jurisdictions that have adopted the Model Rule language, is unnecessary surplusage. The text of the proposed Rule itself will impose obligations that must be complied with and will provide no basis for subsequent events excusing a failure to comply with those obligations.
5. Include Model Rule 3.8, Cmts. [3] and [4], concerning paragraphs (d) and (e), respectively.
- Pros: The Comments provide guidance on applying the referenced paragraphs.
 - Cons: The Comments simply restate the black letter rule.

6. Include the first Commission's proposed Comment [6A].¹⁷

- Pros: The Comment does not explain how to interpret or comply with the Rule but merely refers to other duties under Rule 3.3 (Candor To Tribunal).
- Cons: The Comment provides an important reminder that by withholding exculpatory or mitigating evidence and information, a prosecutor is violating his or her duty to the tribunal.

7. Include the first Commission's proposed Comment [10].¹⁸

- Pros: The Comment belongs in a conflict of interest rule, not in a rule concerning a *current* prosecutor's duties.
- Cons: None identified.

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Paragraph (a) substitutes a knowledge standard for current rule 5-110's standard of "knows or should know". (See Sections IX.A.2 and IX.B.1, above.)
2. Paragraph (b) is a new provision in the Rules. (See Section IX.A.3, above.)
3. Paragraph (c) is a new provision in the Rules. (See Section IX.A.4, above.)
4. Paragraph (d) is a new provision in the Rules, but arguably does not change a prosecutor's duties under current law. (See Sections IX.A.5 and V. and OCTC comments, above.)
5. Paragraph (e) is a new provision in the Rules.
6. Paragraph (f) is a new provision in the Rules.

¹⁷ The proposed comment provided:

[6A] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when that lawyer comes to know of its falsity. (See Rule 3.3, Comment [12].)

¹⁸ The proposed comment provided:

[10] A current or former prosecutor, and any lawyer associated with such person in a law firm, is prohibited from advising, aiding or promoting the defense in any criminal matter or proceeding in which the prosecutor has acted or participated. See Business and Professions Code section 6131. See also Rule 1.7, Comment [16].

7. Paragraphs (g) and (h) are new provisions in the Rules.

D. Non-Substantive Changes to the Current Rule:

1. Substituting the term “lawyer” for “member”.
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California under *pro hac vice* admission (see current rule 1-100(D)(1)) to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. Although a new provision, paragraph (d) is arguably a non-substantive change under current California law. (See Sections IX.A.7 and V. and OCTC comments, above.)

E. Alternatives Considered:

1. Instead of proposed paragraphs (g) and (h), which are based on Model Rule 3.8(g) and (h), an alternative was proposed.¹⁹

¹⁹ The alternative provision would provide:

X. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Messrs. Cardona and Eaton submitted a written dissent. See attached for the full text of the dissent and the Commission's response to the dissent.

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- (g) Upon receipt of evidence that, if true, would show that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
- (1) promptly disclose the evidence to the court or the chief prosecutor for the jurisdiction where the conviction occurred;
 - (2) if the prosecutor prosecuted defendant for the offense, is still employed in the prosecuting jurisdiction, and the evidence appears on its face to be new and credible and to create a reasonable probability that a defendant did not commit an offense of which the defendant was convicted:
 - (i) promptly disclose that evidence to an appropriate court or other authority and to the defendant unless a court authorizes delay in disclosure to the defendant, or
 - (ii) promptly undertake further investigation or review, or make reasonable efforts to cause an investigation promptly to occur. If the prosecutor determines, after prompt investigation or review, that the evidence is not new, not credible, or does not create a reasonable probability that the defendant did not commit an offense of which the defendant was convicted, the prosecutor has no further duties under this Rule. However, if the prosecutor determines that the evidence is new and credible and creates a reasonable probability that the defendant did not commit an offense for which the defendant was convicted, the prosecutor shall undertake the notifications set forth in paragraph (g)(2)(i).

If the prosecutor determines that the evidence constitutes clear and convincing evidence establishing that the defendant was convicted of an offense that the defendant did not commit, the prosecutor shall notify the court of that determination and either move to vacate the conviction or request that the court appoint counsel for an unrepresented indigent defendant to assist the defendant in pursuing efforts to remedy the conviction.

Comment

* * *

[#] The requirement for disclosure set forth in paragraph (g)(1) applies even if the prosecutor receiving the information did not prosecute the defendant for the offense or prosecuted the defendant but is no longer employed in the prosecuting jurisdiction.

[#] Consistent with the objectives of Rules 4.2 and 4.3, disclosure pursuant to paragraph (g)(2)(i) 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. The post-conviction disclosure duty applies to new and credible evidence that creates a reasonable possibility that a defendant did not commit an offense regardless of whether that evidence could previously have been discovered by the defense.

[#] A prosecutor's reasonable independent judgment that evidence is not of such nature as to trigger the obligations of paragraph (g), does not constitute a violation of this Rule even if the judgment is subsequently determined to have been erroneous.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 3.8 [5-110] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed amended Rule 3.8 [5-110] in the form attached to this Report and Recommendation.

**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).

Proposed Rule 3.8 [5-110] Special Responsibilities of a Prosecutor
Synopsis of Public Comments

TOTAL = 14 **A = 8**
 D = 3
 M = 1
 NI = 2

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-12	Loyola Law School Innocence Project (7-22-16)	Y	A	3.8	<p>California is last jurisdiction to adopt such a rule. The rule will help reduce wrongful convictions. It is a fair rule that only requires prosecutors to disclose information known or reasonably should be known to them.</p> <p>The rule will prevent injustice and will actually make prosecutors jobs easier for them.</p>	No response required.
X-2016-16	Santiago, David (8-1-2016)	No	M	3.8	<p>Rule should be expanded to include non-criminal cases. DAs will often prolong cases in search of experts who agree with them.</p> <p>Duty to disclose should also include materials used to impeach DA witnesses or that may undermine the legality of the charge/civil petition being filed.</p>	The rule addresses criminal cases only because of the unique nature of prosecutor's role in such cases. There are other rules that address some of the concerns in civil cases, such as Rules 1.3, 3.2 and 3.4.
X-2016-32j	Law Professors (Zitrin) (07-25-16)	Y	A	3.8	In crafting the excellent Rule 3.8, the commission has understood the duties of the prosecutor as well as the dangers of power that that position holds. Through its clear statements adopting the ABA language and reaffirming the right to counsel while requiring prosecutors to go "beyond <i>Brady</i> " by providing to the defense all <i>information</i> that	No response required.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Proposed Rule 3.8 [5-110] Special Responsibilities of a Prosecutor
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					"tends to negate the guilt of the accused or mitigates the offense [or] sentencing," the commission has simultaneously protected the rights of criminal defendants while properly defining the role or prosecutors.	
X-2016-43aa	COPRAC (Baldwin) (8-12-16)	Y	A	3.8	Supports the rule.	No response required.
X-2016-49	Domenic Lombardo (8-19-16)	N	A	3.8	Rule will do a better job of making sure prosecutors adhere to their Brady duties especially in light of Penal Code section 1424.5.	No response required.
X-2016-52j	Law Professors (Zitrin) (08-24-16)	Y	A	3.8	In crafting the excellent Rule 3.8, the commission has understood the duties of the prosecutor as well as the dangers of power that that position holds. Through its clear statements adopting the ABA language and reaffirming the right to counsel while requiring prosecutors to go "beyond <i>Brady</i> " by providing to the defense all <i>information</i> that "tends to negate the guilt of the accused or mitigates the offense [or] sentencing," the commission has simultaneously protected the rights of criminal defendants while properly defining the role or prosecutors.	No response required.

Proposed Rule 3.8 [5-110] Special Responsibilities of a Prosecutor
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X-2016-54	Paul Cadman (8-30-16)	N	D	3.8	<p>The last thing we need are more rules. Saddling honest, hard-working lawyers with more rules is a waste of time.</p> <p>Recounts example of honest prosecutor he knows and claims that rule creates a de facto presumption of dishonesty among prosecutors.</p> <p>Dishonest lawyers on both sides of criminal cases will be exposed. Don't need new rules.</p>	The Commission was presented with substantial evidence that the issues addressed by proposed Rule 3.8 are necessary to assure a fair trial to defendants. In addition, this Rule will bring California into alignment with the majority of states, one of the charges of the Commission.
X-2016-68j	Law Professors (Zitrin) (9-21-16)	Y	A	3.8	See X-2016-32j Law Professors (Zitrin) dated July 25, 2016, for the comment synopsis. The comments are identical and the only difference is the signatories.	No response required.
X-2016-69	California Police Chiefs Association (Ken Courney) (9-19-16)	Y	D	(f)	<p>No legal authority provides that prosecutors have such authority over law enforcement.</p> <p>Rule would muzzle law enforcement with regard to duties not associated with providing evidentiary testimony in a criminal trial.</p>	The Commission disagrees with the commenter's assessment of the proposed Rule. Paragraph (f) does not change the relationship between prosecutors and law enforcement, but rather states that prosecutors must control public statements of <i>any person they do supervise</i> . If a prosecutor has no supervisory authority over law enforcement personnel, the prosecutor cannot control their public comments. Comment 5 only notes that the prosecutor's

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						duties for those he or she does not supervise is to "issue the appropriate cautions."
X-2016-93k	Los Angeles County Public Defender (Brown) (9-23-16)	Y	A	3.8	Supports adoption of a rule that mirrors ABA Model Rule 3.8, as the Commission has done.	No response required.
X-2016-105	California State Sheriffs Association (Coyne) (9-27-16)	Y	D	(f)	<p>Paragraph (f) would inappropriately direct prosecutors to exert control over law enforcement officers employed by outside agencies.</p> <p>Paragraph (f) would potentially conflict with law enforcement duties to communicate with public.</p> <p>Paragraph (f) creates unreasonable expectation that prosecutor and control the statements made by law enforcement and would thus invite defense counsel's allegations of misconduct, jeopardizing otherwise meritorious cases.</p>	See response to California Police Chiefs Association, X-2016-69, above.
X-2016-104ap	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	NI		<p>Refers Commission to OCTC's prior comments to the Board of Trustees on this rule.</p> <p>OCTC's foremost concerns regarding any revisions to the Rules of Professional Conduct are that the rules protect the</p>	

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					<p>public and are clearly written so as to be understood by the membership and enforceable by OCTC. This comment is offered with those goals in mind.</p> <p>The proposed rule essentially tracks ABA Model Rule 3.8 and is consistent with established California discipline law. Additional clarification within the proposed rule would enhance notice to the membership and enforcement by this office.</p> <p>1. 5-110(B) [3.8(b)] should specify when a prosecutor is obligated to make reasonable efforts to assure that an individual has been advised of his or her right to counsel. In many instances, this responsibility is addressed by police officers at the time of an arrest. A prosecutor may not have knowledge, let alone control, of these events. Police Departments in California are generally independent of prosecutors' offices.</p> <p>2. Regarding 5-110(D) [3.8(d)], the requirement that disclosures be made "timely" is addressed in discussion point 3 which states that a "disclosure's timeliness will</p>	<p>1. The Commission has not made the suggested change. As the commenter notes, the responsibility is typically addressed by police officers at the time of arrest.</p> <p>2. The Commission has not made the suggested change. The purpose of the comment is to clarify the application of the rule. That is precisely what</p>

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					<p>vary with the circumstances: and the rule “is not intended to impose timing requirements different from those established” by law. It may be advisable to clarify and state this concept in the text of the rule.</p> <p>3. 5-110(D) [3.8(d)] requires disclosure of all information that “tends to negate” guilt or mitigate an offense. Discussion point number 3 then states that the disclosure obligation is “not limited to evidence or information that is material as defined by Brady ... and its progeny.” The discussion item notwithstanding, language similar to that recommended in the proposed section has been interpreted differently in some jurisdictions. Consequently, it may be advisable to state the Commission’s intention within the text of the rule itself, namely, that a prosecutor’s duty to disclose is broader than that which is material as defined in Brady. Additionally, the section should address whether the evidence and information to be disclosed includes that which may impeach or discredit a witness for the prosecution.</p>	<p>Comment [3] does.</p> <p>3. The Commission has not made the suggested change. As noted in the response to comment #2, above, the purpose of the comment is to clarify the application of the rule. That is precisely what Comment [4] does. It is not necessary to provide the clarification in the black letter, as the black letter does not state the “materiality” standard in Brady and its progeny.</p>

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					4. Finally, section 5-110(D) states that a prosecutor must disclose all evidence or information “known to the prosecutor.” It is not clear if this language refers to knowledge of the existence of evidence and information, or knowledge that the evidence and information tends to negate the guilt of the accused. Moreover, the section does not address a prosecutor’s duty to search for exculpatory evidence or whether a failure to comply with the section based upon reckless conduct or gross negligence is a basis to find a violation for disciplinary purposes.	4. The Commission addressed this issue in a previous draft of the Rule.
Public Hearing	Ogul, Michael (Provided oral public hearing testimony on July 26, 2016. See pages 58-59 of the public hearing transcript.)	N	A	3.8	Prosecutor’s concerns regarding discipline for not disclosing impeachment materials are unfounded because impeachment evidence doesn’t meet the definition of exculpatory.	No response required.

PROPOSED RULE OF PROFESSIONAL CONDUCT 3.9
(No Current Rule)
Advocate In Nonadjudicative Proceedings

EXECUTIVE SUMMARY

The Commission reviewed and evaluated ABA Model Rule 3.9 (Advocate In Nonadjudicative Proceedings) for which there is no California counterpart. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The result of this evaluation is proposed rule 3.9 (Advocate in Nonadjudicative Proceedings).

Rule As Issued For 90-day Public Comment

Proposed rule 3.9 requires that a lawyer communicating in a representative capacity with a legislative body or administrative agency regarding a pending nonadjudicative matter or proceeding disclose that the lawyer's appearance is in a representative capacity. The rule does not apply when the lawyer seeks information from a body or agency that is available to the public. Proposed rule 3.9 adopts the blackletter portion of New York Rule of Professional Conduct 3.9 verbatim. While both the proposed rule and the New York rule are derived from ABA Model Rule 3.9, they depart from the ABA Model Rule by eliminating the reference to specific rule provisions that are applicable to conduct before a tribunal.¹ The departure from the Model Rule approach is warranted because the provisions referenced in the Model Rule include concepts that are meaningful in representations before *adjudicative* tribunals, such as the concepts of evidence and inappropriate contact with a judge or juror. However, these same concepts are confusing and inapplicable for setting a clear disciplinary standard in a nonadjudicative proceeding.

There is one comment to the rule. This comment is derived from ABA Model Rule 3.9, Comment [3] and it provides specific guidance as to how the rule should be applied. The proposed comment has been revised to explain that the rule does not require disclosure of the client's identity.

National Background – Adoption of Model Rule 3.9

As California does not presently have a direct counterpart to Model Rule 3.9, this section reports on the adoption of the Model Rule in United States' jurisdictions. Other than California, all jurisdictions but two have adopted some version of ABA Model Rule 3.9.²

The ABA State Adoption Chart for ABA Model Rule 3.9 is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_9.authcheckdam.pdf

¹ ABA Model Rule 3.9 requires that a lawyer comply with certain provisions of Rule 3.3 (Candor Toward The Tribunal), Rule 3.4 (Fairness to Opposing Party And Counsel), and Rule 3.5 (Impartiality and Decorum Of The Tribunal).

² The two jurisdictions are: North Carolina and Virginia.

Thirty-one states have adopted Model Rule 3.9 verbatim.³ Fourteen jurisdictions have adopted a slightly modified version of Model Rule 3.9.⁴ Three states have adopted a version of the rule that substantially diverges from Model Rule 3.9.⁵

Post Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission has revised the black letter of the rule to clarify its scope of application.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

³ The thirty-one states are: Alabama, Arizona, Arkansas, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

⁴ The fourteen jurisdictions are: Alaska, District of Columbia, Florida, Georgia, Hawaii, Michigan, Missouri, New Hampshire, New Jersey, New Mexico, New York, Tennessee, Texas, and Washington.

⁵ The three states are: Colorado, Maine, and North Dakota.

COMMISSION REPORT AND RECOMMENDATION: RULE 3.9

Commission Drafting Team Information

Lead Drafter: Mark Tuft

Co-Drafters: Nanci Clinch, Robert Kehr

I. CURRENT ABA MODEL RULE

**[There is no California Rule that corresponds to Model Rule 3.9,
from which proposed Rule 3.9 is derived.]**

Rule 3.9 Advocate In Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Comment

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

I.A. CURRENT NEW YORK RULE

Rule 3.9 Advocate In Non-Adjudicative Matters

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

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 3.9

Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule X

Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 3.9 Advocate in Nonadjudicative Proceedings

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

Comment

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

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 3.9)

Rule 3.9 Advocate ~~In~~in Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative agency in a connection with a pending nonadjudicative matter or proceeding shall disclose that the appearance is in a representative capacity ~~and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5,~~ except when the lawyer seeks information from an agency that is available to the public.

Comment

~~[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.~~

~~[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.~~

~~[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. ~~Not~~This Rule also does ~~it~~not apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4. This Rule does not require a lawyer to disclose a client's identity.~~

IV.A. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 3.9)

Rule 3.9 ~~New York~~-Rule 3.9 Advocate ~~In Non-Adjudicative Matters~~in Nonadjudicative Proceedings

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

Comment

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

V. RULE HISTORY

Although the origin and history of Model Rule 3.9 was not the primary factor in the Commission's consideration of proposed Rule 3.9, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 541 - 544, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

Information on the adoption of New York Rule 3.9 is published online at the New York Legal Ethics Reporter website: <http://www.newyorklegalethics.com/simon-on-new-rules-rule-3-7a-through-rule-3-9/> [last checked February 10, 2017]. This article "Simon on New Rules: Rule 2.1 Through 3.3(a)(1)," by Professor Roy Simon was originally published in NYPRR September 2009 issue.

An excerpt is provided below:

Now (as Monty Python used to say) for something completely different. Rule 3.9, which consists of only one sentence, governs one narrow but important aspect of representing clients in matters involving legislatures or government agencies: the obligation to disclose whether the lawyer is appearing on behalf of a client, rather than on his own behalf or as a public-spirited citizen. The Rule had no counterpart whatsoever in the old Disciplinary Rules, but the first sentence of old EC 8-4 said: "Whenever a lawyer seeks legislative or administrative changes, the lawyer should identify the capacity in which he or she appears, whether on behalf of the lawyer, a client, or the public." Rule 3.9 narrows the focus to situations in which a lawyer is appearing on behalf of a client. It says:

A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending *non-adjudicative* matter or proceeding *shall disclose that the appearance is in a representative capacity*, except when the lawyer seeks information from an agency that is available to the public. [Emphasis added.]

Comment [1] to Rule 3.9 explains the rule and its policies succinctly. It says:

[1] In representation before bodies such as legislatures, municipal councils and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance arguments regarding the matters under consideration. The legislative body or administrative agency is entitled to know that the lawyer is appearing in a representative capacity. Ordinarily the client will consent to being identified, but if not, such as when the lawyer is appearing on behalf of an undisclosed principal, the governmental body at least knows that the lawyer is acting in a representative capacity as opposed to advancing the lawyer's personal opinion as a citizen. Representation in such matters is governed by Rules 4.1 through 4.4, and 8.4.

Thus, a lawyer appearing before a Senate committee or a rule-making agency on behalf of a client must say, "I am here as a representative of a client" or "I am appearing in a representative capacity." The lawyer cannot pretend to be merely an interested public citizen with no axe to grind. Rule 3.9 does not require the lawyer to identify the client — it merely requires a lawyer in a non-adjudicative proceeding before a legislative body or administrative agency to say, "I have a client."

Rule 3.9 is, however, limited to "non-adjudicative" proceedings. Does this take a lawyer off the hook when a legislative body or administrative agency is acting in an adjudicative capacity? No. As Comment [1A] to Rule 3.9 explains:

[1A] Rule 3.9 does not apply to adjudicative proceedings before a tribunal. Court rules and other law require a lawyer, in making an appearance before a tribunal in a representative capacity, to identify the client or clients and provide other information required for communication with the tribunal or other parties.

One of the laws and court rules governing appearances before a tribunal is Rule 3.3(e), which provides as follows:

In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

Thus, if a legislative body or administrative agency is functioning as a "tribunal," the lawyer must nearly always disclose the client's identity. But when is a legislative body or administrative agency functioning as a "tribunal"? A good question — and one answered (at least in the abstract) by Rule 1.0(w), which defines "tribunal" as follows:

"Tribunal" denotes a court, an arbitrator in an 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 legal judgment directly affecting a party's interests in a particular matter. [Emphasis added.]

The Comment to Rule 1.0, unfortunately, does not elaborate on this language. But most lawyers will recognize the situation when they see it. And when in doubt as to whether a proceeding before a legislative body or administrative agency is “adjudicative” (making the legislative body or administrative agency a “tribunal” and triggering Rule 3.3(e)) or “non-adjudicative” (making Rule 3.9 the applicable rule), the best policy will be to ask the client for consent to disclose the client’s identity. If the client refuses, the lawyer may ask for a ruling as to whether the legislative body or administrative agency is acting in an adjudicative capacity, and the lawyer will then know which rule to follow.

How broad is the exception for situations when a lawyer is acting on behalf of a client but “seeks information from an agency that is available to the public”? It is as broad as the law requiring a government agency to furnish the information that any member of the public is entitled to receive either anonymously or solely by giving his name. In those situations, the lawyer is not required to disclose whether the appearance is in a representative capacity because the lawyer is not expressing views, answering questions, or otherwise supplying information to the agency. (The exception covers only an “agency,” but it should also apply to requests for information from legislative bodies, like the rest of Rule 3.9.) Thus, if a lawyer asks the Federal Communications Commission to supply reports on punitive actions taken against license holders within the last five years, and if that information is “available to the public” in the sense that any member of the public has a right to obtain that information upon request (including filling out any necessary forms and paying any standard charges), then the lawyer need not disclose whether the lawyer is representing a client.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule.

Commission Response: No response required.

2. OCTC supports the Comment to this rule.

Commission Response: No response required.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, nine public comments were received. Three comments agreed with the proposed rule, five comments agreed only if modified, and one comment did not indicate a position. During the 45-day public comment period, one public comment was received. That one comment agreed with the proposed rule. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Regarding the issue of action taken in an adjudicative capacity vs. a legislative or non-adjudicative matter, the Commission considered the following cases or authorities:

- *Strumsky v. San Diego Employees Retirement Assn.* (1974) 11 Cal.3d 28, 35
- *American Fed. of Labor and Congress of Indus. Orgs. v. Unemployment Ins. Appeals Bd.* (2002) 13 Cal.4th 1017, 1028
- *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 372
- *People v. Sims* (1982) 32 Cal. 468, 479, fn. 8, superseded on other grounds by statute
- Code of Civil Procedure section 1094.5
- *Horn v. County of Ventura* (1979) 24 Cal.3d 609, 612
- *Governing Bd. of the Alum Rock Union Elem. School Dist. v. Superior Court* (1985) 167 Cal.App.3d 1158, 1162
- *California Teachers Assn. v. Public Employment Relations Bd.* (2009) 169 Cal.App.4th 1076, 10

B. ABA Model Rule Adoptions

Other than California, all jurisdictions but two have adopted some version of ABA Model Rule 3.9.¹ The ABA State Adoption Chart for ABA Model Rule 3.9, revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_9.authcheckdam.pdf (Last accessed on 2/10/17)
- Thirty-one jurisdictions have adopted Model Rule 3.9 verbatim.² Fourteen jurisdictions have adopted a slightly modified version of Model Rule 3.9.³ Three

¹ The two jurisdictions are: North Carolina and Virginia.

² The thirty-one jurisdictions are: Alabama, Arizona, Arkansas, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota,

states have adopted a version of the rule that substantially diverges from Model Rule 3.9.⁴

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of New York Rule 3.9, which the first Commission similarly recommended as its proposed Rule 3.9.
 - Pros: The Model Rule's requirement that a lawyer comply with certain rule provisions (i.e., Rules 3.3, 3.4 and 3.5) that are applicable to conduct *before a tribunal* should not be adopted. This departure from the Model Rule approach is warranted because the provisions referenced in the Model Rule include concepts that are meaningful in representations before *adjudicative* tribunals, such as the concept of "evidence," but these same concepts are confusing or incorrect for setting clear disciplinary standards in a non-adjudicative proceeding. It is appropriate, however, that lawyers be held to the requirements set forth in Rules 4.1 through 4.4.
 - Cons: The proposed rule substantively diverges from the Model Rule language which has been adopted verbatim or nearly verbatim in a substantial majority of jurisdictions. There is no good reason to depart from the standard in those jurisdictions; lawyers should be held to a higher standard in their dealings with legislatures or administrative agencies in their rule-making capacity. The rules referenced in the Model Rules (i.e., Rules 3.3, 3.4 and 3.5) do not merely address "trial" concepts such as evidence. In fact, the specific provisions in Rule 3.3 [paragraphs (a) through (c)] concern the lawyer's duty of *candor* to the tribunal. It is not evident that the same standards should not apply when a lawyer appears in a representative capacity before a non-adjudicative body such as a legislature or an administrative agency acting in a rule-making or policy-making capacity.
2. Recommend deletion of Model Rule Comments [1] and [2].
 - Pros: Model Rule 3.9, Cmt. [1], restates the Model Rule which is not being recommended, and explains the policy underlying the Model Rule, which is not appropriate in a disciplinary Rule. Model Rule 3.9, Cmts. [1] and [2],

Mississippi, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

³ The fourteen jurisdictions are: Alaska, District of Columbia, Florida, Georgia, Hawaii, Michigan, Missouri, New Hampshire, New Jersey, New Mexico, New York, Tennessee, Texas, and Washington.

⁴ The three jurisdictions are: Colorado, Maine, and North Dakota.

similarly address the policy that justifies the application of Rules 3.3, 3.4 and 3.5 in non-adjudicative proceedings.

- Cons: See “Cons” to paragraph 1, above.

3. Recommend adoption of Model Rule 3.9, Comment [3], as revised.⁵

- Pros: The proposed Comment provides specific guidance as to how the rule should be applied. The Comment has also been revised to explain the rule does not require disclosure of the client’s identity.
- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of the first Commission’s proposed Rule 1.9, Comment [1A].⁶

- Pros: The Comment informs the reader that the lawyer’s conduct will be governed by the specific rules of a tribunal when appearing before such body.
- Cons: The Comment merely states the policy underlying the rule and does not elucidate upon, or provide helpful explanation of, the proposed rule. It is derived from the New York rule and has no counterpart in the Model Rule.

2. Recommend adoption of a sentence at the end of the Comment stating: “A client’s identity may be disclosed when that disclosure is authorized by the lawyer’s client.”

- Pros: The Comment currently states the rule does not require disclosure of the client’s identity. A reader could infer disclosure of the client’s identity is optional at the lawyer’s discretion, or required when asked by a member of a legislative body or administrative agency.
- Cons: The sentence is too limiting. A client’s identity may or may not be confidential depending on the circumstances and a lawyer may or may not be required to obtain consent to disclose the client’s identity. Nevertheless, the sentence is unnecessary as it does not require any explanation that a client may authorize the disclosure of its name.

⁵ Note: the cross-reference to Rules 4.1 through 4.4 is bracketed pending the Commission’s decision regarding those rules.

⁶ RRC1’s proposed Rule 3.9, Cmt. [1A], provided:

[1A] Rule 3.9 does not apply to adjudicative proceedings before a tribunal. Court rules and other law require a lawyer, in making an appearance before a tribunal in a representative capacity, to identify the client or clients and provide other information required for communication with the tribunal or other parties.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rules:

1. This would be new rule of professional conduct in California and is a substantive change in that violation of the rule would subject a lawyer to discipline.

D. Non-substantive Changes to the Model Rule:

None.

E. Alternatives Considered:

See Section IX.A.1 above. The main alternatives considered was whether to add this concept to the rules and, if so, whether to include the Model Rule's references to 3.3, 3.4 and 3.5.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 3.9 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 3.9 in the form attached to this Report and Recommendation.

**Proposed Rule 3.9 Advocate in Non-adjudicative Proceedings
Synopsis of Public Comments**

TOTAL = 1	A = 1
	D = 0
	M = 0
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-21x	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Yes	A		1. OCTC supports this rule. 2. OCTC supports the Comment to this rule.	1. No response required. 2. No response required.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

PROPOSED RULE OF PROFESSIONAL CONDUCT 3.10
(Current Rule 5-100)
Threatening Criminal, Administrative, or Disciplinary Charges

EXECUTIVE SUMMARY

The Commission evaluated current rule 5-100 (Threatening Criminal, Administrative, or Disciplinary Charges)¹ in accordance with the Commission Charter. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 3.10 (Threatening Criminal, Administrative, or Disciplinary Charges).

Rule As Issued For 90-day Public Comment

Proposed rule 3.10 carries forward current rule 5-100. Only one substantive change is recommended in the black letter text of proposed rule 3.10. In paragraph (b), the Commission is recommending that the definition of “administrative charges” be expanded to encompass the filing of a complaint with a foreign governmental organization. Under current rule 5-100(B), “administrative charges” is limited to complaints filed with a “federal, state or local government entity.” The Commission understands that the policy of the current rule is to prohibit lawyer misconduct that is tantamount to extortion and that this policy logically extends to threats of charges made to a foreign or international governmental organization, such as the equivalent of the State Bar of California in a foreign jurisdiction. The current rule’s use of restrictive terms unnecessarily limits the public protection afforded by the rule and is inconsistent with modern changes in the practice of law that include globalization and international multi-jurisdictional practice of law.

In addition to this one substantive change to the black letter of the rule, other proposed amendments include the following.

- In Comment [1], adding an explanation that the rule does not prohibit a statement by a lawyer that the lawyer will present criminal, administrative, or disciplinary charges, unless the statement is made to obtain an advantage in a civil dispute. For additional clarification, this comment states that if a lawyer believes in good faith that the conduct of the opposing lawyer or party violates criminal or other laws, the lawyer may state that if the conduct continues the lawyer will report it to criminal or administrative authorities. However, that same lawyer could not state or imply that a criminal or administrative action will be pursued unless the opposing party agrees to settle the civil dispute. This is included by the Commission to address potential concerns that the concept of a

¹ There is no corresponding American Bar Association (“ABA”) Model Rules. The predecessor to current California rule 5-100 is former rule 7-104 and that rule was derived from DR 7-105 of the ABA Model Code of Professional Responsibility. DR 7-105 of the Model Code differs from current California rule 5-100 in that DR 7-105 was limited only to threats of criminal prosecution. The DR 7-105 prohibition was not carried forward by the ABA when it adopted the Model Rules to replace the Model Code. Eleven jurisdictions, however, have carried forward the DR 7-105 prohibition as part of their current rules despite the omission of a counterpart in the current Model Rules. Additionally, eleven other jurisdictions have rules which more closely parallel rule 5-100 in that they prohibit not only threats of presenting criminal charges, but also threats of disciplinary or other administrative charges. Accordingly while there is not a corresponding Model Rule, California is not alone in having a rule prohibiting this misconduct.

prohibited threat is not sufficiently clear despite the fact that the rule is used for imposing discipline. (See, e.g., *In re Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160 [respondent threatened to report individuals to the FBI, State Attorney General and others if they did not comply with his various demands regarding administration of his father's estate and his litigation with a mortgage company].)

- In Comment [2], clarifying that a mere statement that a lawyer will pursue “all available legal remedies” does not alone violate the rule and that finding a violation ordinarily requires consideration of the specific facts of a particular situation.
- In Comment [4], clarifying that the rule does not prohibit a government lawyer from engaging in a typical “release-dismissal” agreement in connection with related criminal, civil, or administrative matters.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 3.10 [5-100]

Commission Drafting Team Information

Lead Drafter: Dean Zipser

Co-Drafters: Jeffrey Bleich, Robert Kehr

I. CURRENT CALIFORNIA RULE

Rule 5-100 Threatening Criminal, Administrative, or Disciplinary Charges

- (A) A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.
- (B) As used in paragraph (A) of this rule, the term “administrative charges” means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.
- (C) As used in paragraph (A) of this rule, the term “civil dispute” means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

Discussion

Rule 5-100 is not intended to apply to a member’s threatening to initiate contempt proceedings against a party for a failure to comply with a court order.

Paragraph (B) is intended to exempt the threat of filing an administrative charge which is a prerequisite to filing a civil complaint on the same transaction or occurrence.

For purposes of paragraph (C), the definition of “civil dispute” makes clear that the rule is applicable prior to the formal filing of a civil action.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 3.10 [5-100]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 3.10 [5-100]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 3.10 [5-100] Threatening Criminal, Administrative, or Disciplinary Charges

- (a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.
- (b) As used in paragraph (a) of this Rule, the term “administrative charges” means the filing or lodging of a complaint with any governmental organization that may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.
- (c) As used in this Rule, the term “civil dispute” means a controversy or potential controversy over the rights and duties of two or more persons* under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

Comment

[1] Paragraph (a) does not prohibit a statement by a lawyer that the lawyer will present criminal, administrative, or disciplinary charges, unless the statement is made to obtain an advantage in a civil dispute. For example, if a lawyer believes* in good faith that the conduct of the opposing lawyer or party violates criminal or other laws, the lawyer may state that if the conduct continues the lawyer will report it to criminal or administrative authorities. On the other hand, a lawyer could not state or imply that a criminal or administrative action will be pursued unless the opposing party agrees to settle the civil dispute.

[2] This Rule does not apply to a threat to bring a civil action. It also does not prohibit actually presenting criminal, administrative or disciplinary charges, even if doing so creates an advantage in a civil dispute. Whether a lawyer's statement violates this Rule depends on the specific facts. See, e.g., *Crane v. State Bar* (1981) 30 Cal.3d 117 [177 Cal.Rptr. 670]. A statement that the lawyer will pursue “all available legal remedies,” or words of similar import, does not by itself violate this Rule.

[3] This Rule does not apply to (i) a threat to initiate contempt proceedings for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code §§ 1377-78.

[4] This Rule does not prohibit a government lawyer from offering a global settlement or release-dismissal agreement in connection with related criminal, civil or administrative matters. The government lawyer must have probable cause for initiating or continuing criminal charges. See Rule 3.8.

[5] As used in paragraph (b), “governmental organizations” includes any federal, state, local, and foreign governmental organizations. Paragraph (b) exempts the threat of filing an administrative charge that is a prerequisite to filing a civil complaint on the same transaction or occurrence.

IV. COMMISSION’S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 5-100)

Rule 3.10 [5-100] Threatening Criminal, Administrative, or Disciplinary Charges

- (Aa) A ~~member~~lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.
- (Bb) As used in paragraph (Aa) of this ~~rule~~Rule, the term “administrative charges” means the filing or lodging of a complaint with ~~a federal, state, or local~~any governmental ~~entity which~~organization that may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.
- (Cc) As used in ~~paragraph (A) of this rule~~Rule, the term “civil dispute” means a controversy or potential controversy over the rights and duties of two or more ~~parties~~persons* under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

~~Discussion~~Comment

~~Rule 5-100 is not intended to apply to a member’s threatening to initiate contempt proceedings against a party for a failure to comply with a court order.~~

[1] Paragraph (a) does not prohibit a statement by a lawyer that the lawyer will present criminal, administrative, or disciplinary charges, unless the statement is made to obtain an advantage in a civil dispute. For example, if a lawyer believes* in good faith that the conduct of the opposing lawyer or party violates criminal or other laws, the lawyer may state that if the conduct continues the lawyer will report it to criminal or administrative authorities. On the other hand, a lawyer could not state or imply that a criminal or administrative action will be pursued unless the opposing party agrees to settle the civil dispute.

[2] This Rule does not apply to a threat to bring a civil action. It also does not prohibit actually presenting criminal, administrative or disciplinary charges, even if doing so

creates an advantage in a civil dispute. Whether a lawyer's statement violates this Rule depends on the specific facts. See, e.g., *Crane v. State Bar* (1981) 30 Cal.3d 117 [177 Cal.Rptr. 670]. A statement that the lawyer will pursue "all available legal remedies," or words of similar import, does not by itself violate this Rule.

[3] This Rule does not apply to (i) a threat to initiate contempt proceedings for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code §§ 1377-78.

[4] This Rule does not prohibit a government lawyer from offering a global settlement or release-dismissal agreement in connection with related criminal, civil or administrative matters. The government lawyer must have probable cause for initiating or continuing criminal charges. See Rule 3.8.

[5] As used in paragraph (b), "governmental organizations" includes any federal, state, local, and foreign governmental organizations. Paragraph (B) ~~is intended to exempt~~ exempts the threat of filing an administrative charge ~~which~~ that is a prerequisite to filing a civil complaint on the same transaction or occurrence.

~~For purposes of paragraph (C), the definition of "civil dispute" makes clear that the rule is applicable prior to the formal filing of a civil action.~~

V. RULE HISTORY

In 1972, in anticipation of comprehensive amendments to the original 1928 Rules of Professional Conduct, the California State Bar Special Committee to Study the ABA Code of Professional Responsibility recommended adoption of proposed rule 7-104, the predecessor to rule 5-100, as follows:

Rule 7-104. Threatening Criminal Prosecution.

A member of the State Bar shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

Comment:

In California there is no Rule of Professional Conduct covering an attorney who threatens another with criminal prosecution. However, the Supreme Court has imposed discipline in the past for acts in the nature of extortion on the theory that such conduct involves moral turpitude (Business and Professions Code § 6106). See Arden v. State Bar (1959) 52 Cal.2d 310, 321. Libarian v. State Bar (1952) 38 Cal.2d 328; Lindenbaum v. State Bar (1945) 26 Cal.2d 565.

Rule 7-104 was adopted from ABA Code DR 7-105.

(California State Bar Special Committee to Study the ABA Code of Professional Responsibility, Final Report (1972) at p. 40.)

In 1975, Rule 7-104 as recommended by the Special Committee was amended and was approved by the California Supreme Court as follows:

Rule 7-104. Threatening Criminal Prosecution.

A member of the State Bar shall not threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil action nor shall he present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter.

In 1989, the California Rules of Professional Conduct underwent another comprehensive revision that included a complete reorganization and renumbering of the rules. Rule 7-104 was amended and renumbered as rule 5-100. In its 1987 rule filing that preceded the adoption and approval of the comprehensive amendments, the then Rules Revision Commission summarized the changes as follows:

Proposed rule 5-100 is based loosely on current rule 7-104 which prohibits an attorney from threatening to file criminal, administrative, or disciplinary charges to obtain an advantage in a civil action or presenting such charges solely to obtain an advantage in a civil matter.

Paragraph (A) continues the prohibition on threatening to file criminal, administrative, or disciplinary charges but amends the context of the threat from “civil action” to “civil dispute” to avoid the ambiguity found in current rule 7-104.

The proposed deletion of the prohibition on filing such charges would permit an attorney to assist a client in presenting criminal, administrative or disciplinary charges with respect to matters arising out of the same transaction or occurrence as a civil dispute. In many cases, the client may need the assistance of the attorney in effectively presenting such charges.

Paragraph (B) is new and is intended to make clear that the threat of filing an administrative charge which is a prerequisite to filing a civil complaint is not prohibited by the rule.

Paragraph (C) is new and is intended to define the term “civil dispute” as that term is used in paragraph (A).

[December 1987 gray bound rule filing at p. 47.]

Amendments Operative 1989 (Comparison of Proposed Rule 5-100 to Current Rule) 7-104

Rule 5-100. 7-104. Threatening Criminal, Administrative, or Disciplinary Charges. Prosecution.

(A) ~~A member of the State Bar~~ shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil ~~action~~

~~dispute. nor shall he present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter.~~

(B) As used in paragraph (A) of this rule, the term “administrative charges” means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

(C) As used in paragraph (A) of this rule, the term “civil dispute” means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

Discussion:

Rule 5-100 is not intended to apply to a member’s threatening to initiate contempt proceedings against a party for a failure to comply with a court order.

Paragraph (B) is intended to exempt the threat of filing an administrative charge which is a prerequisite to filing a civil complaint on the same transaction or occurrence.

For purposes of paragraph (C), the definition of “civil dispute” makes clear that the rule is applicable prior to the formal filing of a civil action.

[December 1987 gray bound rule filing, enc. 2.]

No further changes have been made to Rule 5-100 since 1989.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

• **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule.

Commission Response: No response required.

2. Comments [1] and [2] are unnecessary, as they merely repeat and restate the rule.

Commission Response: The Commission disagrees with the commenter’s assessment. Both comments clarify the how the Rule is applied, which is an

appropriate function of a comment. Neither repeats the Rule.

3. OCTC supports Comments [3] – [5].

Commission Response: No response required.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, three public comments were received. Two comments agreed with the proposed Rule, and one comment disagreed. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. California law related to current rule 5-100.

(a) Extortion

Prior to 5-100's adoption, attorneys were disciplined for conduct equivalent to extortion. (See *Arden v. State Bar* (1959) 52 Cal.2d 310 [341 P.2d 6]; *Libarian v. State Bar* (1952) 38 Cal.2d 328 [239 P.2d 865]; *Lindenbaum v. State Bar* (1945) 26 Cal.2d 565 [160 P.2d 9].)

Despite the adoption of Rule 5-100, there remains an unresolved overlap or even a conflict between the rule and the legal concept of extortion in the context of attorney conduct. (See *Flatley v. Mauro* (2006) 39 Cal.4th 299 [46 Cal.Rptr.3d 606] (*Flatley*) [". . . a threat that constitutes criminal extortion is not cleansed of its illegality merely because it is laundered by transmission through the offices of an attorney."]; *Cohen v. Brown* (2009) 173 Cal.App.4th 302, 317-318 [93 Cal.Rptr.3d 24] (*Cohen*) [holding that assisting a client with the filing of a State Bar complaint under the circumstances of that case constituted extortion. "Here, [attorney] Brown went a step further than merely threatening to present administrative charges [as prohibited by Rule 5-100]. He actually did present an administrative charge to the State Bar, through [Brown's client] Zerah, and the communications he had with plaintiff and plaintiff's law partner demonstrate that the purpose of filing the State Bar complaint was to gain an advantage in the underlying action by pressuring plaintiff and his law partner into immediately signing off on the settlement check."]; *Mendoza v. Hamzeh* (2013) 215 Cal.App.4th 799, 806-807 [155 Cal.Rptr.3d 832] (*Mendoza*) [attorney's demand letter threatening to report plaintiff's alleged criminal conduct to enforcement agencies and to his customers and vendors, coupled with a demand for money, constituted criminal extortion as

a matter of law.], citation, internal quotation marks and emphasis omitted; but see *Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1299 [159 Cal.Rptr.3d 292] [concluding that attorney Singer's demand letter did not fall under the narrow exception [to protected activity under the Anti-SLAPP statute] articulated in *Flatley* because the letter was so extreme in its demands that it constituted criminal extortion as a matter of law. "We see a critical distinction between Singer's demand letter, which made no overt threat to report Malin to prosecuting agencies or the Internal Revenue Service, and the letters in *Flatley* and *Mendoza*, which contained those express threats and others that had no reasonable connection to the underlying dispute."].)

(b) Release-dismissal agreements

Case law related to release-dismissal agreements conflicts with California State Bar Formal Op. No. 1989-106 (CAL 1989-106).

Case authority provides that prosecutors may agree to drop criminal charges in exchange for defendant's agreement to not pursue a civil complaint against law enforcement officers or the municipality. (See Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2015) ¶ 8:982, p. 8-151; *Newton v. Rumery* (1987) 480 U.S. 386; *Hoines v. Barney's Club, Inc.* (1980) 28 Cal.3d 603.)

However, the State Bar of California Standing Committee on Professional Responsibility and Conduct has opined that a prosecutor's agreement to dismiss criminal charges conditioned on release from civil liability violates rule 5-100 (CAL 1989-106.) "Since a release-dismissal offer constitutes a veiled threat to continue the prosecution if the defendant rejects it (that is, if he or she refuses to waive the right to have a potential civil claim determined by due process), the practice cannot be countenanced under rule 5-100." This conflicts with the California Practice Guide on Professional Responsibility which states that while a prosecutor may violate rule 5-100 by threatening criminal charges to gain advantage in a civil matter, if charges are already filed, the prosecutor does not violate the rule by negotiating an agreement in which the criminal charges are dropped in exchange for release of civil liability. (Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2015) ¶ 8:983, p. 8-152.)

B. ABA Model Rule Adoptions

There is no corresponding ABA model rule. As discussed above, former California rule 7-104 was derived from Disciplinary Rule (DR) 7-105 of the ABA Model Code of Professional Responsibility, which was limited to threats of criminal prosecution.¹ The

¹ DR 7-105, which prohibited threats of criminal prosecution in order to gain an advantage in a civil matter, stated:

A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

DR 7-105 prohibition was not carried forward by the ABA when it adopted the Model Rules. (Geraghty, *Making threats* (American Bar Association 2008) at p. 1.)

However, eleven jurisdictions have carried forward the DR 7-105 prohibition as part of their rules.² Additionally, eleven other jurisdictions have rules which more closely parallel rule 5-100 in that they prohibit not only threats of presenting criminal charges, but also threats of disciplinary or other administrative charges.³

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

A. Concepts Accepted (Pros and Cons):

1. General: Carry forward the concept in current rule 5-100 that expressly prohibits threats to present criminal, administrative or disciplinary charges.
 - Pros: The Rule is intended to prohibit lawyers from making threats to present charges to gain an advantage. Although there are criminal laws regarding extortion that prohibit such conduct, it is important to have a disciplinary rule that prohibits the conduct and puts lawyers on notice that they are subject to discipline for making such threats. This is conduct in which lawyers should not engage and this Rule is the most direct approach to preventing it. Moreover, the Rule has been in existence in some form in California since 1975 and there is no evidence there has been a problem with it, and removing this long-standing Rule might suggest to some readers that these threats now are to be permitted. Violations of this Rule have been charged by OCTC and culpability has been found in the State Bar Court (see, e.g., *In re Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160 [respondent threatened to report individuals to the FBI, State Attorney General and others if they did not comply with his various demands regarding administration of his father's estate and his litigation with a mortgage company]). Further, the targeted conduct should be expressly prohibited in the Rules as a lawyer's threat would function to drive a wedge between the opposing lawyer and the lawyer's client, creating a conflict of interest. Finally, that a majority of

² See Alabama Rule of Professional Conduct 3.10, Connecticut Rule of Professional Conduct 3.4(7), Georgia Rule of Professional Conduct 3.4(h), Hawaii Rule of Professional Conduct 3.4(i), Idaho Rule of Professional Conduct 4.4(a)(4), New Jersey Rule of Professional Conduct 3.4(g), New York Rule of Professional Conduct 3.4(e), Oregon Rule of Professional Conduct 3.4(g), South Carolina Rule of Professional Conduct 4.5, Tennessee Rule of Professional Conduct 4.4(a)(2), Vermont Rule of Professional Conduct 4.5.

³ See Colorado Rule of Professional Conduct 4.5(a), District of Columbia Rule of Professional Conduct 8.4(g), Florida Rule of Professional Conduct 3.4 (g), (h), Illinois Rule of Professional Conduct 8.4(g), Kentucky Rule of Professional Conduct 3.4(f), Louisiana Rule of Professional Conduct 8.4(g), Maine Rule of Professional Conduct 3.1(b), Massachusetts Rule of Professional Conduct 3.4(h), Ohio Rule of Professional Conduct 1.2(e), Texas Rule of Professional Conduct 4.04(b), and Virginia Rule of Professional Conduct 3.4(i).

jurisdictions have followed the ABA's lead in removing the language of DR 7-105 from their Rules of Professional Conduct has not created a national standard as a substantial minority of jurisdictions have retained the language.

- Cons: Criminal statutes prohibiting extortion adequately address the conduct targeted by the rule. The ABA (and a majority of jurisdictions) have dispensed with DR 7-105, the ABA Code of Professional Responsibility counterpart, when it adopted the Model Rules in 1983. ABA Formal Ethics Op. 92-363 (6/6/1992), explained:

"The deliberate omission of DR 7-105(A)'s language or any counterpart from the Model Rules rested on the drafters' position that "extortionate, fraudulent, or otherwise abusive threats were covered by other, more general prohibitions in the Model Rules and thus that there was no need to outlaw such threats specifically." (C.W. Wolfram, *Modern Legal Ethics* (1986) § 13.5.5, at 718, citing Model Rule 8.4 legal background note (Proposed Final Draft, May 30, 1981), (last paragraph). Model Rules that both provide an explanation of why the omitted provision DR 7-105(A) was deemed unnecessary and set the limits on legitimate use of threats of prosecution are Rules 8.4, 4.4, 4.1 and 3.1. (footnotes omitted).

In addition, current rule 5-100 arguably inhibits lawyers from engaging in appropriate corrective action. For example, a lawyer who observes unethical conduct by another lawyer can be deterred from pointing out that misconduct for fear that a mere statement that an opponent is engaging in unethical conduct could be construed as a veiled threat to report the adversary to the State Bar, thus constituting a reportable violation of the Rule.

2. In paragraph (b)'s definition of "administrative charges," delete references to "federal, state, or local" as modifiers of a "governmental entity." The current rule uses "federal, state, or local" to modify the description a governmental agency that can order or recommend the loss of a license or impose quasi-criminal sanctions. Proposed paragraph (b) omits those restrictive modifiers to broaden the Rule to prohibit threats of charges made to a foreign or international governmental organization.
 - Pros: The Rule's prohibition against lawyer misconduct that is tantamount to extortion logically extends to threats of charges made to a foreign or international governmental organization, such as the equivalent of the State Bar of California in a foreign jurisdiction. The current rule's use of restrictive terms unnecessarily limits the public protection afforded by the rule and is inconsistent with modern changes in the practice of law that include globalization and international MJP.
 - Cons: None identified.

3. In paragraph (c), substitute “persons” for “parties,” as provided in current rule 5-100(B).
 - Pros: The use of the word “parties” is too restrictive. The term “parties” suggests that the Rule would not apply unless there is a contract, an ongoing lawsuit, or a dispute that ultimately matures into a lawsuit. The Rule should apply to the use of threats to gain an advantage in any civil dispute. Further, if adopted as proposed, “persons” will also include any non-party witnesses in a matter.
 - Cons: First, there is no evidence that the use of “parties” has proven confusing or restrictive. The clause following “parties” in current rule 5-100(C), “whether or not an action has been commenced,” obviates the concern that lawyers might be misled into believing the rule only applies to parties in formal proceedings or contracts. Second, some public commenters could erroneously perceive that the Commission is intending a controversial substantive change simply because of the history concerning rule 2-100 (Communication with a Represented Party) and the change from “party” to “person” proposed in that Rule. In response to this concern, staff observed that a different approach for removing the restrictive impact of the term “parties” in paragraph (C) might be to remove the entire phrase so that the clause simply states: “. . . the term “civil dispute” means a controversy or potential controversy over rights and duties under civil law. . . .”
4. Include new comments identifying conduct that is not prohibited by the Rule. Unlike the current rule, proposed Comments [1] and [2] would clarify that the following conduct is not prohibited by the rule: (i) a statement in good faith that seeks cessation of unlawful conduct but does not constitute a veiled threat to obtain an improper advantage (e.g., settlement on favorable terms); (ii) threat to bring a civil action; (iii) actual presentation of charges (see San Diego County Bar Association Formal Op. No. 2005-1); (iv) general statements that “all available legal remedies;” and (v) the offer of a civil compromise under Penal Code §§ 1377-1378. Similarly, Comment [3] provides that the Rule does not apply to threats to initiate civil contempt proceedings.
 - Pros: Misconstruing the rule to be an overbroad prohibition can chill a lawyer’s advocacy. The new comment helps lawyers understand the rule’s limited scope.
 - Cons: The guidance provided by the comment can be determined through normal legal research of applicable case law and ethics opinions.
5. Add new Comment [4] on negotiation of release-dismissal agreements with criminal prosecutors. A prosecutor may agree to drop criminal charges in exchange for a defendant’s agreement to not pursue a civil complaint against law enforcement officers or the municipality (see *Town of Newton v. Rumery* (1987) 480 U.S. 386 [107 S. Ct. 1187].) However, the State Bar of California

Standing Committee on Professional Responsibility and Conduct has opined that a prosecutor's agreement to dismiss criminal charges conditioned on release from civil liability violates the current rule (see CAL 1989-106).

- Pros: This comment clarifies that the Rule is not intended to apply to criminal settlement practices that have been found to be lawful.
- Cons: Whether the negotiation of a release-dismissal agreement violates the rule is a case-by-case fact dependent inquiry that accounts for the all of the surrounding circumstances. A comment would be either: misleading in suggesting a one-size-fits-all application; or too vague and equivocal to offer any real guidance.

6. Add new Comment [5] that defines "governmental organizations" as used in paragraph (b). This comment clarifies that such organizations include any federal, state, local or foreign governmental organizations.

- Pros: This clarifies a possible ambiguity that the current rule is limited to state governmental organizations
- Cons: This comment is unnecessary because there is no restrictive language in paragraph (b) concerning types of governmental organizations.

B. Concepts Rejected (Pros and Cons):

1. The main concept rejected was the policy decision to completely repeal the rule as many other jurisdictions no longer include this general prohibition. (See Section IX.A.1, above.)

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. The changes to paragraph (b) are substantive. (See Section IX.A.2, above.)
2. All other changes are non-substantive clarifications of the current rule. (See Section IX.D below.)

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".
 - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by

virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

- Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).
- Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. In paragraph (b), the word “organization” is substituted for “entity” to be consistent with the use of the term “organization” throughout the proposed rules and also under rule 3-600 (proposed rule 1.13).
4. In paragraph (c), the word “persons” is substituted for “parties” to clarify that the prohibition can apply, for example, when an anticipated claim has not been filed or served, or when negotiation of a business transaction has not yet commenced. (See Section IX.A.3, above.)

E. Alternatives Considered:

1. See Section IX.B.1, above.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 3.10 [5-100] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 3.10 [5-100] in the form attached to this Report and Recommendation.

**Proposed Rule 3.10 [5-100] Threatening Criminal, Administrative,
or Disciplinary Charges
Synopsis of Public Comments**

TOTAL = 3	A = 2
	D = 1
	M = 0
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43ab	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	A	Cmt. 1, 2	Comments 1 and 2 provide much needed guidance to the profession.	No response required.
X-2016-104ar	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	A	Cmt. 1, 2	Comments 1 and 2 are unnecessary as they merely repeat the rule.	The Commission disagrees with the commenter's assessment. Both comments clarify the how the rule is applied, which is an appropriate function of a comment. Neither repeats the rule.
X-2016-122	Beverly Hills Bar Association (Fisher) (9-28-16)	Y	D	3.10	California should join the majority of jurisdictions and drop this rule.	The Commission disagrees. Proposed rule 3.9, which carries forward current rule 5-100, prohibits conduct that a lawyer might otherwise believe is permitted because it does not rise to level of criminal extortion. However, a lawyer's threat to report a lawyer to the State Bar poses a danger to the effective operation of the legal system by having an adverse effect on the lawyer-client relationship between the threatened lawyer and the lawyer's client. The Commission also notes that the Model Rule's removal

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Proposed Rule 3.10 [5-100] Threatening Criminal, Administrative,
or Disciplinary Charges
Synopsis of Public Comments**

TOTAL = 3	A = 2
	D = 1
	M = 0
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						of ABA DR 7-105 has not been followed by a substantial majority of jurisdictions. Eleven jurisdictions have carried forward as part of their rules ABA DR 7-105, which prohibits threats of criminal charges. Additionally, eleven other jurisdictions have rules which more closely parallel rule 5-100 in that they prohibit not only threats of presenting criminal charges, but also threats of disciplinary or other administrative charges.

PROPOSED RULE OF PROFESSIONAL CONDUCT 4.1
(No Current Rule)
Truthfulness In Statements To Others

EXECUTIVE SUMMARY

The Commission reviewed and evaluated American Bar Association (“ABA”) Model Rule 4.1 (Truthfulness In Statements To Others) for which there is no California counterpart. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The result of this evaluation is proposed rule 4.1 (Advocate in Nonadjudicative Proceedings).

Rule As Issued For 90-day Public Comment

Proposed rule 4.1 prohibits a lawyer from making a false statement of fact or law to a third person and also requires a lawyer to disclose a material fact to avoid assisting a client in a criminal or fraudulent act, subject to the lawyer’s duties under rule 1.6 and Business and Professions Code section 6068(e). The main issue considered when evaluating this proposed rule was whether this rule was necessary as a rule of professional conduct in California.¹ The Commission recommends adoption of ABA Model Rule 4.1 for several reasons. First, the rule provides crucial public protection. The concept embodied in proposed rule 4.1 is an important part of the entire set of rules being recommended and it is intended to supplement other rules proscribing similar conduct in other situations, such as rule 3.3 (Candor to the Tribunal) and rule 1.2.1 (Advising a Client Regarding Criminal or Fraudulent Conduct). Second, the proposed rule provides language that is more precise than either Business and Professions Code sections 6068(d) or 6128 and therefore will provide a clearer disciplinary standard than either of those statutes. Finally, every other jurisdiction has adopted some version of Model Rule 4.1. Adopting this rule helps fulfill one of the principles of the Commission’s Charter which is to eliminate unnecessary differences between California’s rules and the rules used by a preponderance of states in order to help promote a national standard with respect to professional responsibility issues.

There are four comments to the rule. Comment [1] draws the important distinction that while there is generally no affirmative duty to inform the opposing party of relevant facts, incorporation of another’s falsehood into the lawyer’s statement or a material omission in a partially true statement can violate the rule. Comment [2] provides clarifying examples of non-material facts in a common situation in which the rule would apply. Comment [3] alerts lawyers to the relationship of rule 4.1 with rules 1.2.1 (Advising or Assisting the Violation of Law) and 1.16 (Declining or Terminating Representation). Comment [4] directs lawyers to Comment [5] of proposed rule 8.4, which notes that a lawyer’s participation in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights does not violate that

¹ Some of the arguments made in opposition to the proposed rule included: (1) gross misconduct with respect to the subject of the proposed rule is already subject to discipline under Business and Professions Code sections 6068(d) and 6106; (2) the “knowledge” standard required by the rule may make it difficult to establish discipline under the rule; (3) the concept of a lawyer’s duty not to adopt or vouch for a client’s or witness’s falsehood is well-established in California; such a disciplinary rule is unnecessary; and (4) as to whether the proposed rule is necessary to assure that lawyers be candid and complete in dealing with opposing parties, the law of civil liability for incomplete statements and disclosures, and even for silence while a client makes an untrue statement, is well established.

rule's prohibition against a lawyer engaging "in conduct involving moral turpitude, dishonesty, fraud, deceit or reckless or intentional misrepresentation," which would apply equally to rule 4.1.

Although the concepts contained in proposed rule 4.1 are currently addressed in statutes and case law, this proposed rule is a substantive change to the current rules because these obligations are now being included as a rule of discipline.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made non-substantive stylistic edits and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 4.1

Commission Drafting Team Information

Lead Drafter: Carol Langford

Co-Drafters: George Cardona, Judge Karen Clopton

I. CURRENT CALIFORNIA RULE

**[There is no California Rule that corresponds to Model Rule 4.1,
from which proposed Rule 4.1 is derived.]**

Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 4.1

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 4.1

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:*

- (a) make a false statement of material fact or law to a third person;* or
- (b) fail to disclose a material fact to a third person* when disclosure is necessary to avoid assisting a criminal or fraudulent* act by a client, unless disclosure is prohibited by Business and Professions Code § 6068(e)(1) or Rule 1.6.

Comment

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person* that the lawyer knows* is false. However, in drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch

for the truthfulness of representations made by the client in the agreement or document. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer makes a partially true but misleading material statement or material omission. In addition to this Rule, lawyers remain bound by Business and Professions Code § 6106 and Rule 8.4.

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.*

[3] Under Rule 1.2.1, a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows* is criminal or fraudulent.* See Rule 1.4(a)(4) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. In some circumstances, a lawyer can avoid assisting a client's crime or fraud* by withdrawing from the representation in compliance with Rule 1.16.

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

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 4.1)

Rule 4.1 Truthfulness ~~in~~in Statements ~~To~~to Others

In the course of representing a client a lawyer shall not knowingly:*

- (a) make a false statement of material fact or law to a third person;* or
- (b) fail to disclose a material fact to a third person* when disclosure is necessary to avoid assisting a criminal or fraudulent* act by a client, unless disclosure is prohibited by Business and Professions Code § 6068(e)(1) or Rule 1.6.

Comment

~~Misrepresentation~~

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person* that the lawyer knows* is false. ~~Misrepresentations can also occur by~~ However, in drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer makes a partially true but misleading ~~statements or omissions that are the equivalent of affirmative false~~

~~statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4, material statement or material omission. In addition to this Rule, lawyers remain bound by Business and Professions Code § 6106 and Rule 8.4.~~

~~Statements of Fact~~

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. ~~Under generally accepted conventions~~ For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.* ~~Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.~~

~~Crime or Fraud by Client~~

[3] Under Rule ~~1.2(d)~~1.2.1, a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows* is criminal or fraudulent.* ~~Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily~~ See Rule 1.4(a)(4) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. In some circumstances, a lawyer can avoid assisting a client's crime or fraud* by withdrawing from the representation. ~~Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by~~ in compliance with Rule 1.61.16.

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

V. RULE HISTORY

Although the origin and history of Model Rule 4.1 was not the primary factor in the Commission's consideration of proposed Rule 4.1, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 545 – 554 ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC is concerned with the use of the term “knows” in regards to section (ii) of Comment 1 for the reasons expressed in OCTC’s comments to proposed Rules 1.9 and 3.3 and the General Comments sections of this letter. While what constitutes recklessness or gross negligence to a third party is not the same as to a client or a court, an attorney can be disciplined for gross negligence to others.

Commission Response: The Commission disagrees that “knows” is an inappropriate standard for this rule. Under proposed Rule 1.0.1(f), although “knows” means actual knowledge of the fact in question, that knowledge may be inferred from the specific circumstances.

2. OCTC is concerned with the use of the term “knowingly” in Comment 1 for the same reasons expressed to the use of that word in the rule itself.

Commission Response: See Commission’s response to #1, above.

3. OCTC supports Comments [2], [3], and [4].

Commission Response: No response required.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, seven public comments were received. All seven comments agreed with the proposed rule. A public comment synopsis table, with the Commission’s responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Concerning the law of civil liability for incomplete statements and disclosures, and for inexcusable silence while a client makes untrue statements, see: *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 293, 294; *Roberts v. Ball, Hunt, Hart etc.* (1976) 57 Cal.App.3d 104; *Cicone v. URS Corporation* (1986) 183 Cal.App.3d 194, 208; and *Pumphrey v. K.W.Thompson Tool Co.* (9 Cir 1995) 62 F.3d 1128.

B. ABA Model Rule Adoptions

Model Rule 4.4. The ABA State Adoption Chart for Model Rule 4.1, entitled Variations of the ABA Model Rules of Professional Conduct Rule 4.1,” revised September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_1.authcheckdam.pdf [Last visited 2/7/17]
- Every jurisdiction except California has adopted some version of ABA Model Rule 4.1. Among these jurisdictions, thirty have adopted the rule verbatim,¹ nine have adopted substantially similar variations of the Model Rule,² and eleven have a substantially modified version of Model Rule 1.2.³
- **Colorado Rule 4.1** is identical to Model Rule 4.1:

Colorado Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
 - (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.
- **Maryland Rule 4.1** is a substantial departure from the Model Rule in its adoption of paragraph (b), under which Maryland Rule 4.1 supersedes a lawyer’s duty of confidentiality:

Maryland Rule 4.1 Truthfulness In Statements To Others

- (a) In the course of representing a client a lawyer shall not knowingly:
 - (1) make a false statement of material fact or law to a third person; or
 - (2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

¹ The thirty jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Washington, West Virginia and Wyoming.

² The nine jurisdictions are: Georgia, Iowa, Kentucky, New Mexico, Ohio, Pennsylvania, Texas, Vermont and Wisconsin.

³ The eleven jurisdictions are: Hawaii, Maryland, Michigan, Minnesota, Mississippi, New Jersey, New York, North Carolina, North Dakota, Tennessee and Virginia.

- (b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of the black letter of Model Rule 4.1, which prohibits a lawyer from making a false statement of fact or law to a third person and also requires a lawyer to disclose a material fact to avoid assisting a client in a criminal or fraudulent act, subject to the lawyer's duties under Rule 1.6 and Bus. & Prof. Code § 6068(e).

- Pros: There are numerous reasons in support of recommending Rule 4.1's adoption:

(1) Public Protection. The rule provides crucial public protection. It is an important part of the entire set of rules being recommended, intended to supplement other rules proscribing similar conduct in other situations, such as Rule 3.3 (candor to the tribunal) and Rule 1.2.1 (advising a client regarding criminal or fraudulent conduct).

(2) Articulate Standard of Discipline. The proposed Rule provides language is that is more precise than either Bus. & Prof. Code §§ 6068(d) or 6128 and thus will provide a clearer disciplinary standard than either of those Rules.

Section 6068(d) employs 19th Century language that presents ambiguous direction to lawyers in modern practice ("to employ...those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law"). In fact, this Commission has rejected that very language in proposed Rule 3.3.

Section 6128(a) is also an inadequate substitute because it is limited to acts of deceit or collusion that constitute criminal misconduct.

Section 6106 employs the amorphous concept of moral turpitude, dishonesty or corruption and could apply to conduct proscribed by many of the rules this Commission has already proposed, e.g., Rule 8.4.

(3) Advocacy Not Chilled. Model Rule 4.1 has been in existence for over 30 years and has been shown not to chill legitimate advocacy. (See Restatement (3d) The Law Governing Lawyers §98 and the ABA Annot. Model Rules.)

(4) Relationship to proposed Rule 3.9. Proposed Rule 3.9 requires lawyers to do two things: to announce in certain legislative and administrative circumstances that they are acting as advocates for others (because failing to

do so would be dishonest), and to comply with Rule 4.1, which imposes on lawyers a duty to tell the truth when appearing as an advocate in a non-adjudicative proceeding, e.g., before a legislature, an agency acting in its rule-making capacity, etc. To recommend against adoption of Rule 4.1 would leave proposed Rule 3.9 largely impotent in regulating lawyer conduct before those official bodies.

(5) Widespread adoption. Every jurisdiction has adopted some version of Model Rule 4.1. (See Section VII.) As noted, its widespread adoption has not been shown to have chilled legitimate advocacy.

- Cons: There are several reasons that militate against adopting Model Rule 4.1:

(1) Gross misconduct with respect to the subject of the Model Rule is already subject to discipline under Business and Professions Code §§ 6068(d) and 6106.

(2) What knowledge is required to establish a lawyer's "knowledge" of a statement's untruth or what constitutes "incorporation" by a lawyer of a client's untrue statement reflect subtleties of language in the Model Rule do not lend themselves to a disciplinary rule.

(3) The concept of a lawyer's duty not to adopt or vouch for a client's or witness's falsehood is well-established; there is no need for a disciplinary rule to that effect.

(4) As to whether Rule 4.1 is necessary to assure that lawyers be candid and complete in dealing with opposing parties, the law of civil liability for incomplete statements and disclosures, and even for silence while a client makes untrue statements, is well established.⁴

2. Recommend adoption of several Comments, all of which provide guidance on interpreting the rule or its application.

- Pros: Each Comment assists in interpreting or applying the Rule:

Comment [1] draws the important distinction that while there is generally no affirmative duty to inform the opposing party of relevant facts, incorporation of another's falsehood into the lawyer's statement or a material omission in a partially true statement can violate the rule.

⁴ See, e.g., *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 293, 294; *Roberts v. Ball, Hunt, Hart etc.* (1976) 57 Cal.App.3d 104; *Cicone v. URS Corporation* (1986) 183 Cal.App.3d 194, 208; and *Pumphrey v. K.W.Thompson Tool Co.* (9 Cir 1995) 62 F.3d 1128.

Comment [2] provides clarifying examples of non-material facts in a common situation in which the rule would apply, negotiation.

Comment [3] alerts lawyers to the relationship of Rule 4.1 with Rules 1.2.1 [Advising or Assisting the Violation of Law] and 1.16 [Declining or Terminating Representation].

Comment [4] directs lawyers to Comment [5] of proposed Rule 8.4, which notes that a lawyer's participation in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights does not violate that rule's prohibition against a lawyer engaging "in conduct involving moral turpitude, dishonesty, fraud, deceit or reckless or intentional misrepresentation," which would apply equally to Rule 4.1.

- Cons: If the rule in fact provides an articulable standard for discipline, there should be no need for any Comments to the Rule.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of a *black letter* provision that would expressly except from the application of the Rule a lawyer's participation in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights. (Such a provision, based on Oregon Rule 8.4(b), was recommended by the first Commission in its initial public comment draft of Rule 4.1.⁵

⁵ The first Commission's proposed Rule 4.1(b) provided:

- (b) This Rule does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules. "Covert activity," as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.

Oregon Rule 8.4(b) provides:

- (b) Notwithstanding paragraphs (a) (1), (3) and (4) and Rule 3.3 (a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

- Pros: The Comment in Rule 8.4 establishes an exception to the application of both Rule 4.1 and 8.4 and should be in the black letter of either rule.
- Cons: First, the concept is adequately addressed by the Comment to Rule 8.4 because the Comment provides guidance on how that rule's general prohibition on dishonest conduct, Rule 8.4(c), should be applied. Second, the concept is more appropriately addressed in relation to proposed Rule 8.4(c), which contains a general prohibition on a lawyer engaging in dishonest conduct.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. The inclusion of proposed Rule 4.1's concept, although addressed in statutes and case law, is nevertheless a substantive change in that the concept is now being included as a disciplinary rule.

D. Non-Substantive Changes to the Model Rule:

1. In paragraph (b), include the statutory duty of confidentiality.
 - Pros: In California, the duty of confidentiality resides in the State Bar Act so it is appropriate to include that reference in addition to the reference to Rule 1.6 [3-100].
 - Cons: None identified.
2. Implement clarifying edits to the Model Rule Comment language recommended for the proposed rule.
 - Pros: In the second sentence of Comment [1], adding the words "the truth of" before "statement of another person" is more precise than the Model Rule language because it emphasizes the nature of the misrepresentation involved. In the second sentence of Comment [2], substitute "[f]or example" for "[u]nder generally accepted conventions" to eliminate ambiguity as to whether the illustration that follows is, in fact, just one example.
 - Cons: For purposes of national uniformity, non-substantive changes to Model Rule Comments should be done sparingly.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 4.1 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 4.1 in the form attached to this Report and Recommendation.

Proposed Rule 4.1 Truthfulness in Statements to Others
Synopsis of Public Comments

TOTAL = 7 **A = 7**
D = 0
M = 0
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-32k	Law Professors (Zitrin) (07-25-16)	Yes	A	4.1	This rule, admonishing lawyers that they may not make false material statements while representing a client, seems to be a simple and completely appropriate statement about proper lawyer behavior.” We commend the Commission for including this rule.	No response required.
X-2016-43ac	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-22-16)	Yes	A	4.1	COPRAC supports the adoption of proposed Rule 4.1.	No response required.
X-2016-52k	Law Professors (Zitrin) (08-24-16)	Yes	A	4.1	See X-2016-32k Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-32k for the Commission’s response to the Law Professors’ comments.
X-2016-66s	San Diego County Bar Association (SDCBA) (Riley) (09-21-16)	Yes	A	4.1	We support and approve this proposed rule. If one of the hallmarks of our profession is candor to our clients and to tribunals, lawyers should also be ethically precluded from deceiving third parties, either by false statement or material omission. This proposed rule, together with the others that mandate truthfulness in other contexts, underscores	No response required.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

TOTAL = 7 **A = 7**
D = 0
M = 0
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					that lawyers have an ethical duty not to deceive anybody they deal with in the course of their representation of a client.	
X-2016-68k	Law Professors (Zitrin) (09-22-16)	Yes	A	4.1	See X-2016-32k Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-32k for the Commission's response to the Law Professors' comments.
X-2016-104as	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	M	4.1	<p>1. OCTC is concerned with the use of the term "knows" in regards to section (ii) of Comment 1 for the reasons expressed in OCTC's comments to proposed Rules 1.9 and 3.3 and the General Comments sections of this letter. While what constitutes recklessness or gross negligence to a third party is not the same as to a client or a court, an attorney can be disciplined for gross negligence to others.</p> <p>2. OCTC is concerned with the use of the term "knowingly" in Comment 1 for the same reasons expressed to the use of that word in the rule itself.</p> <p>3. OCTC supports Comments 2, 3, and 4.</p>	<p>1. The Commission disagrees that "knows" is an inappropriate standard for this rule. Under proposed rule 1.0.1(f), although "knows" means actual knowledge of the fact in question, that knowledge may be inferred from the specific circumstances.</p> <p>2. (See above response to no. 1.)</p> <p>3. No response required.</p>
X-2016-114	Legal Services for Prisoners with Children (Barry) (09-27-16)	Yes	D	4.1 (This letter was submitted for	Legal Services for Prisoners with Children hereby agrees with and signs onto the comment	The substance of this public comment pertains to proposed Rule 8.4.1. Please refer to the

**Proposed Rule 4.1 Truthfulness in Statements to Others
Synopsis of Public Comments**

TOTAL = 7 **A = 7**
D = 0
M = 0
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
				rule 4.1 but it pertains to rule 8.4.1)	submitted by Equal Rights Advocates on proposed rule 8.4.1.	public commenter table for Rule 8.4.1.

PROPOSED RULE OF PROFESSIONAL CONDUCT 4.2
(Current Rule 2-100)
Communication With a Represented Person

EXECUTIVE SUMMARY

The Commission evaluated current rule 2-100 (Communication With a Represented Party) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 4.2 (concerning communications with a represented person) and the Restatement of Law Governing Lawyers counterpart, Restatement § 99 (Represented Nonclient – The General Anti-contact Rule). The result of the Commission's evaluation is proposed rule 4.2 (Communication With a Represented Person).

Rule As Issued For 90-day Public Comment

Proposed rule 4.2 carries forward the substance of current rule 2-100, the “no contact” rule, and prohibits a lawyer who represents a client in a matter from communicating, either directly or indirectly, about the subject matter of the representation with a person represented by a lawyer in the same matter. The Rule is intended to protect the represented person against (i) possible overreaching by the prohibited lawyer, (ii) interference by the prohibited lawyer with the client-lawyer relationship, and (iii) the uncounseled disclosure of privileged or other confidential information.

In addition to containing the basic prohibition in paragraph (a), the proposed Rule would carry forward, largely intact, the other black letter provisions in current rule 2-100(B) and (C) as paragraphs (b) and (c). There are also two new paragraphs: paragraph (d), which imposes a duty on a lawyer to treat with fairness a represented person with whom communications are permitted under the Rule (e.g. a public official), and paragraph (e), which includes two definitions intended to avoid ambiguity in the application of the Rule.

Proposed Rule 4.2, like current rule 2-100, is substantially more detailed than the corresponding Model Rule, which is a single blackletter sentence supplemented by nine Comments, many of which expand or provide express exceptions to the rule. The Commission believes that a rule similar to current rule 2-100 is preferred to the Model Rule because it more closely adheres to the Charter's principle that the Rule function as a minimal disciplinary standard. Further, the detailed proposed rule enhances compliance and facilitates enforcement, as well as promotes protection for the public and respect for the legal profession and administration of justice.

Paragraph (a), the basic prohibition, presents a key issue: whether to substitute the term “person” for “party” in current rule 2-100. This substitution has been made by every jurisdiction, either by making the substitution in the black letter provision of its Rule 4.2 counterpart or by stating in a comment that “party” applies to any person involved in a matter who is represented by a lawyer. Changing “party” to “person” will also resolve the limitations inherent in using the term “party” that were recognized in *In the Matter of Dale* (Rev. Dept. 2004) 4 Cal. State Bar Ct. Rptr. 798. Given the rule's aforementioned objectives to protect any person who has chosen to be represented by a lawyer in a matter against possible overreaching by lawyers who are employed in the matter, interference by those lawyers with the lawyer-client relationship, or the uncounseled disclosure of confidential information, there is no principled reason to limit the protection of the rule to those persons who are parties. Nevertheless, public comment received by the first Commission and this

Commission demonstrates that some lawyers in the criminal justice system believe that the substitution of “person” for “party” will inhibit their ability to investigate. However, the experience in other jurisdictions has not borne that out. In any event, proposed Comment [8] makes clear that the change is not intended to prohibit current legitimate investigative practices. In light of these contentions, this change in language creates a point of controversy in considering the Rule. See also discussion of paragraph (c), below.

Paragraph (b), which carries forward the substance of current rule 2-100(B), is intended to clarify the operation of the proposed rule when the represented “person” is an organization, including a governmental organization.¹ The only substantive change to that paragraph is to no longer view as a “represented person” a constituent of the organization “whose statement may constitute an admission on the part of the organization.” That clause was deleted because it is ambiguous and applies even if the statement “may” constitute an admission against interest, and the provision requires a lawyer at his or her peril to analyze the applicable state rules of evidence and law of agency in deciding whether to communicate with a non-managerial employee or agent of a represented entity. Most states do not include this as the ABA deleted a similar clause as a part of its Ethics 2000 Commission’s comprehensive revisions of the Model Rules. In any event, deleting the clause should not put organizations at risk of conceding liability in a communication by one of its constituents because nearly every communication that could constitute an admission would have to originate from a constituent who is already off-limits under subparagraph (b)(1) (which encompasses any officer, director, partner, or managing agent).

Paragraph (c) carries forward most of current Rule 2-100(C), which explicitly recognizes several exceptions to application of the rule, including communications with public officials or public entities and communications otherwise authorized by law. Paragraph (c) does not carry forward current paragraph (C)(2), which excepts communications initiated by a represented person seeking advice from an independent lawyer. Current rule 2-100(C)(2) is superfluous because an independent lawyer could not be covered by the rule, which applies only to communications *by a lawyer in the course of representing a client in the matter*, which would make the lawyer making those communications not independent.

A key issue, however, is the addition of the phrase, “or a court order.” This is intended to address concerns expressed by lawyers in the criminal justice system to the prior Commission that the substitution of “person” would interfere with the ability to conduct investigations. Including this phrase removes any ambiguity that might otherwise suggest that, for example, a prosecutor could not seek a court order to communicate with a represented witness in conducting a criminal investigation. Most states that have a version of Model Rule 4.2 include the option of seeking a court order. When considered in light of the substitution of “person” for “party,” the phrase represents an appropriate balancing between protecting lawyer-client relationships of any person involved in a matter and permitting lawyers, whether on behalf of private or governmental interests, to effectively represent their clients by conducting investigations into the matters for which they had been retained. During the first Commission’s process, the provision generated substantial input from interested stakeholders both in formal public comment and in appearances at Commission meetings and public hearings. This Commission also received communications from interested stakeholders regarding this change. To address the expressed concerns, this Commission has also recommended including proposed Comment [8].

¹ Proposed Rule 1.0.1(g-1) defines “person” to mean “a natural person or an organization.”

Paragraph (d) is new. It requires that when lawyers deal with a represented person as permitted by the rule, i.e., pursuant to paragraph (c)(1), the lawyer must comply with the requirements of Rule 4.3, which in effect requires lawyers to treat unrepresented persons fairly and is intended to prevent overreaching by lawyers when communicating with *unrepresented* persons. Although there may be other general provisions under which a lawyer might be charged for engaging in overreaching conduct, e.g., Bus. & Prof. Code §§ 6068(a) and 6106, their application to situations governed by proposed Rule 4.2 is not readily apparent. Including this express provision should eliminate that ambiguity and facilitate compliance.

Paragraph (e) includes two definitions, one for “managing agent” and another for “public official.” They are intended to clarify the application of the rule in an organizational context and when a lawyer is attempting to exercise the right to petition the government, respectively.

Finally, non-substantive changes to the current rule include rule numbering to track the Commission’s general proposal to use the Model Rule numbering system and the substitution of the term “lawyer” for “member.”

Principle 5 of the Commission’s Charter provides that comments “should not conflict with the language of the rules, and should be used sparingly to elucidate, and not to expand upon, the rules themselves.” Proposed Rule 4.2 has been the focus of a substantial amount of case law that has clarified how it should be applied. The comments the Commission recommends are an attempt to capture that case law and other authority to clarify how the rule is applied, do not conflict with Principle 5, and also accord with Principle 4 of the Commission’s Charter by facilitating “compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties.”

Of particular note is Comment [8] which, as noted above, has been added to clarify that the Rule is not intended to preclude communications with represented persons in the course of legitimate investigations as authorized by law. A similar comment was included in the first Commission’s proposed Rule to address the concerns of lawyers on both sides in the criminal justice system.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission has deleted paragraph (d) and Comment [2A]. However, the Commission added Comment [9] to clarify that communications with a represented person not prohibited under the Rule are still subject to other restrictions.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 4.2 [2-100]

Commission Drafting Team Information

Lead Drafter: Mark Tuft

Co-Drafters: George Cardona, Danny Chou, Joan Croker, Raul Martinez,
Dean Zipser

I. CURRENT CALIFORNIA RULE

Rule 2-100 Communication With a Represented Party

- (A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.
- (B) For purposes of this rule, a “party” includes:
 - (1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or
 - (2) An association member or an employee of an association, corporation, or partnership, 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 or whose statement may constitute an admission on the part of the organization.
- (C) This rule shall not prohibit:
 - (1) Communications with a public officer, board, committee, or body; or
 - (2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party’s choice; or
 - (3) Communications otherwise authorized by law.

Discussion

Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of government

prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.

Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice. Since A is employed by the opposition, the member cannot give independent advice.

As used in paragraph (A), "the subject of the representation," "matter," and "party" are not limited to a litigation context.

Paragraph (B) is intended to apply only to persons employed at the time of the communication. (See *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493].)

Subparagraph (C)(2) is intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 4.2 [2-100]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 4.2 [2-100]

Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 4.2 [2-100] Communication With a Represented Person

- (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.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 2-100)

Rule 4.2 [2-100] Communication With a Represented Person

(Aa) ~~While~~In representing a client, a ~~member~~lawyer shall not communicate directly or indirectly about the subject of the representation with a ~~party~~person* the ~~member~~lawyer knows* to be represented by another lawyer in the matter, unless the ~~member~~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:

~~(B) For purposes of this rule, a "party" includes:~~

- (1) ~~An~~A current officer, director, partner,* or managing agent of ~~a corporation or association, and a partner or managing agent of a partnership~~the organization; or
- (2) ~~An association member or an employee of an association, corporation, or partnership~~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 ~~or whose statement may constitute an admission on the part of the organization.~~

(Cc) This ~~rule~~Rule shall not prohibit:

- (1) ~~Communications~~communications with a public ~~officer~~official, board, committee, or body; or

(2) communications otherwise authorized by law or a court order.

~~(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or~~

~~(3) Communications otherwise authorized by law.~~

(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).

DiscussionComment

~~Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.~~

~~Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer party, and (2) not to accept or engage in communications with the lawyer party.~~

~~Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice. Since A is employed by the opposition, the member cannot give independent advice.~~

~~As used in paragraph (A), “the subject of the representation,” “matter,” and “party” are not limited to a litigation context.~~

~~Paragraph (B) is intended to apply only to persons employed at the time of the communication. (See *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493].)~~

~~Subparagraph (C)(2) is intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.)~~

[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.

V. RULE HISTORY

Rule 2-100 had its origin in the first rules promulgated in 1928. (The 1928 rules are found at 204 Cal. at p. xci.) Former Rule 12 provided:

A member of the State Bar shall not communicate with a party represented by counsel upon a subject of controversy, in the absence and without the consent of such counsel. This rule shall not apply to communications with a public officer, board committee or body.

In 1975, Rule 12 was revised and renumbered 7-103. The rule that was adopted differed from the version that appeared in the 1972 Final Report of the Special Committee to Study the ABA Code of Professional Responsibility. In that report, the special committee had recommended retaining Rule 12's language, "communicate with a party represented by counsel," but the language actually adopted was derived from ABA Code of Professional Responsibility, DR 7-104, which provided "communicate directly or indirectly with a party whom he knows to be represented by counsel."

In 1989, Rule 7-103 was renumbered as 2-100 and was further revised. The rule continued the general prohibition found in Rule 7-103 on communication with a represented party but was amended to prohibit communications with a represented party only when the member is already representing a client in the matter. A new paragraph (B) was added to clarify the complicated issue of which constituents of an opponent entity are protected under the rule from *ex parte* communications by a lawyer representing an opposing party. The State Bar's memorandum to the Supreme Court explained the addition of paragraph (B):

Paragraph (B) is new and is intended to clarify the troubling issue of which employees of an entity may be approached without consent of the attorney for the entity when the entity is the opponent.

The issue has sometimes been analogized to the issue of whether communications between a party's counsel and that party's employees are protected by the attorney work product rule and the attorney-client privilege. Some courts have applied the so called "control group test" in this situation. The test restricts the availability of the privilege to a control group—those employees who play a substantial role in deciding and directing the employee's legal response. In *Upjohn Co. v. United States* (1981) 449 U.S. 391, 392, the Supreme Court rejected that test, noting that it frustrates the very purpose of the attorney-client privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation, that such advice will frequently be more significant to noncontrol group members than those who officially sanction the advice, and that the test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy.

The Los Angeles County Bar Association Ethics Committee, in Formal Opinion 410 (March 24, 1983) opined that the reasoning of *Upjohn* could be logically extended to *ex parte* contacts with a corporate party's employee by opposing counsel because: (1) the corporate employee may be prejudiced either directly or indirectly by the *ex parte* contact; (2) the corporation has an interest in seeing that information or knowledge learned by an employee in the course of the employee's employment is not released to a party with an interest inimical to the corporate employer without the protection and advice of counsel; (3) due to the difficulty of ascertaining whether an employee is acting within the scope of his or her employment, a corporate employee might be induced by opposing counsel into making admissions or statements that are binding upon the corporation; and

(4) due to the difficulty in ascertaining who is a control group member, opposing counsel might contact a party who he believes is not a control group member, only to find out later that the person contacted was a control group member, thereby rendering the contact improper. (See also San Diego County Bar Association Ethics Opinion 1984-5.) Both opinions found, after discussion of *Upjohn* and *Chadbourn*, that it is ethically improper for opposing counsel to contact, ex parte, any employee of a corporation or other entity that is a party to a suit, knowing that the information sought from the employee relates to the subject of the controversy.

However, the large number of comments received on this rule as presented in the Red Book, which proposed prohibiting members from communicating directly with the employee of a corporate opponent, stressed the hardship that such a prohibition would create on certain litigants. The employment discrimination bar, both public and private, pointed out that such a prohibition would make it virtually impossible to investigate claims prior to filing a suit, thus requiring more lawsuits to be filed and costly depositions taken. In addition, certain administrative proceedings have no mechanisms for formal discovery at all, thus making it possible that some potential witnesses would never be interviewed at all. As a result of these comments and many others, it is proposed that paragraph (B) utilize the “control group test.”

(See page 24 of Bar Misc. No. 5626, “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” December 1987.)

The State Bar’s memorandum also explained the addition of new subparagraphs (C)(2) and (C)(3):

Subparagraph (C)(2) is new and is intended to expressly permit a member to communicate with an individual seeking to hire new counsel or to obtain a “second opinion.” Current rule 7-103 has sometimes been interpreted to prohibit an attorney from responding to such inquiries.

Subparagraph (C)(3) is new and is intended to make clear that where a statutory scheme or case law exits regarding communication with a represented party with respect to the subject matter of the representation, the statute or case overrides the rule.

(*Id.*) In 1988, in response to an inquiry from the Supreme Court concerning subparagraph (B)(2), the State Bar responded:

As to the Court’s comment regarding the “binding” standard in rule 2-100(B)(2) being ambiguous, the language of the proposed rule was not intended to be substantively different from the “liability” test in the Comment to ABA Model Rule 4.2. Indeed, the “liability” test appears to be a clearer formulation of the concept

underlying 2-100(B)(2). In order to clarify the rule, it is recommended that the “liability” test from ABA Model Rule 4.2 be added to 2-100(B)(2) as follows:

An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person ~~which may be binding on such entity or which may be the basis of a claim or defense involving that entity in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.~~ which may be binding on such entity or which may be the basis of a claim or defense involving that entity.

In 1992, Rule 2-100 was further revised. The fifth paragraph of the Discussion section added case authority in support of the stated proposition that communications with former employees of an organization are exempt from the rule. The sixth paragraph of the Discussion section was revised to conform it to the language used in the rule and the rest of the Discussion section as follows:

Subparagraph (C)(2) is intended to permit a member to communicate with ~~an individual~~ a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such ~~an individual~~ a party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.)

The 1992 amendments were the last revisions of Rule 2-100.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule. It is concerned, however, with the use of the term “knows” in subsection (a), as it would appear to allow willful blindness, recklessness, or gross negligence in learning whether the person was represented by counsel. (See also OCTC comments to proposed Rules 1.9 and 1.3, and the General Comments sections of this letter.)

Commission Response: The Commission has not made a change to the Rule. As it has noted with respect to other rules, the definition of “knowingly” in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. A lawyer may not engage in willful blindness to avoid knowledge that the person with whom the lawyer seeks to communicate is represented by counsel.

Further, case law has sanctioned the “knowledge” standard with respect to current rule 2-100. See, e.g., *Truitt v. Superior Court* (1997) 59 Cal.App.4th 1183 [69 Cal.Rptr.2d 558]; *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398 [58 Cal.Rptr.2d 178].

2. OCTC supports Comments [1], [2], [3], [5], [6], [7], and [8].

Commission Response: No response required.

3. OCTC is concerned that Comment [2A] merely repeats the rule and its definition of actual knowledge for the same reasons discussed in its Comments to subsection (a) of the rule.

Commission Response: Comment [2A] has been deleted. See proposed Rule 1.0.1(f).

4. OCTC supports the first sentence of Comment [4]. OCTC is, however, concerned with Comment [4]'s use of the term "knows" for the same reasons it is concerned with the use of that term in subsection (a) of this proposed rule.

Commission Response: See Commission's response to #1

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

- **State Bar Court:** No comment was received from the State Bar Court.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, sixteen public comments were received. Six comments agreed with the proposed Rule, three comments disagreed, six comments agreed only if modified, and one comment did not indicate a position. During the 45-day public comment period, three public comments were received. One comment agreed with the proposed Rule, and two comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

See Section V on the history of the current rule. In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- *Abeles v. State Bar* (1973) 9 Cal.3d 603, 609 [108 Cal.Rptr. 359, 510 P.2d 719]

- *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196]
- *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398, 1403 [58 Cal.Rptr.2d 178]
- *Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719 [135 Cal.Rptr.2d 415].
- *La Jolla Cove Hotel & Motel Apartments v. Superior Court* (2004) 121 Cal.App.4th 773 [17 Cal.Rptr.3d 467]
- *McMillan v. Shadow Ridge At Oak Park Homeowner's Ass'n* (2008) 165 Cal.App.4th 960 [81 Cal.Rptr.3d 550].
- *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493]
- *Truitt v. Superior Court* (1997) 59 Cal.App.4th 1183, 1190 [69 Cal.Rptr.2d 558, 563]
- *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798
- Cal. Formal Ethics Opn. 2011-181 (Communications with Opposing Counsel's Implied Consent Under the "No Contact" Rule)
- Cal. Formal Ethics Opn. 1993-131 (Communication with represented party)
- Cal. Formal Ethics Opn. 1996-145 (Communication with represented party or unrepresented party)
- California Rules of Court, Appendix C, proposed guideline 11 (communication with represented litigants)

B. ABA Model Rule Adoptions

- **Massachusetts Rule 4.2** is identical to Model Rule 4.2:

Massachusetts Rule 4.2 Communication With Person Represented By Counsel

In representing a client, a lawyer shall not communicate 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 or is authorized to do so by law or a court order.

- **Utah Rule 4.2** has a rule that diverges from Model Rule 4.2 and more closely approximates the California Rule by identifying exceptions and providing specific definitions in the black letter. Utah Rule 4.2 provides:

Utah Rule 4.2. Communication with Persons Represented by Counsel.

(a) General Rule. In representing a client, a lawyer shall not communicate 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. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client if authorized to do so by any law, rule, or court order, in which event the communication shall be strictly restricted to that allowed by the law, rule or court order, or as authorized by paragraphs (b), (c), (d) or (e) of this Rule.

(b) Rules Relating to Unbundling of Legal Services. A lawyer may consider a person whose representation by counsel in a matter does not encompass all aspects of the matter to be unrepresented for purposes of this Rule and Rule 4.3, unless that person's counsel has provided written notice to the lawyer of those aspects of the matter or the time limitation for which the person is represented. Only as to such aspects and time is the person considered to be represented by counsel.

(c) Rules Relating to Government Lawyers Engaged in Civil or Criminal Law Enforcement. A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer's direction in the matter, may communicate with a person known to be represented by a lawyer if:

(c)(1) the communication is in the course of, and limited to, an investigation of a different matter unrelated to the representation or any ongoing, unlawful conduct; or

(c)(2) the communication is made to protect against an imminent risk of death or serious bodily harm or substantial property damage that the government lawyer reasonably believes may occur and the communication is limited to those matters necessary to protect against the imminent risk; or

(c)(3) the communication is made at the time of the arrest of the represented person and after that person is advised of the right to remain silent and the right to counsel and voluntarily and knowingly waives these rights; or

(c)(4) the communication is initiated by the represented person, directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel, including the right to have substitute counsel, for that communication.

(d) Organizations as Represented Persons.

(d)(1) When the represented person is an organization, an individual is represented by counsel for the organization if the individual is not separately represented with respect to the subject matter of the communication, and

(d)(1)(A) with respect to a communication by a government lawyer in a civil or criminal law enforcement matter, is known by the government lawyer to be a current member of the control group of the represented organization; or

(d)(1)(B) with respect to a communication by a lawyer in any other matter, is known by the lawyer to be

(d)(1)(B)(i) a current member of the control group of the represented organization; or

(d)(1)(B)(ii) a representative of the organization whose acts or omissions in the matter may be imputed to the organization under applicable law; or

(d)(1)(B)(iii) a representative of the organization whose statements under applicable rules of evidence would have the effect of binding the organization with respect to proof of the matter.

(d)(2) The term " control group" means the following persons: (A) the chief executive officer, chief operating officer, chief financial officer, and the chief legal officer of the organization; and (B) to the extent not encompassed by Subsection (A), the chair of the organization's governing body, president, treasurer, secretary and a vice-president or vice-chair who is in charge of a principal business unit, division or function (such as sales, administration or finance) or performs a major policy-making function for the organization; and (C) any other current employee or official who is known to be participating as a principal decision maker in the determination of the organization's legal position in the matter.

(d)(3) This Rule does not apply to communications with government parties, employees or officials unless litigation about the subject of the representation is pending or imminent. Communications with elected officials on policy matters are permissible when litigation is pending or imminent after disclosure of the representation to the official.

(e) Limitations on Communications. When communicating with a represented person pursuant to this Rule, no lawyer may

(e)(1) inquire about privileged communications between the person and counsel or about information regarding litigation strategy or legal arguments of counsel or seek to induce the person to forgo representation or disregard the advice of the person's counsel; or

(e)(2) engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement or other disposition of actual or potential criminal charges or civil enforcement claims or sentences or penalties with respect to the matter in which the person is represented by counsel unless such negotiations are permitted by law, rule or court order.¹

The ABA State Adoption Chart for the ABA Model Rule 4.2, which is the counterpart to current rule 2-100, revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_2.authcheckdam.pdf (Last accessed on 2/6/17.)
- 46 jurisdictions have adopted "person" (Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Dakota, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode

¹ Utah Rule 4.2 also has 23 comments. See: https://www.utcourts.gov/resources/rules/ucja/ch13/4_2.htm.

Island, South Carolina, South Dakota, Tennessee, Texas, Utah Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming). Four jurisdictions besides California have retained “party” in their rule (Arizona, Connecticut, Michigan, Mississippi). All four jurisdictions: (i) have a title that states “Communication With A *Person* Represented By Counsel” (Emphasis added), and (ii) include a Comment providing that the rule applies to a represented person: “This Rule also covers *any person*, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.” (Emphasis added).

- 40 jurisdictions have adopted a rule that includes “or a court order” (Alaska, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming); and 11 jurisdictions do not have “or a court order” (Alabama, Arkansas, Arizona, California, Connecticut, Florida, Michigan, Mississippi, New York, Texas, Virginia).
- Seven jurisdictions include “organizations” and a definition of what is considered an “organization” (California, District of Columbia, Louisiana, Maryland, New Jersey, Texas, Utah); and 1 state includes “organization” but refers to Rule 1.13 for the definition (New Mexico).
- Two jurisdictions expressly prohibit indirect as well as direct violations of the rule.²
- Eight jurisdictions have a black letter provision similar to proposed Comment [5], which addresses the application of the rule in the context of a limited scope representation.³

² The two jurisdictions are New York and Texas. See, e.g., New York Rule 4.2(a), which provides:

(a) In representing a client, a lawyer shall not communicate *or cause another to communicate* about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law. (Emphasis added.)

³ The eight jurisdictions are: Alabama, Alaska, Connecticut, Florida, Maine, Montana, New Hampshire, and Utah. For example, Maine Rule 4.2(b) provides:

(b) An otherwise unrepresented party to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule, except to the extent the limited representation attorney provides other counsel written notice of a time period within which other counsel shall communicate only with the limited representation attorney.

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

A. Concepts Accepted (Pros and Cons):

1. General: There was consensus among Commission members to recommend substituting “person” for “party” in the Rule.
 - Pros: First, this change accords with federal and state law interpreting existing rule 2-100 as applying outside the litigation context to “persons” represented in connection with a particular matter, even if the “persons” are not “parties” in the matter. Second, this change also accords with ABA Model Rule 4.2 and every other jurisdiction in the country. Only four jurisdictions have retained “party” in the black letter of their rule (Arizona, Connecticut, Michigan, and Mississippi), and: (i) all have a title that states “Communication With A *Person* Represented By Counsel” (Emphasis added), and (ii) all include a comment that provides the rule applies to a represented person: “This Rule also covers *any person*, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.” (Emphasis added). Third, changing “party” to “person” will also resolve the limitations inherent in “party” that were recognized in *In the Matter of Dale* (Rev. Dept. 2004) 4 Cal. State Bar Ct. Rptr. 798. Given the rule’s objectives to protect any “person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the lawyer-client relationship and the uncounseled disclosure of information relating to the representation,” (See Model Rule 4.2, Cmt. [1]), there is no reason to limit the protection of the rule to those persons who are parties.⁴ Finally, notwithstanding public comment

⁴ See also *In the Matter of Dale*, *supra*, 4 Cal. State Bar Ct. Rptr. 798. Although the court concluded the word “party” must be construed strictly, it recognized that such an interpretation undermined the purposes of the rule:

We recognize that a strict construction of the rule, limiting its applicability only to represented parties to litigation or to a transaction could, as in this case, defeat the important public policy underlying the rule, which was described in *United States v. Lopez*, *supra*, 4 F.3d 1455, 1458-1459: “The rule against communicating with a represented party without the consent of that party’s counsel shields a party’s substantive interests against encroachment by opposing counsel [T]he trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition.” Our Supreme Court echoed this same assessment in *Mitton v. State Bar*, *supra*, 71 Cal.2d 524, 534: “[The no contact rule] shields the opposing party not only from an attorney’s approaches which are intentionally improper, but, in addition, from approaches which are well intended but misguided. [¶] The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role. If a party’s counsel is present when an opposing attorney communicates with a party, counsel can easily correct any element of error in the communication or correct the effect of the communication by calling attention to counteracting elements which may exist.”

(Footnotes omitted.)

received at the outset⁵ of the Commission's project that opposed the change in the belief it will interfere with criminal investigations, the experience in other jurisdictions has not borne that out. (See also discussion of Comment [8] in Section IX.A.21, below.)

- Cons: Public comment received demonstrates that some lawyers in the criminal justice system believe that the substitution of “person” for “party” will inhibit their ability to investigate. However, proposed Comment [8] makes clear that the change is not intended to prohibit current legitimate investigative practices. (See discussion of Comment [8] in Section IX.A.21, below.) Moreover, addition of the phrase “or a court order” to (c)(2) in accordance with the ABA Model Rule further ensures that this rule will not unduly limit the ability of lawyers in the criminal justice system to engage in legitimate investigative activities. (See discussion of (c)(2) in Section IX.A.11, below.)

2. In proposed paragraph (a), substitute “In” for “While”.

- Pros: Although not a substantive change, it clarifies precisely which communications are governed by the rule and removes unnecessary differences between California and every jurisdiction except one (Georgia).⁶
- Cons: None identified.

3. In proposed paragraph (a), retain the phrase “directly or indirectly”.

- Pros: This language prevents a lawyer from attempting to circumvent the rule by directing an agent (e.g., private investigator) to communicate with the represented person. Not carrying forward this language may create a risk that a court or lawyers might conclude that indirect communications are no longer prohibited.
- Cons: Retaining this language would perpetuate an existing difference between the language of the California rule and the rule adopted in a preponderance of other jurisdictions.

4. Retain concept in current Rule 2-100(B), which identifies which constituents in an organization are covered by the rule and therefore protected under the Rule's prohibition against communications with represented persons.

- Pros: Proposed paragraph (b) is necessary to clarify the complicated and recurring issue of which constituents of an opponent entity are protected under

⁵ A 45-day public comment period was held at the beginning of the Rules Revision project to solicit comments on changes that recipients of the solicitation thought were important and should be made.

⁶ Georgia Rule 4.2 provides in relevant part: “(a) A lawyer who is representing a client in a matter shall not communicate”

the rule from *ex parte* communications by a lawyer representing an opposing party. It provides important guidance that will foster compliance with the Rule. The Commission disagrees with OCTC that drawing such distinctions is not necessary. There is no evidence that current rule 2-100(B) has not provided useful guidance on the application of the rule in the organizational context. Moreover, the definition of the constituents covered by the rule remains in general terms, leaving application to specific fact patterns for interpretation by ethics opinions and/or the courts.

- Cons: Attempting to clarify this point risks being too narrow or overly broad.

5. Change the introductory clause to proposed paragraph (b) from its current form of being a defined term to a statement of the kinds of entities to which paragraph (b)'s prohibition applies. (See also paragraph 6, below.)

- Pros: The proposed new structure more accurately demarcates the kinds of entities to which paragraph (b)'s prohibitions apply while also making clearer that its prohibitions apply based on organizational, as opposed to individual, representation. In particular, unlike the current structure, which could be interpreted as suggesting that its prohibition was based on deemed individual "representation," the proposed structure more accurately describes paragraph (b)'s actual effect, which is to prohibit and prevent communications with the persons identified in subparagraphs (b)(1) and (b)(2) based on the organization's representation; in many instances, this prohibition may apply even before the identified constituents have had an opportunity to consult with an organization lawyer, and at times when they may not even know that the organization is represented in connection with the matter.
- Cons: Notwithstanding the intent of this change, there may be a risk that a court interpreting the new language might view the new structure as an invitation to abandon existing case law concerning the protection afforded by the rule to represented organizations and their constituents.

6. In the introductory clause to paragraph (b)(1) and (b)(2) add the phrase "or other private or governmental organization" after "corporation, partnership, association".

- Pros: Recognizes that there may be organizations other than corporations, partnerships, or associations to which the rule applies. In addition, explicitly states that the rule applies to governmental organizations, not just private organizations. (See also discussion of (c)(1) in paragraph 9, below.)
- Cons: The explicit statement that the rule also applies to governmental organizations might cause some confusion given the provision in both the current rule (paragraph (C)(1)) and proposed Rule (paragraph (c)(1)) stating that communications with a public official are not prohibited in recognition of the constitutional right to petition government.

7. In proposed paragraph (b)(1), insert “current” to modify managerial employees of an organization.
- Pros: Clarifies that the rule’s prohibitions based on organizational representation apply only to currently-employed constituents. Current Rule 2-100 states the same limitation in Discussion ¶. 6. This limitation on the rule’s scope should be in the black letter. Although there is case law so holding, including the concept in the black letter should remove ambiguity and facilitate compliance without requiring further clarification by a court. In particular, the clarification helps assure that this application of the current rule will not be disturbed by the recommended change from party to person.
 - Cons: This clarification in the black letter might be unnecessary as case law already addresses this point (see, e.g., *Nalian Truck Lines v. Nakano Warehouse and Transportation* (1992) 6 Cal.App.4th 1256.) While this clarification may have been important guidance when the rule was revised in 1989, the application of the rule only to currently-employed constituents now appears to be a well-settled point.
8. In proposed paragraph (b)(2), retain the first clause in current Rule 2-100(B)(2) (when act or omission “may be binding upon or imputed to the organization”), but delete the second clause in current Rule 2-100(B)(2) (“the person’s statement may constitute an admission on the part of the organization.”)
- Pros: (1) the second clause was dropped from the Model Rule and is not the law in most states that have adopted Rule 4.2; (2) the provision is ambiguous and applies even if the statement “may” constitute an admission against interest; (3) the provision requires a lawyer at his or her peril to analyze the applicable state rules of evidence and law of agency in deciding whether to communicate with a non-managerial employee or agent of a represented entity; and (4) deleting the clause generally will not put organizations at risk of conceding liability in a communication by one of its constituents because nearly every communication that might constitute an admission would have to originate from a constituent who is already off-limits under paragraph (b)(1) (which encompasses any officer, director, partner, or managing agent); only in rare situations would a constituent not already covered under paragraph (b)(1) be able to make an admission that would be binding on the organization. The aforementioned burdens placed on the communicating lawyer by the admissions clause and its potential for interfering with pre-filing investigations outweigh the benefits that might be realized in prohibiting communications that would only rarely result in an admission.
 - Cons: “Statements” are different from acts and omissions. Constituents of an organization whose statements can result in liability being imposed on the organization should therefore be protected by the Rule. The deletion is a change to existing law.

9. Retain as proposed paragraph (c)(1) current Rule 2-100(C)(1), which excepts from the rule communications with public officers, boards, committees, or bodies, but substitute “public official” (defined in (f)(2)) for “public officer”.
- Pros: The exception in current rule 2-100(C)(1) reflects recognition of the important constitutional right to petition the government and is in accord with public comment received from the California Access To Justice Commission. The change from "public officer" to "public official" (as defined in (f)(2)) provides a more precise description of those constituents of a governmental organization for whom the right to petition would apply, and results in the rule reflecting the appropriate scope of the right to petition the government while preserving government counsel's attorney-client relationship with the governmental agency and its constituents. . (See also discussion re Comment [7] in paragraph 20, below.)
 - Cons: None identified.
10. Delete current Rule 2-100(C)(2) (represented party seeking second opinion from independent lawyer) but include it as a clarifying Comment (Comment [5]).
- Pros: Current (C)(2) is superfluous because an independent lawyer could not be covered by this rule, which applies only to communications *by a lawyer in the course of representing a client*, which would make the lawyer making those communications not independent. In any event, it is properly placed in a paragraph that identifies exception to the rule because the rule does not apply to the described situation in the first instance. Instead, the current rule 2-100(C)(2) concept has been retained as a clarifying Comment to assure lawyers that such communications are not prohibited under the Rule. (See Comment [5].)
 - Cons: Notwithstanding the intent of this change, a court might interpret the movement of this concept from the black letter to a Comment as a signal that the point is rendered less than authoritative in the context of the proposed rule.
11. Retain as proposed paragraph (c)(2) the concept in current Rule 2-100(C)(3) (exception for communications otherwise authorized by law) and include a further exception for communications authorized by a court order.
- Pros: Adding the phrase “or a court order” accords with the ABA Model Rule and the rule in 40 jurisdictions. Together with proposed Comment [8], which is derived from current rule 2-100, Discussion ¶ 1, the addition of the phrase, “or a court order,” is intended to address concerns over the substitution of “person” that were expressed by lawyers in the criminal justice system that the substitution would interfere with their ability to conduct investigations. In 2002, the ABA encountered similar opposition to its proposed amendments to Model Rule 4.2 and responded:

Although a communication with a represented person pursuant to a court order will ordinarily fall within the “authorized by law” exception, the specific reference to a court order is intended to alert lawyers to the availability of judicial relief in the rare situations in which it is needed. These situations are described generally in Comment [4] (renumbered Comment [6]).

After consideration of concerns aired by prosecutors about the effect of Rule 4.2 on their ability to carry out their investigative responsibilities, the Commission decided against recommending adoption of special rules governing communications with represented persons by government lawyers engaged in law enforcement. The Commission concluded that Rule 4.2 strikes the proper balance between effective law enforcement and the need to protect the client-lawyer relationships that are essential to the proper functioning of the justice system.⁷

The Commission believes the ABA responded appropriately to the concerns of law enforcement by amending Model Rule 4.2 to include a reference to “a court order.” (See also discussion of the substitution of “person” for “party” in paragraph 1, above, and of Comment [8] in paragraph 21, below.)

- Cons: The option of seeking a court order to authorize a communication with a represented person appears to be untested in California in relation to the longstanding legal ethics standard set by current rule 2-100 and its predecessors. Even if such an option is borne out as being technically available as a procedural matter, it might nevertheless be illusory as a practical matter for lawyers who have limitations on time and resources during the investigative phase of a case.
12. In proposed paragraph (d)(1), include definition of “Managing Agent”.
- Pros: Defining managing agent provides an important clarification of when the proposed Rule would apply in organizational settings. Moreover, the definition remains in general terms, leaving application to specific fact patterns for interpretation by ethics opinions and/or the courts.
 - Cons: Codifying a definition may render the rule inflexible and inhibit appropriate application to the various factual settings that are confronted by courts, including the State Bar Court.
13. In proposed paragraph (d)(2), include definition of “Public Official”.
- Pros: See discussion of change from “public officer” to “public official” in Section IX.A.9, above, and of Comment [7] in paragraph 20, below.

⁷ See Reporter’s Explanation of Changes, Rule 4.2, available at: http://www.americanbar.org/groups/professional_responsibility/policy/ethics/2000_commission/e2k_rule42rem.html (Last accessed February 16, 2017.)

- Cons: None identified.

COMMENTS

Note on Comments To Proposed Rule 4.2: Principle 5 of the Commission’s Charter provides that Comments “should not conflict with the language of the rules, and should be used sparingly to elucidate, and not to expand upon, the rules themselves.” Proposed Rule 4.2 has been the focus of a substantial amount of case law that has clarified how it should be applied. The Comments the Commission recommends are an attempt to capture that case law and other authority to clarify how the rule is applied, do not conflict with Principle 5, and also accord with Principle 4 of the Commission’s Charter by facilitating “compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties.”

14. Add proposed Comment [1], which state that the rule applies even though the represented person initiates or consents to the communication.

- Pros: The Comment provides an important clarification that it is not just communications that a lawyer might initiate, but rather *any* communication with a represented person where the person’s lawyer has not consented, even those that the person initiates or consents to.
- Cons: None identified.

15. As proposed Comment [2], retain the substance of current Rule 2-100, Discussion ¶ 4.

- Pros: The Comment importantly clarifies that “matter,” etc., is not limited to litigation contexts. The Commission has added a second sentence that further clarifies the point.
- Cons: If the word “person” is substituted for “party,” there is no longer a need for a clarifying Comment re the scope of “matter,” etc.

16. As proposed Comment [3], retain the substance of current Rule 2-100, Discussion ¶ 2.

- Pros: Current Discussion ¶ 2 identifies kinds of communications that do not violate the policies underlying the rule and therefore are permitted. The Commission has shortened the current Discussion paragraph and added language from Model Rule 4.2, Comment [4]. This language clarifies the extent to which a lawyer may advise a client who engages in a communication with a represented opponent without the lawyer violating the prohibition on “indirectly” communicating with a represented person.
- Cons: None identified.

17. Add proposed Comment [4], which clarifies that the rule prohibits only those communications that relate to the subject of the representation, and also clarifies that when a person is represented on a limited scope basis, only those communications related to that person's representation are prohibited.
- Pros: The Commission considered Comment [4] necessary to address the concerns of access to justice stakeholders that an indiscriminately applied prohibition on *ex parte* communication could function to denigrate and discourage limited scope representation.
 - Cons: The topics addressed in this Comment might be better suited to an ethics opinion as the application of the rule in these settings would be dependent upon the facts.
18. As proposed Comment [5], retain the concept in current Rule 2-100(C)(2).
- Pros: See discussion concerning rule 2-100(C)(2) in paragraph 10, above.
 - Cons: None identified.
19. Add proposed Comment [6], which clarifies that when an organizational constituent is independently represented, the consent of the constituent's lawyer alone will permit communications with the constituent, and consent from the organization's lawyer need not also be obtained.
- Pros: Proposed Comment [6] clarifies the term, "consent of the other lawyer" in paragraph (a), when applied to communications with constituents of a represented organization. It recognizes the rule set forth in California case law. See *La Jolla Cove Motel & Hotel Apartments, Inc. v. Superior Court* (2004) 121 Cal.App.4th 773 [17 Cal.Rptr.3d 467].
 - Cons: None identified.
20. Add proposed Comment [7], which clarifies the scope of the exception for communications with public officials, boards, committees, or bodies.
- Pros: See discussion of the change from "public officer" to "public official" in paragraph 9, above. As noted, paragraph (c)(1) of the rule reflects recognition of the constitutional right to petition the government. Comment [7], however, clarifies that not every constituent of a government organization is subject to that paragraph's exception and that those persons falling outside the exception must be provided with the same protections afforded private organization constituents under paragraph (b)(2).
 - Cons: None identified.

21. Include proposed Comment [8], which is derived from current Rule 2-100 Discussion ¶ 1, concerning the scope of the paragraph (c)(2) exception for communications authorized by law or a court order.

- Pros: This Comment clarifies the application of the “authorized by law” exception, including in particular the recognized application of the exception to legitimate government investigative activities. The Comment is important to provide reassurance that the change from “party” to “person” is not intended to change application of the exception. In this regard, the last sentence of the Comment has been added to assure lawyers in the criminal justice system concerned with the change from “party” to “person” that the rule is not intended to prohibit current legitimate investigative practices. See discussion of the substitution of “person” for “party” in paragraph 1, above.
- Cons: The last sentence of the Comment is unnecessary and may raise problems depending upon how it is interpreted. The concerns raised by those practicing in the criminal justice system have not been borne out. There is no legal authority or empirical evidence that criminal defendants have been deprived of due process or the right to a fair trial in the 20 years since the Model Rule 4.2 was amended to substitute “person” for “party.” The purpose of the change is to clarify that represented persons in the matter that is the subject of the communication will receive the same protection whether they are considered parties now or could be named later or are not identified as parties in a particular case or legal matter.

22. Include proposed Comment [9], which provides a cross-reference to Bus. & Prof. Code § 6106 and case law applying the rule in an organizational setting.

- Pros: It is appropriate to include a cross reference to § 6106 and the two cases to alert lawyers that even if an exception to proposed Rule 4.2 applies, there remain other restrictions to communicating with represented persons. See also Concepts Rejected, Section IX.B.3, regarding a proposed text provision that would have explicitly required lawyers to comply with proposed Rule 4.3 (communications with unrepresented persons) when permitted by this rule to communicate with a represented person.
- Cons: If the Comment is intended to require a lawyer must comply with the requirements of proposed Rule 4.3, then the Comment should so explicitly state.

B. Concepts Rejected (Pros and Cons):

1. Add a provision that would prohibit a lawyer for an organization from claiming the lawyer represents all constituents of the organization unless such representation is true.

- Pros: Adding the provision would clarify that an organization’s lawyer could not inhibit pre-litigation investigations by opposing lawyers by simply claiming

to represent all constituents in the organization. (Cf. *Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719 [135 Cal.Rptr.2d 415].)

- Cons: Such misrepresentations are already prohibited under provisions of the State Bar Act.
2. Retain current 2-100(C)(2) in the black letter of the rule.
- Pros: See Section IX.A.10.
 - Cons: See Section IX.A.10.
3. Add a proposed black letter provision, which would provide that a lawyer must comply with the requirements of proposed Rule 4.3 (Communicating with an Unrepresented Person) when the lawyer engages in a communication with a represented person that is not prohibited under the Rule.
- Pros: This provision would align with the objectives of Rule 4.2 (see discussion of the substitution of “person” for “party” in Section IX.A.1, above) and would clarify that even when a communication with a *represented* person is not prohibited (whether because it is made with the consent of the lawyer or because it falls within one of the exceptions in paragraph (c)), the lawyer still must not engage in conduct prohibited by proposed Rule 4.3,⁸ which is intended to prevent overreaching by lawyers when communicating with *unrepresented* persons. Although there may be other general provisions under which a lawyer might be *charged* for engaging in overreaching conduct, their application to situations governed by this rule is not readily apparent. Including this express provision should eliminate that ambiguity and facilitate compliance.
 - Cons: Adding this concept might be unnecessary given that OCTC has commented that there are charging bases (i.e., Business and Professions

⁸ If adopted, proposed Rule 4.3 would provide:

(a) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the lawyer knows or reasonably should know that the interests of the unrepresented person are or may become in conflict with the interests of the client, the lawyer shall not give legal advice to that person, except that the lawyer may, but is not required to, advise the person to secure counsel.

(b) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

Code §§ 6068(a) and 6106) other than the ex parte communication rubric for addressing this type of misconduct.

4. Carve out an express exception in the black letter of the rule for government lawyers conducting criminal or civil action investigations.
 - Pros: See Section IX.A.11 & 21.
 - Cons: See Section IX.A.11 & 21.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Substitution of "person" for "party." (See Section IX.A.1.) Although rule 2-100, Discussion ¶ 1⁹ and case law¹⁰ suggest that substituting "person" for "party" might be a non-substantive change, the better view, in light of *In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798, which held that the rule's protections were limited to "parties" in a matter, is that this is a substantive change.
2. Substitution of "public official" for "public officer." (See Section IX.A.9.) Although there is support for the position that this is a non-substantive clarification of which government employees are excepted from the protections of the rule under paragraph (c)(1), the first Commission received a substantial amount of input from representatives of County and City Attorneys in California, as well as from several law firms with extensive land use practices, considering the substitution as working a substantive change. Consequently, this change is listed under substantive changes.
3. Addition of "or a court order" in proposed paragraph (c)(2) [former rule 2-100(C)(3)]. See Section IX.A.11.
4. Addition in paragraph (d)(1) of a definition of "managing agent." Although this is intended as a clarification of a term already existing in the rule, as interpreted by existing case law, it is a substantive change to the extent the definition delimits the scope of the term. See Section IX.A.12.

⁹ Discussion ¶ 1 provides: "Rule 2-100 is intended to control communications between a member and *persons* the member knows to be represented by counsel unless a statutory scheme or case law will override the rule." (Emphasis added.)

¹⁰ See *Jackson v. Ingersoll-Rand Co.* (1996) 42 Cal.App.4th 1163, 1167 (although rule 2-100 applies to a *person* represented by counsel, the lawyer had not violated the rule because even assuming the *person* was represented by counsel, the lawyer had no knowledge of the representation.)

5. Addition in paragraph (d)(2) of a definition of “public official.” See Section IX.A.13 and IX.C.2.

D. Non-Substantive Changes to the Current Rule:

1. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction’s rule, thus permitting them more easily to determine whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
2. Substituting the term “lawyer” for “member”.
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
3. In paragraph (a), substitution of “in” for “while”. See Section IX.A.2.
4. In paragraph (b)(1), addition of “current” to modify managerial employees of organization. See Section IX.A.7.
5. In introductory clause to paragraph (b), addition of phrase, “or other private or governmental organization.” See Section IX.A.6.
6. None of the Comments are intended as substantive changes to the current rule

that would have an effect on a lawyer's duties. Several are derived from current Discussion paragraphs to current rule 2-100 (i.e., Comments [2], [3], [5] and [8]). All Comments are included to clarify the application of the proposed rule and enhance compliance with it.

E. Alternatives Considered:

None.

X. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION

Ms. Langford submitted a written dissent. See attached for the full text of the dissent and the Commission's response to the dissent.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 4.2 [2-100] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 4.2 [2-100] in the form attached to this Report and Recommendation.

**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.

Proposed Rule 4.2 [2-100] Communication with a Represented Person
Synopsis of Public Comments

TOTAL = 3 **A = 1**
 D = 0
 M = 2
 NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-3	League of California Cities (Leary) (12-15-16)	Y	M		1. Substitute "Public Officer" for "Public Official" in Proposed Rule 4.2 because "Public Officer" is well defined in California public agency law and its use will clarify the scope of Proposed Rule 4.2's application.	1. The Commission has not made the suggested changes. As it previously noted, the recommended change from "public officer" to "public official" (as defined in (e)(2) [relettered as (d)(2) in the revised rule draft]) provides a more precise description of those constituents of a governmental organization for whom the right to petition would apply, and results in the rule reflecting the appropriate scope of the right to petition the government while preserving government counsel's attorney-client relationship with the governmental agency and its constituents. The definition lists "public officer" as within the meaning of the term "public official." Further, the rule also applies to situations involving the federal government and to incorporate the term, "public officer," would cause unnecessary confusion, as the rule would provide an exception for communications with many federal officers to which the exception is not

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Proposed Rule 4.2 [2-100] Communication with a Represented Person
Synopsis of Public Comments**

TOTAL = 3
A = 1
D = 0
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>2. Either define “public officer” as “an individual who holds a position in government that is created or authorized by law, the tenure of which is continuing and permanent, not occasional or temporary, and in which the individual performs a public function for the public benefit and exercises some of the sovereign powers of the government,” or reference the existing body of law distinguishing between public officers and public employees in a comment to Rule 4.2.</p> <p>3. Adopt the ABA’s approach to an opposing counsel’s contacts with public officers, as outlined in ABA Formal Opinion 97-408, in lieu of Proposed Rule 4.2’s wholesale exception. Under this approach, (1) opposing counsel must provide the government attorney with reasonable advance notice of any attempt to</p>	<p>intended to apply. Finally, the Commission notes that the cases and Attorney General opinions cited do not discuss the term “public officer” in the context of the Constitutional right to petition, which is the policy underlying the exception.</p> <p>2. See response at No. 1, above.</p> <p>3. The Commission did not make the suggested change. It continues to believe that Comment [7] of proposed Rule 4.2 adequately addresses the commenter’s points that are taken from an ethics opinion, ABA Formal Ethics Op. 1997-408. The ABA also does not provide the requested</p>

**Proposed Rule 4.2 [2-100] Communication with a Represented Person
Synopsis of Public Comments**

TOTAL = 3 **A = 1**
D = 0
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					communicate with a public client; (2) the communication must be directed to an individual who has authority to take or recommend action in the matter; and (3) the sole purpose of such communication must be to address a policy issue, including potential settlement.	guidance in a rule.
Y-2016-7h	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (12-21-16)	Y	A		COPRAC supports the adoption of proposed Rule 4.2 as revised.	No response required.
Y-2016-21y	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (1-9-17)	Y	M		1. OCTC supports this rule. OCTC is, however, concerned with the use of the term “knows” in subsection (a), as it would appear to allow willful blindness, recklessness, or gross negligence in learning whether the person was represented by counsel. (See prior comments about “knowing” and “knowingly” in this letter and the General Comments sections of OCTC’s September 27, 2016 letter.)	1. The Commission has not made a change to the Rule. The use of “knows” in paragraph (a) and Comment 4 is consistent with current Rule 2-100, the corresponding rule in every other jurisdiction, and California case law, all of which require knowledge of the representation (using a definition of knowledge equivalent to that contained in Proposed Rule 1.0.1(f)) for the Rule to apply. See, e.g., <i>Truitt v. Superior Court</i> (1997) 59 Cal.App.4th 1183 [69 Cal.Rptr.2d 558]; <i>Jorgensen v. Taco Bell Corp.</i> (1996) 50 Cal.App.4th 1398 [58 Cal.Rptr.2d 178]. As the Commission has noted with

Proposed Rule 4.2 [2-100] Communication with a Represented Person
Synopsis of Public Comments

TOTAL = 3 **A = 1**
D = 0
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>respect to other rules, the definition of “knowingly” in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. A lawyer may not engage in willful blindness to avoid knowledge that the person with whom the lawyer seeks to communicate is represented by counsel.</p> <p>2. OCTC supports Comments 1, 2, 3, 5, 6, 7, 8, and 9.</p> <p>3. OCTC supports the first sentence of Comment 4. OCTC is, however, concerned with Comment 4’s use of the term “knows” for the same reasons it is concerned with the use of that term in subsection (a) of this proposed rule.</p>	<p>2. No response required.</p> <p>3. See response to OCTC’s comment 1.</p>

PROPOSED RULE OF PROFESSIONAL CONDUCT 4.3
(No Current Rule)
Communicating with an Unrepresented Person

EXECUTIVE SUMMARY

In connection with the consideration of current Rule 2-100 (Communication with a Represented Party), the Commission reviewed and evaluated ABA Model Rule 4.3 (Dealing With an Unrepresented Person), the Restatement of the Law of Lawyering, section 103 (Communications with Unrepresented Nonclient). The Commission also reviewed relevant California statutes, rules, and case law relating to issues addressed by the proposed rule. Although the proposed rule has no direct counterpart in the current California rules, much of its concept is found in current rule 3-600(D) concerning how a lawyer for an organization must deal with the organization's constituents. The result of the evaluation is proposed rule 4.3 (Communicating with an Unrepresented Person).

Rule As Issued For 90-day Public Comment

The key concept of the proposed rule is in **paragraph (a)**, which prohibits a lawyer when communicating on behalf of a client with an unrepresented person from doing three things: (i) stating or implying the lawyer is disinterested; (ii) correcting the person's misconception if the lawyer knows or reasonably should know the person incorrectly believes the lawyer is disinterested; and (iii) providing legal advice, other than to obtain counsel, if the interests of the person are in conflict with the client's interests. By including the first two objectives, the proposed rule will extend the principles found in current rule 3-600(D) beyond the organizational context.¹ The Commission concluded the provision provides important public protection and critical guidance to lawyers interacting with unrepresented persons by clarifying the conduct that is prohibited rather than requiring them to parse and interpret more general prohibitions in the State Bar Act. Further, proposed Rule 4.3 complements proposed Rule 4.2's prohibitions on communicating with a represented party when such communications are permitted under that rule. Moreover, Rule 4.3 would provide an alternative basis for discipline to Business & Professions Code §§ 6068(a) and 6106 that would not require the establishment of a fiduciary relationship or proof of an act of moral turpitude. Finally, a version of Model Rule 4.3 has been adopted in every other jurisdiction in the country.

The major concern with paragraph (a) is the third prohibition concerning the giving of legal advice. Unless the person retains counsel, the lawyer will be unreasonably restricted in attempting to inform the person of the lawyer's client's legal positions. There is a fine line between providing legal advice and giving legal information and a lawyer arguably should not be subject to discipline for giving legal advice or stating the legal positions of the lawyer's client. The Commission has addressed this concern by including proposed Comment [2], discussed below.

¹ Rule 3-600(D) provides:

(D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

Paragraph (b) has no counterpart in jurisdictions that have adopted Model Rule 4.3. Nevertheless, the provision is important in protecting the attorney-client privilege and legal rights of third persons with whom the lawyer interacts. A concern expressed regarding paragraph (b) is that it imposes unique risks on a lawyer and creates a gap between what a client may do and what a lawyer is permitted to do. The Commission, however, concluded that a lawyer should not be permitted to engage in conduct that is prejudicial to the administration of justice simply because a layperson might not have the same duties as a lawyer.

Finally, non-substantive changes to the current rule include rule numbering to track the Commission's general proposal to use the model rule numbering system and the substitution of the term "lawyer" for "member."

There are three comments to the Rule. Comment [1] states the policy underlying the rule and its intent, and so explains how the rule should be applied to a contemplated course of conduct, an approved function of a rule comment. Comment [2] is a substantial revision of the corresponding Model Rule comment and clarifies the prohibition on giving "legal advice" in the third sentence of paragraph (a). In particular, it includes the important point that a lawyer does not give legal advice to an unrepresented person when the lawyer states a legal position on behalf of his or her client. Comment [3] was a placeholder when the Commission adopted the rule and in fact, has been moved to different rule.

National Background – Adoption of Model Rule 4.3

As California does not presently have a direct counterpart to Model Rule 4.3, this section reports on the adoption of the Model Rule in United States' jurisdictions.

The ABA State Adoption Chart for the ABA Model Rule 4.3, from which proposed rule 4.3 is derived, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_3.authcheckdam.pdf

28 states have adopted Model Rule 4.3 verbatim (AK, AZ, AR, CO, DE, HI, ID, IL, IN, IA, LA, MA, MS, MO, NE, NV, NH, NM, ND, OH, OK, RI, SC, SD, TN, VT, WV, WY); 22 jurisdictions have adopted a rule that is substantially similar to 4.3 (AL, CT, DC, FL, GA, KS, KY, ME, MD, MI, MN, MT, NJ, NY, NC, OR, PA, TX, UT, VA, WA, WI); only California has not adopted a rule derived from Model Rule 4.3 (CA).

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission added Comment [3] which provides a cross-reference to proposed Rule 8.4, Comment [5], regarding a lawyer's involvement in lawful covert activity when investigating violations of law. Comment [5] to proposed Rule 8.4 (Misconduct) states a lawyer does not engage in conduct involving dishonesty, fraud, deceit or reckless or intentional misrepresentation when a lawyer "advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules and the State Bar Act."

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 4.3

Commission Drafting Team Information

Lead Drafter: Mark Tuft

Co-Drafters: George Cardona, Danny Chou, Joan Croker, Raul Martinez,
Dean Zipser

I. CURRENT ABA MODEL RULE 4.3

**[There is no California Rule that corresponds to Model Rule 4.3,
from which proposed Rule 4.3 is derived.]**

Rule 4.3 Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare

documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 4.3

Vote: 13 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 4.3

Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 4.3 Communicating with an Unrepresented Person

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

Comment

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

[2] Paragraph (a) distinguishes between situations in which a lawyer knows* or reasonably should know* that the interests of an unrepresented person* are in conflict with the interests of the lawyer's client and situations in which the lawyer does not. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any legal advice, apart from the advice to obtain counsel. A lawyer does not give legal advice merely by stating

a legal position on behalf of the lawyer's client. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person.* So long as the lawyer discloses that the lawyer represents an adverse party and not the person,* the lawyer may inform the person* of the terms on which the lawyer's client will enter into the agreement or settle the matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document and the underlying legal obligations.

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

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 4.3)

Rule 4.3 ~~Dealing~~Communicating with an Unrepresented Person

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

Comment

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

~~[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).~~

[2] ~~The Rule~~Paragraph (a) distinguishes between situations ~~involving unrepresented persons whose~~in which a lawyer knows* or reasonably should know* that the interests

~~may be adverse to those~~ of an unrepresented person* are in conflict with the interests of the lawyer's client and ~~those in which the person's interests are not in conflict with the client's~~ situations in which the lawyer does not. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any legal advice, apart from the advice to obtain counsel. ~~Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur~~ A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person.* So long as the lawyer ~~has explained~~ discloses that the lawyer represents an adverse party and ~~is not representing~~ the person,* the lawyer may inform the person* of the terms on which the lawyer's client will enter into ~~an~~ the agreement or settle ~~a~~ the matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document ~~or the lawyer's view of~~ and the underlying legal obligations.

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

V. RULE HISTORY

Although the origin and history of Model Rule 4.3 was not the primary factor in the Commission's consideration of proposed Rule 4.3, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 571 – 576, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule.

Commission Response: No response required.

2. OCTC is concerned that Comments [1] and [2] are unnecessary, merely repeat the rule, or provide the philosophical reasons for the rule.

Commission Response: The Commission continues to believe that Comments [1] and [2] provide important guidance with respect to the application of the Rule.

3. Comment [3] is unnecessary, as this subject is covered in Rule 4.4.

Commission Response: The Commission continues to believe it is important to have a cross-reference to provide guidance with respect to a situation in which all the requirements of the Rule will not apply.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

For the 45-day public comment version of the rule, OCTC re-submitted the same comments as for the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

- **State Bar Court:** No comment was received from the State Bar Court.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, ten public comments were received. Four comments agreed with the proposed Rule, two comments disagreed, and four comments agreed only if modified. During the 45-day public comment period, two public comments were received. One comment agreed with the proposed Rule, and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

A provision analogous to the first sentence of Model Rule 4.3 is found in the second sentence of current rule 3-600(D), which provides:

(D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

Model Rule 4.3 applies the prohibition in 3-600(D) more generally, so that it is not limited to contexts involving a constituent of an organization.¹

¹ Conduct analogous to that prohibited in Model Rule 4.3 appeared in a Court of Appeal decision, *Furia v. Helm* (2003) 111 Cal.App.4th 945, 955 (In dispute between contractor and homeowners, homeowner's lawyer, who had agreed to mediate the dispute, breached the duty to exercise reasonable care the lawyer assumed towards contractor when the lawyer did not fully and fairly disclose to contractor that he did not intend to be entirely impartial as a mediator.)

The second sentence of Model Rule 4.3, which requires a lawyer to take reasonable steps to correct a misunderstanding when the unrepresented person incorrectly believes the lawyer is disinterested, has an analogous provision in the first sentence of current rule 3-600(D), above. Again, Model Rule 4.3 applies the prohibition more generally.

The concept in the third sentence of Model Rule 4.3, which prohibits the lawyer from giving the unrepresented person legal advice – except the advice to seek independent counsel – also has a predicate in case law. (See *In re Marriage of Bonds* (2000) 24 Cal.4th 1 [99 Cal.Rptr.2d 252]. But compare *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537].)

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for the ABA Model Rule 4.3, from which proposed Rule 4.3 is derived, revised September 15, 2011⁶, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_3.authcheckdam.pdf [Last visited 2/6/17]
- Twenty-eight jurisdictions have adopted Model Rule 4.3 verbatim.² Twenty-two jurisdictions have adopted a rule that is substantially similar to 4.3.³ Only California has not adopted a rule derived from Model Rule 4.3.

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

A. Concepts Accepted (Pros and Cons):

1. General: Recommendation that a version of ABA Model Rule 4.3, as amended, be adopted.
 - Pros: Notwithstanding objections to the adoption of such a rule on the ground that “overreaching and other improper conduct that may arise in this context is addressed in other rules and the State Bar Act,” the Commission believes the proposed rule is necessary to protect the public. The Rule is intended to ensure that unrepresented persons, whatever their interests may be, are not being misled when communicating with a lawyer who is acting on behalf of a client. The rule provides important public protection and critical guidance to

² The twenty-eight jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, West Virginia, and Wyoming.

³ The twenty-two jurisdictions are: Alabama, Connecticut, District of Columbia, Florida, Georgia, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Texas, Utah, Virginia, Washington, and Wisconsin.

lawyers interacting with represented persons by clarifying the conduct that is prohibited rather than requiring them to parse and interpret more general prohibitions in the State Bar Act. Further, proposed Rule 4.3 complements Rule 4.2's prohibitions on communicating with a represented party. Moreover, Rule 4.3 would provide an alternative basis for discipline to Bus. & Prof. Code §§ 6068(a) and 6106 that does not require the establishment of a fiduciary relationship or proof of an act of moral turpitude. Finally, a version of Model Rule 4.3 has been adopted in every other jurisdiction in the country. There is no reason for California to remain the only state not to have the Rule.

- Cons: A revision to current Rule 2-100 governing contact with one who is not represented by counsel is unnecessary. Overreaching and other improper conduct that may arise in this context is addressed in other rules and the State Bar Act.

2. In title and rule, change “dealing with” to “communicating with”.

- Pros: The change will clarify precisely what conduct is being reached and make Rule parallel with proposed Rule 4.2 (Communicating With Represented Person).
- Cons: None identified.

3. In paragraph (a), second sentence, substitute “incorrectly believes the lawyer is disinterested” for “misunderstands the lawyer’s role” in Model Rule 4.3.

- Pros: The change will more precisely identify the concern the proposed rule is intended to address. In addition, unlike the word “misunderstands,” the term “believes” is a term defined in the terminology rule, proposed Rule 1.0.1(a).
- Cons: None identified.

4. Retain the concept of paragraph (a), third sentence, i.e., when the client’s and unrepresented person’s interests are adverse, a lawyer shall not give legal advice to the person except to secure counsel.

- Pros: A lawyer who represents a client with interests adverse to an unrepresented person should not provide legal advice to that person. The danger of the lawyer overreaching and compromising the interests of the unrepresented person are too great. The rule does not prohibit a lawyer from stating a legal position on behalf of the lawyer’s client. (See proposed Comment [2].) Moreover, appropriate disclaimers when stating the client’s legal position could avoid a misunderstanding on the part of the unrepresented person that the lawyer is providing legal advice.
- Cons: Unless the person were to retain counsel, the lawyer will be unreasonably restricted in attempting to inform the person of the client’s legal positions. There is a fine line between providing legal advice and giving legal

information and a lawyer should not be subject to discipline for giving legal advice or stating the legal positions of the lawyer's client.

5. In paragraph (a), third sentence, delete the Model Rule 4.3 phrase "might have a reasonable possibility of being".
 - Pros: Requiring a lawyer not only to recognize when an unrepresented person's interests are adverse to the lawyer's client's interests but also to anticipate when their interests might become adverse in the future places too great a burden on a lawyer and would interfere with the lawyer's ability to advocate effectively on behalf of his or her client. On balance, the likely interference with effective advocacy warrants deleting the clause.
 - Cons: A lawyer should reasonably be able to anticipate when there is a "reasonable possibility" that the interests of the person and the lawyer's client will become adverse.
6. In paragraph (a), reverse the sentence structure of the third sentence of ABA Model Rule 4.3, so that the qualifying clause comes first.
 - Pros: The clause reversal emphasizes that the prohibition and duty described in the sentence are triggered when the lawyer "knows" the interests of client and unrepresented person conflict.
 - Cons: None identified.
7. Add paragraph (b), which prohibits a lawyer from seeking to obtain from an unrepresented person information that is privileged or confidential.
 - Pros: Although proposed paragraph (b) is not found in Model Rule 4.3, there is a similar concept in Model Rule 4.4(a) that prohibits a lawyer from using methods of obtaining evidence that violate the legal rights of a third person. Including a requirement in this rule that prohibits a lawyer from seeking to obtain privileged or other confidential information that the lawyer knows or reasonably should know the person may not reveal without violating a duty to another, or which the lawyer is not otherwise entitled to receive, is important in protecting the attorney-client privilege and legal rights of third persons with whom the lawyer interacts. Including the provision in this Rule is appropriate because the Commission has not recommended that Model Rule 4.4(a) be adopted. Finally, that the lawyer's client might have the ability to engage in such conduct is no reason to permit a lawyer to do so; lawyers who are trained advocates should be held to a higher standard of conduct.
 - Cons: The provision imposes unique risks on a lawyer and creates a gap between what a client may do and what a lawyer is permitted to do.

8. Add Comment [1], not found in Model Rule 4.3, and delete Model Rule Comment [1].

- Pros: Comment [1] succinctly states the policy underlying the rule and its intent, and so explains how the rule will likely be applied to a contemplated course of conduct. The Model Rule Comment merely repeats the rule and is thus unnecessary.
- Cons: None identified.

9. Retain but substantially revise Model Rule 4.3, Comment [2].

- Pros: The Comment contains important guidance that clarifies the prohibition on giving “legal advice” in the third sentence of paragraph (a). In particular, it makes the important point that in negotiating with an unrepresented person, a lawyer does not give legal advice when the lawyer states a legal position on behalf of the lawyer’s client.
- Cons: None identified.

10. Add Comment [3], which has no counterpart in Model Rule 4.3, and which provides a cross-reference to Rule 8.4, Comment [5] concerning lawful covert investigative activities.

- Pros: By referencing proposed Rule 8.4, Comment [5], this Rule’s Comment [3] provides guidance and assurance to both government and private lawyers who engage in lawful covert investigative activities. Comment [3] is derived from Oregon Rule 8.4(b), a rule that was adopted in Oregon following the Oregon Supreme Court’s decision in *In re Gatti* (2000) 8 P.3d 966, in which the court sanctioned a lawyer for a covert investigation he conducted on behalf of a client in violation of the Oregon DR 1-102(A)(3) [conduct involving dishonesty, fraud, deceit or misrepresentation] and DR 7-102(A)(5) [knowingly making false statement of law or fact]. Subsequently, the Oregon Code was amended to permit the conduct and this was carried forward when Oregon converted to rules based on the ABA Model Rules as Oregon Rule 8.4(b).⁴ Use of the qualification “lawful” should prevent the Comment from swallowing the rule.

⁴ Oregon Rule 8.4(b) provides:

(b) Notwithstanding paragraphs (a) (1), (3) and (4) and Rule 3.3 (a)(1) , it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer’s conduct is otherwise in compliance with these Rules of Professional Conduct . “Covert activity,” as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. “Covert activity” may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

- Cons: Some questions/concerns were raised about including Comment [3]:
 - (1) This exception encompasses actions taken by both governmental and non-governmental/private lawyers and might be construed to be so broad that it “swallows the general prohibition” insofar as covert investigations are involved.
 - (2) Even with the limitation that the covert activity be “lawful,” deciding what is a “lawful” covert investigation in the private sector would still leave a great deal of uncertainty in the rule.
 - (3) Even if it is determined that the Comment is not too broad, it belongs in the blackletter because creates an exception to the rule.
 - (4) Even if it is determined that the Comment is not too broad and is appropriate either as a Comment or a black letter exception, whether Rule 4.3 is the appropriate rule in which to place a Comment providing that a lawyer who conducts a lawful covert investigation is not in violation of the Rules. Alternative rules would include proposed Rule 8.4, should the Commission recommend adoption of a counterpart to Model Rule 8.4 or a rule counterpart to Model Rule 4.1 (Truthfulness in Statements to Others).

B. Concepts Rejected (Pros and Cons):

None. However, other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:

1. California has similar provisions, (see, e.g., rule 3-600(D) and Business & Professions Code §§ 6068(a) and 6106), so the adoption of proposed Rule 4.3 arguably would not create any new duties but instead would provide lawyers with guidance in communicating with unrepresented persons.

D. Non-Substantive Changes to the Current Rule:

None.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 4.3 in the form attached to this Rule and Recommendation.

Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 4.3 in the form attached to this Report and Recommendation.

**Proposed Rule 4.3 Communication with an Unrepresented Person
Synopsis of Public Comments**

TOTAL = 2 **A = 1**
D = 0
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-21z	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Yes	M		<p>1. OCTC supports this rule.</p> <p>2. Comments [1] and [2] are unnecessary, merely repeat the rule, or provide the philosophical reasons for the rule. Comment [3] is unnecessary, as this subject is covered in Rule 8.4.</p> <p>3. Comment [3] is unnecessary, as this subject is covered in Rule 4.4.</p>	<p>1. No response required.</p> <p>2. The Commission continues to believe that Comments [1] and [2] provide important guidance with respect to the application of the Rule.</p> <p>3. The Commission continues to believe it is important to have a cross-reference to provide guidance with respect to a situation in which all the requirements of the Rule will not apply.</p>
Y-2016-7i	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (12-20-16)	Yes	A		<p>We reiterate our support for proposed Rule 4.3 and the proposed Comments.</p> <p>We have concluded that none of the public comments cause us to reconsider our support. Your Commission's responses to those comments should dispel the concerns raised, particularly with the addition of Comment [3].</p>	No response required.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

PROPOSED RULE OF PROFESSIONAL CONDUCT 4.4
(No Current Rule)
Duties Concerning Inadvertently Transmitted Writings

EXECUTIVE SUMMARY

The Commission reviewed and evaluated ABA Model Rule 4.4 (Respect For Rights Of Third Persons) for which there is no California counterpart. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The result of this evaluation is proposed rule 4.4 (Duties Concerning Inadvertently Transmitted Writings).

Rule As Issued For 90-day Public Comment

Proposed rule 4.4 is derived from ABA Model Rule 4.4(b). ABA Model Rule 4.4(a) seeks to regulate lawyer conduct that embarrasses, delays, or burdens a third party. It also prohibits a lawyer from obtaining evidence through means that violate the rights of a third person. The Commission determined to not recommend adoption of ABA Model Rule 4.4(a) because, similar to the First Commission, this Commission believes the rule is vague and overbroad with use of the terms “embarrass, delay, or burden a third party.” In addition, there was concern that such a rule could be used for mischief in discovery disputes if one were to assert a discovery motion was being used in violation of the rule.

Proposed rule 4.4 requires a lawyer who receives a writing relating to the representation of the lawyer’s client and knows or reasonably should know that the writing is either privileged or subject to the work product doctrine, when it is reasonably apparent to the receiving lawyer that the writing was inadvertently sent or produced, to promptly notify the sender. The Commission is recommending that California adopt this duty as a rule of professional conduct because California case law¹ affirmatively states it is an ethical obligation of an attorney who receives inadvertently produced materials that obviously appear to be subject to the attorney-client privilege or otherwise clearly appear to be confidential and privileged that the attorney shall immediately notify the sender. In California, this duty is currently only found in case law and the Commission believes capturing the obligation in a rule of professional conduct will help protect the public and the administration of justice, as well as inform attorneys of their ethical obligation.

The main issue debated when evaluating this rule was whether to recommend an “obviously appear” standard regarding a writing’s status as privileged or subject to the attorney work product doctrine, instead of a “knows or reasonably should know” standard. The argument in favor of an “obviously appear” standard was that California case law uses the phrase “materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged . . .” (*Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817, quoting favorably *State Comp. Ins. Fund v. WPS* (1999) 70 Cal.App.4th 644, 656-657).² The Commission ultimately determined to recommend the objective standard of “knows or

¹ See, *Rico v. Mitsubishi* (2007) 42 Cal.4th 807; *State Comp. Ins. Fund v. WPS* (1999) 70 Cal.App.4th 644.

² But see, *Rico*, 42 Cal.4th at 818: “The *State Fund* rule is an objective standard. In applying the rule, courts must consider whether reasonably competent counsel, knowing the circumstances of the litigation, would have concluded the materials were privileged, how much review was reasonably necessary to draw that conclusion, and when counsel’s examination should have ended.”

reasonably should know” because this standard accomplishes the same result articulated in the case by using a known disciplinary standard that is used in several proposed rules and in our current rules. Further, an objective standard should be more protective of privileged information because the standard will be that of a reasonably competent attorney. Such a standard will prevent an attorney from raising as a defense that the document did not obviously appear privileged or subject to the attorney work product doctrine “to me.”

There is one comment to the rule. The comment provides guidance as to what steps the receiving lawyer should do, in addition to promptly notifying the sender, to either stop reading the document and return the writing to the sender, seek to reach agreement with the sender regarding the disposition of the writing, or seek guidance from a tribunal. These steps are consistent with what the California Supreme Court has stated a lawyer should do in this situation.

Although the concept contained in proposed rule 4.4 is currently addressed in case law, the proposed rule is a substantive change to the current rules because the duty is now being included as a rule of discipline.

National Background – Adoption of Model Rule 4.4

As California does not presently have a direct counterpart to Model Rule 4.4, this section reports on the adoption of the Model Rule in United States’ jurisdictions. Other than California, all jurisdictions have adopted some version of ABA Model Rule 4.4; however, three jurisdictions do not have a version of Model Rule 4.4(b).³

The ABA State Adoption Chart for ABA Model Rule 4.4 is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_4.authcheckdam.pdf

Fourteen states have adopted Model Rule 4.4 verbatim.⁴ Thirty-one jurisdictions have adopted a slightly modified version of Model Rule 4.4.⁵ Two states have adopted a version of the rule that substantially diverges from Model Rule 4.4.⁶

³ The three jurisdictions are: Georgia, Michigan, and Texas.

⁴ The fourteen states are: Arkansas, Connecticut, Delaware, Iowa, Kansas (with a different title), Massachusetts, Minnesota, Nevada, New Mexico (with a different title), North Dakota (Model Rule 4.4(b) is found in North Dakota Rule 4.5(a)), Ohio (4.4(b) is verbatim), Oregon (4.4(b) is verbatim), West Virginia, and Wyoming.

⁵ The thirty-one jurisdictions are: Alabama, Alaska, Arizona, Colorado, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin.

⁶ The two states are: Maryland and New Jersey.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made several changes to the text and comment of proposed Rule 4.4.

Text. The Commission modified the syntax of the black letter text to clarify the rule's application. This change is non-substantive. It also added the requirement that the lawyer "refrain from examining the writing* any more than is necessary to determine that it is privileged or subject to the work product doctrine." This latter change conforms the rule to the holding in *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758].

Comment. The Commission made a non-substantive change to the second sentence of Comment [1] (formerly the only comment to the rule) to include a cross-reference to Rule 4.2, which comprehensively regulates communications with a represented person. The public comment draft had provided: "If the sender is known to be represented by counsel, the lawyer must communicate with the sender's counsel."

The Commission also added proposed Comment [2], derived in part from Model Rule 4.4, cmt. [4], to clarify that the rule does not apply to writings that may have been inappropriately been disclosed to the lawyer. A citation to California case law that governs such disclosures has also been added.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made a minor citation format change. In Comment [4], the Commission added the word "See" before the citation *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 [125 Cal.Rptr.3d 361]. This was the only change to the rule.

With this change, the Commission voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 4.4

Commission Drafting Team Information

Lead Drafter: Raul Martinez

Co-Drafters: Joan Croker, Toby Rothschild

I. CURRENT ABA MODEL RULE

**[There is no California Rule that corresponds to Model Rule 4.4,
from which proposed Rule 4.4 is derived.]**

Rule 4.4 Respect For Rights Of Third Persons

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, “document or electronically stored information” includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly

referred to as “metadata”), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 4.4

Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 4.4

Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION’S PROPOSED RULE 4.4 (CLEAN)

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings*

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

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

Comment

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

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

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 4.4)

Rule 4.4 ~~Respect For Rights Of Third Persons~~Duties Concerning Inadvertently Transmitted Writings*

~~(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.~~

~~(b) A~~Where it is reasonably* apparent to a lawyer who receives a ~~document or electronically stored information~~writing* relating to ~~the~~a lawyer's representation of ~~the lawyer's client and a client that the writing* was inadvertently sent or produced, and the lawyer~~ knows* or reasonably should know* that the ~~document or electronically stored information was inadvertently sent~~writing* is privileged or subject to the work product doctrine, the lawyer shall:

(a) refrain from examining the writing* any more than is necessary to determine that it is privileged or subject to the work product doctrine, and

(b) promptly notify the sender.

Comment

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

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

~~[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.~~

~~[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently~~

~~sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, “document or electronically stored information” includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as “metadata”), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.~~

~~[3]—Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.~~

V. RULE HISTORY

Although the origin and history of Model Rule 4.4 was not the primary factor in the Commission’s consideration of proposed Rule 4.4, that information is published in “A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013,” Art Garwin, Editor, 2013 American Bar Association, at pages 577 – 584, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. Model Rule 4.4(a) is consistent with California law. (See Business and Professions Code sections 6068(g) and 6068(f), rule 3-200 of the Rules of Professional Conduct, and rule 128.7 of the Code of Civil Procedure. Also see *Sorenson v. State Bar* (1991) 52 Cal.3d 1036 [encouraging the commencement or continuance of an action from spite and vindictiveness]; *In the Matter of Scott* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 446, 454-457 [attorney acted in bad faith, out of spite, with a retaliatory motive, and with the purpose to harm others and cause delay]; and *In the Matter of Varakin* (Review Dept. 1994) 3 Cal.

State Bar Ct. Rptr. 179, 187 [attorney acted in bad faith, out of spite and for the purpose of harassment].)

Commission Response: No response required.

2. Model Rule 4.4(b) is also consistent with California law. (See *Rico v. Mitsubishi Motors Corp* (2007) 42 Cal.4th 807.)

Commission Response: No response required.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

1. OCTC supports this rule and Comments [1] and [2].

Commission Response: No response required.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, four public comments were received. One comment agreed with the proposed Rule and three comments agreed only if modified. During the 45-day public comment period, two public comments, including the above comment from OCTC, were received. One comment agreed with the proposed Rule, and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

The following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- Cal. Evidence Code § 954
- *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725 [101 Cal.Rptr.3d 758]
- *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807 [68 Cal.Rptr.3d 758]
- *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 [125 Cal.Rptr.3d 361]
- *Oxy Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874 [9 Cal.Rptr.3d 621]
- State Bar Formal Opn. 2013-188

B. ABA Model Rule Adoptions

Other than California, all jurisdictions have adopted some version of ABA Model Rule 4.4; however, three jurisdictions do not have a version of Model Rule 4.4(b).¹

The ABA State Adoption Chart for ABA Model Rule 4.4, revised December 29, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_4.authcheckdam.pdf
- Fourteen jurisdictions have adopted Model Rule 4.4 verbatim.² Thirty-one jurisdictions have adopted a slightly modified version of Model Rule 4.4.³ Two states have adopted a version of the rule that substantially diverges from Model Rule 4.4.⁴

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

A. Concepts Accepted (Pros and Cons):

1. Change the title of the rule to “Duties Concerning Inadvertently Transmitted Writings”
 - Pros: The title more accurately describes the content and purpose of the rule.
 - Cons: None identified.
2. Recommend that California adopt of a version of ABA Model Rule 4.4(b)
 - Pros: California case law states it is an ethical obligation of an attorney who receives inadvertently produced materials that obviously appear to be subject to the attorney-client privilege or otherwise clearly appear to be confidential and privileged that the attorney shall immediately notify the sender. In California, this duty is currently only found in case law and capturing the

¹ The three jurisdictions are: Georgia, Michigan, and Texas.

² The fourteen jurisdictions are: Arkansas, Connecticut, Delaware, Iowa, Kansas (with a different title), Massachusetts, Minnesota, Nevada, New Mexico (with a different title), North Dakota (Model Rule 4.4(b) is found in North Dakota Rule 4.5(a)), Ohio (4.4(b) is verbatim), Oregon (4.4(b) is verbatim), West Virginia, and Wyoming.

³ The thirty-one jurisdictions are: Alabama, Alaska, Arizona, Colorado, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin.

⁴ The two jurisdictions are: Maryland and New Jersey.

obligation in a rule of professional conduct will help protect the public and the administration of justice, as well as inform attorneys of their ethical obligation.

- Cons: A lawyer's duties concerning inadvertently transmitted writings often are fact-bound inquiries and therefore are difficult to specify in a one-size-fits-all rule that will have disciplinary consequences.
3. Recommend the rule use an "reasonably apparent" standard regarding the documents status as privileged or confidential or subject to the attorney work product doctrine, instead of a "knows or reasonably should know" standard.
- Pros: California case law uses the phrase "materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged . . ." (*Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817, quoting favorably *State Comp. Ins. Fund v. WPS* (1999) 70 Cal.App.4th 644, 656-657).⁵ The "reasonably apparent" standard approximates the case law standard and offers the advantage of using the term "reasonably" which is defined in the proposed terminology rule (Rule 1.0.1(h)).
 - Cons: An objective standard (knows or reasonably should know) accomplishes the same result articulated in the case law by using a known disciplinary standard being used in several proposed rules, and in our current rules (see, current Rule 5-110). An objective standard may be more protective of privileged or confidential information because the standard would be that of a reasonably competent attorney. Such a standard would prevent an attorney from raising as a defense the document did not obviously appear privileged, or confidential, or subject the attorney work product doctrine "to me."
4. Include in the blackletter of the rule specific steps that the receiving lawyer should do upon receiving inadvertently transmitted writings that appear to be privileged. California case law states the receiving lawyer "should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged." (*Rico*, 42 Cal.4th at p. 817)
- Pros: What the Supreme Court has stated is what a lawyer, at minimum, should do in this situation: stop reading the materials any more than is necessary to determine the materials are privileged, and notify the sender the lawyer is in possession of such materials. Although the language used in the case law is both "should" and "shall," given the context of the Court's

⁵ But see, *Rico*, 42 Cal.4th at 818: "The *State Fund* rule is an objective standard. In applying the rule, courts must consider whether reasonably competent counsel, knowing the circumstances of the litigation, would have concluded the materials were privileged, how much review was reasonably necessary to draw that conclusion, and when counsel's examination should have ended."

description of an “ethical obligation,” these steps should be regarded as mandatory imperatives rather than permissive guidance.

- Cons: The steps described in case law are practice guidance and depend upon the specific facts and circumstances. As practice guidance, these steps do not belong in the blackletter of the rule. California court decisions state the receiving lawyer “should refrain” from reading the materials any more than is necessary to determine if the materials are privileged, and the lawyer “shall immediately” notify the sender that the lawyer possesses material that appears to be privileged. The additional guidance these court decisions provide use the permissive term “may” to describe what lawyers can do to resolve the dispute. Such language is not appropriate in the blackletter of a rule of discipline.
5. Recommend adoption of Comment [1] that provides a citation to the key California case on this subject (*Rico v. Mitsubishi*).
- Pros: The proposed Comment clarifies the scope of the rule which is important in this situation because this rule would be a new rule in California. Comment [1] states the purpose of the rule and provides guidance as to how the rule should be applied. The Comment also cites to the California Supreme Court case stating the ethical obligations of an attorney who receives inadvertently sent or produced materials.
 - Cons: Including case law as guidance assumes a risk that the case could change or be superseded.
6. Recommend adoption of Comment [2] which explains that the rule does not address the legal duties of a lawyer who receives information that may have been inappropriately disclosed by the sending person.
- Pros: The proposed Comment alerts lawyers to a problem area that is not addressed by the proposed rule. It provides citation to relevant case law (*Clark v. Superior Court*). This Comment is important to avoid erroneous application of the new rule.
 - Cons: The case cited is from the Court of Appeal and this could easily lead to confusion if subsequent cases provide different guidance.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption ABA Model Rule 4.4(a) which seeks to regulate lawyer conduct that embarrasses, delays, or burdens a third party. It also prohibits a lawyer from obtaining evidence through means that violate the rights of a third person.
- Pros: Model Rule 4.4(a) provides important protection regarding the rights of third persons.

- Cons: The Commission believes the rule is vague and overbroad with use of the terms “embarrass, delay, or burden a third party.” The rule could be used as a “club” in discovery disputes if one were to assert a discovery motion was being used in violation of the rule.
2. Include the phrase “or electronically stored information” after “writing” in the blackletter of the rule.
- Pros: As part of Ethics 20/20, the ABA revised Model Rule 4.4(b) in 2012 to address the issues surrounding electronic documents and ESI discovery. The risk of inadvertently produced material grows when dealing with huge amounts of electronically stored data.
 - Cons: The ethical obligations imposed upon an attorney who receives inadvertently produced privileged or confidential material are no different whether the writing or document is “electronically stored,” or hand written. Further, the Commission is under the belief that the term “writing” will be defined as described by Evidence Code § 250, which would include electronically stored information.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables

C. Changes in Duties/Substantive Changes to the Current Rule:

This would be new rule of professional conduct in California; however, the proposed rule would not be a substantive change in duties as articulated in California case law.

D. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 4.4 in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopt proposed Rule 4.4 in the form attached to this Report and Recommendation.

**Proposed Rule 4.4 Duties Concerning Inadvertently Transmitted Writings
Synopsis of Public Comments**

TOTAL = 2 **A = 1**
D = 0
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-21aa	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Yes	A		OCTC supports this rule and Comments [1] and [2].	No response required.
Y-2016-7k	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (01-09-17)	Yes	M		COPRAC supports the adoption of proposed Rule 4.4 as revised but we respectfully suggest that Comment [2] be deleted. The Comment is confusing, both because the term “inappropriately disclosed” is vague and because it is not clear why the comment is limited only to “sending persons.” If the rule is intended to be limited to inadvertent disclosures, it would be more clear simply to state that.	<p>The Commission did not make the requested change. The Commission believes that Comment [2] is not confusing because the concise statement provided therein should be construed in light of the case citation that follows the statement. The Commission is charged with using comments sparingly and the approach of including a brief statement together with a case cite that provides more extensive information is intended to be consistent with that charge.</p> <p>However, the Commission made a citation change to add the word “See” before the reference to the <i>Clark</i> case.</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings*
(Commission's Proposed Rule Adopted on January 20, 2017 –
Redline to Public Comment Draft Version)

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

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

Comment

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

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

PROPOSED RULE OF PROFESSIONAL CONDUCT 5.1
(Current Rule 3-110 Disc.)
Responsibilities of Managerial and Supervisory Lawyers

EXECUTIVE SUMMARY

In connection with consideration of current rule 3-110 (Failing to Act Competently), the Commission has reviewed and evaluated ABA Model Rules 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer), and 5.3 (Responsibilities Regarding Nonlawyer Assistants). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The evaluation was made with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. Although these proposed rules have no direct counterpart in the current California rules, the concept of the duty to supervise is found in the first Discussion paragraph to current rule 3-110, which states: “The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents.”¹ The result of this evaluation is proposed rules 5.1 (Responsibilities of Managerial and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer), and 5.3 (Responsibilities Regarding Nonlawyer Assistants).

Rule As Issued For 90-day Public Comment

The main issue considered when evaluating a lawyer’s duty to supervise was whether to adopt versions of ABA Model Rules 5.1, 5.2, and 5.3, or retain the duty to supervise only as an element of the duty of competence. The Commission concluded that adopting these proposed rules provides important public protection and critical guidance to lawyers possessing managerial authority by more specifically describing a lawyer’s duty to supervise other lawyers (proposed rule 5.1) and non-lawyer personnel (proposed rule 5.3). Proposed rules 5.1 and 5.3 extend beyond the duty to supervise that is implicit in current rule 3-110 and include a duty on firm managers to have procedures and practices that foster ethical conduct within a law firm. Current rule 3-110 includes a duty to supervise but says nothing about the subordinate lawyer’s duties. Proposed rule 5.2 addresses this omission by stating that a subordinate lawyer generally cannot defend a disciplinary charge by blaming the supervisor. Although California’s current rules have no equivalent to proposed rule 5.2, there appears to be no conflict with the proposed rule and current California law in that there is no known California authority that permits a subordinate lawyer to defend a disciplinary charge based on clearly improper directions from a senior lawyer.

¹ The first Discussion paragraph to current rule 3-110 provides:

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)

The following is a summary of proposed rule 5.1 (Responsibilities of Managerial and Supervisory Lawyers).² This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 5.1 adopts the substance of ABA Model Rule 5.1. Paragraph (a) requires that managing lawyers make “reasonable efforts to ensure” the law firm has measures that provide reasonable assurance that all lawyers in the firm comply with the Rules of Professional Conduct and the State Bar Act. Paragraph (b) requires that a lawyer who directly supervises another lawyer make “reasonable efforts to ensure” the other lawyer complies with the Rules of Professional Conduct and the State Bar Act, whether or not the other lawyer is a member or employee of the same firm. Neither provision imposes vicarious liability. However, a lawyer will be responsible for a subordinate’s rules violation under paragraph (c) if a lawyer either ordered or, with knowledge of the relevant facts and specific conduct, ratifies the conduct of the subordinate, ((c)(1)), or knowing of the misconduct, failed to take remedial action when there was still time to avoid or mitigate the consequences, ((c)(2)).

There are nine comments to the rule. Comments [1] – [4] describe the duties of managerial lawyers to reasonably assure compliance with the rules under paragraph (a). Comment [5] states that whether a lawyer has direct supervisory authority over another lawyer in a specific instance is a question of fact. Comments [6] – [9] elucidate on a supervisory lawyer’s responsibility for another lawyer’s violation.

National Background – Adoption of Model Rule 5.1

As California does not presently have a direct counterpart to Model Rule 5.1, this section reports on the adoption of the Model Rule in United States’ jurisdictions. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers,” revised May 5, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_1.pdf

Thirty-one states have adopted Model Rule 5.1 verbatim.³ Fourteen jurisdictions have adopted a slightly modified version of Model Rule 5.1.⁴ Five states have adopted a version of the rule that is substantially different to Model Rule 5.1.⁵ One state has not adopted a version Model Rule 5.1.⁶

² The executive summaries for proposed rules 5.2 and 5.3 are provided separately.

³ The thirty-one states are: Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

⁴ The fourteen jurisdictions are: Alabama, Alaska, District of Columbia, Florida, Georgia, Michigan, Mississippi, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Vermont, and Virginia.

⁵ The five states are: New Jersey, New York, Ohio, Oregon, and Texas.

⁶ The one state is California.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission added Comment [6] which is derived in part from proposed rule 5.2(b). In addition, the Commission has modified Comment [3] for clarity and deleted Comment [9] as unnecessary.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 5.1

Commission Drafting Team Information

Lead Drafter: Robert Kehr

Co-Drafters: Joan Croker, Judge Karen Clopton, Howard Kornberg,
Toby Rothschild

I. CURRENT ABA MODEL RULE 5.1

**[There is no California Rule that corresponds to Model Rule 5.1,
from which proposed Rule 5.1 is derived.]**

Rule 5.1 Responsibilities Of Partners, Managers, And Supervisory Lawyers

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
 - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 5.1

Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 5.1

Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers

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

Comment

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

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

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

[3] A partner,* shareholder or other lawyer in a law firm* who has intermediate managerial responsibilities satisfies paragraph (a) if the law firm* has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. For example, the managing lawyer of an office of a multi-office law firm* would not necessarily be required to promulgate firm-wide policies intended to reasonably* assure that the law firm's lawyers comply with the Rules or State Bar Act. However, a lawyer remains responsible to take corrective steps if the lawyer knows* or reasonably should know* that the delegated body or person* is not providing or implementing measures as required by this Rule.

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

Paragraph (b) – Duties of Supervisory Lawyers

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

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

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

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

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

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

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 5.1)

Rule 5.1 Responsibilities of ~~a Partner or~~Managerial and Supervisory Lawyer~~Lawyers~~

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

Comment

~~[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.~~ Duties Of Managerial Lawyers To Reasonably* Assure Compliance with the Rules.

[21] Paragraph (a) requires lawyers with managerial authority within a law firm* to make reasonable* efforts to establish internal policies and procedures designed ~~to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed, for example,~~ to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

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

~~[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.~~

[3] A partner,* shareholder or other lawyer in a law firm* who has intermediate managerial responsibilities satisfies paragraph (a) if the law firm* has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. For example, the managing lawyer of an office of a multi-office law firm* would not necessarily be required to promulgate firm-wide policies intended to reasonably* assure that the law firm's lawyers comply with the Rules or State Bar Act. However, a lawyer remains responsible to take corrective steps if the lawyer knows* or reasonably should

know* that the delegated body or person* is not providing or implementing measures as required by this Rule.

[4] ~~Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).a)~~ also requires managerial lawyers to make reasonable* efforts to assure that other lawyers in an agency or department comply with these Rules and the State Bar Act. This Rule contemplates, for example, the creation and implementation of reasonable* guidelines relating to the assignment of cases and the distribution of workload among lawyers in a public sector legal agency or other legal department. See, e.g., State Bar of California, Guidelines on Indigent Defense Services Delivery Systems (2006).

Paragraph (b) – Duties of Supervisory Lawyers

[5] ~~Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as Whether a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate~~

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

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

[7] The appropriateness of remedial action by a partner or managing lawyer under paragraph (c)(2) would depend on the immediacy of that lawyer's involvement and the nature and seriousness of the misconduct. A supervisor is required to and the nature and immediacy of its harm. A managerial or supervisory lawyer must intervene to prevent avoidable consequences of misconduct if the supervisor knows lawyer knows* that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

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

~~[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.~~

~~[7] Apart from~~⁹ Paragraphs (a), (b), and (c) create independent bases for discipline. This Rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm.* Apart from paragraph (c) of this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner,* associate, or subordinate.~~Whether~~ lawyer. The question of whether a lawyer ~~may~~^{can} be liable civilly or criminally for another lawyer's~~lawyer's~~ conduct is ~~a question of law~~ beyond the scope of these Rules.

~~[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a). the Rules of Professional Conduct. See Rule 5.2(a).~~

V. RULE HISTORY

There are no current rule counterparts in the California Rules to Model Rules 5.1 to 5.3, however, there is predicate authority in the California Rules and case law that is in line with those rules. See Section XIII.A Related California Law, below.

For background on the concepts relating to the duty to supervise refer to Report and Recommendation for proposed Rule 1.1, Section V.

Although the origin and history of Model Rule 5.1 was not the primary factor in the Commission's consideration of proposed Rule 5.1, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 585 - 594 ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. Supervision should remain part of Rule 1.1 b/c there is an established history of case law governing this duty that would be upset by reallocating the supervision duty to a different rule that is structured differently.
2. Competence and supervision can be hard to distinguish, so separating the two duties will lead to unwanted charging errors.
3. Respondent lawyers often dispute a competence charge but at trial argue for the first time that what OCTC has described in an uncharged supervision issue.

Commission Response to #1-3, above: The decision to separate diligence, competence and supervision into separate rules to enhance compliance and conform to the national standard remains valid and OCTC should not have any greater charging difficulties than bar regulators in other jurisdictions. Most of the comments we have received favor treating these duties in separate rules.

Separating competence and diligence is also consistent with other rules. See, e.g., proposed Rule 1.7(b)(1).

4. Comments [5], [6], [8], and [9] are unnecessary and merely repeat the Rule and Comment [6] also is obvious and not needed.

Commission Response: The Commission disagrees with the commenter as to Comments [5] through [8]. The Commission believes each of those comments provide helpful explanation of the rule's application and so promotes compliance and facilitates enforcement. The Commission agrees that Comment [9] is not necessary.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

1. Supervision should remain a part of the rule addressing competence (Rule 1.1). Supervision by an attorney is an essential part of lawyer competence.

Commission Response: The duty to supervise currently is part of the competence rule, but the Commission believes that adoption of proposed Rule 5.1 will make clear to lawyers who manage law firms the importance of assuring ethical conduct within the firm and will make clear to supervising lawyers that supervision includes ethical conduct, and will clarify the limits on a supervisor's responsibilities.

2. Comments [5], [8], and [9] are unnecessary and merely repeat the rule.

Commission Response: The Commission disagrees with the commenter as to Comments [5], [8], and [9]. The Commission believes each of those comments provide helpful explanation of the rule's application and so promotes compliance and facilitates enforcement.

3. The first sentence of Comment [7] is unnecessary.

Commission Response: The Commission disagrees with the commenter's assessment. The sentence provides context for the following sentence and explains the text of the proposed Rule.

4. The term "knowingly" well established law providing that violations can be found based upon recklessness, gross negligence, or willful blindness, as well as "knowingly" or intentionally.

Commission Response: The definition of "knowingly" recognizes that a person's knowledge may be inferred from circumstances, and the Commission believes this will encompass the same field as currently covered by conduct previously labeled with other terms.

5. The Comment [9] discussion of subsections (a) through (c) merely repeats the rule and is unnecessary.

Commission Response: The Commission believes this sentence helps to explain the text of the proposed Rule.

6. The third sentence of Comment [9] states that paragraph (c) of this proposed Rule and proposed Rule 8.4 are the only time there is disciplinary liability for the conduct of a partner, associate, or subordinate lawyer. That Comment is overly broad because Rule 8.4.1, Comment [1] states that Rule 8.4.1 imposes on all firm lawyers an obligation to advocate corrective action.

Commission Response: The Commission has not made the suggested change. Comment [1] of Rule 8.4.1 does not impose liability on a lawyer as only the black letter text can be a source of discipline. However, Comment [1] of Rule 8.4.1 does clarify that subparagraphs (b)(i) and (ii) of the rule prohibits a lawyer in a firm from “knowingly permit[ting]” discriminatory conduct prohibited by the rule. Under paragraph (c)(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).” Nevertheless, liability would not be imposed on the lawyer because of the conduct of others in the firm but because of the lawyer’s own failure to comply with the rule and engage in conduct that advocates corrective action.

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

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, five public comments were received. One comment agreed with the proposed Rule, two comments disagreed, and two comments agreed only if modified. During the 45-day public comment period, two public comments were received. One comment disagreed with the proposed Rule, and one comment agreed only if modified. A public comment synopsis table, with the Commission’s responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Although there are no current rule counterparts in the California Rules to Model Rules 5.1 to 5.3, there is predicate authority in the California Rules and case law that is in line with those rules.

1. Discussion Paragraph To Rule 3-110 Identifies The Duty To Supervise

The first Discussion paragraph to current rule 3-110 states: “The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and nonattorney

employees and agents.”¹ This Discussion paragraph provides citations to seven lawyer disciplinary cases, which are listed below with a brief statement of the context in which discipline was imposed at least in part for a breach of supervisory responsibilities.

2. Authorities Considered by the Commission

The following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- *Waysman v. State Bar* (1986) 41 Cal.3d 452, 458 [224 Cal.Rptr. 101] (Lawyer was disciplined for misappropriating client money for office expenses. Lawyer’s negligence in supervising his office was a factor in the misconduct.)
- *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525] (Lawyer settled client’s claim without the client’s consent. Lawyer claimed that secretarial errors caused a failure to promptly deliver the settlement proceeds to the client. This Court found that even without deliberate wrongdoing, fiduciary violations resulting from lapses in office procedure may be deemed “wilful” for disciplinary purposes and the lawyer failed to show that office staff was properly supervised.)
- *Palomo v. State Bar* (1984) 36 Cal.3d 785, 796 [205 Cal.Rptr. 834] (Lawyer endorsed his client’s name on a check payable to the client without client authorization and claimed that an office employee mistakenly deposited the check in the lawyer’s payroll account instead of the client trust account. This Court found the evidence demonstrated the lawyer’s pervasive carelessness in failing to give the office manager any supervision and that the lawyer generally failed to instruct the office manager on trust account requirements and procedures.)
- *Crane v. State Bar* (1981) 30 Cal.3d 117, 122 – 123 [177 Cal.Rptr. 670] (Lawyer claimed that letter communications with a party represented by counsel without that counsel’s consent were sent inadvertently by office staff. This Court found that the attorney was responsible for the work product of his employees, which is performed pursuant to his direction and authority.)
- *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288] (Lawyer blamed secretary mismanagement for a disbursement from his client trust account when there were insufficient funds on deposit. This Court observed that the rule governing client trust accounts is binding upon attorneys – not lay personnel – and necessitates reasonable staff supervision in the handling of trust account matters.)
- *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857 – 858 [100 Cal.Rptr. 713] (Lawyer blamed his staff for mistakes in securing an execution against client’s husband to

¹ This first paragraph of the Discussion section was added operative May 26, 1989. (See Bar Misc. No. 5626, “Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation,” December 1987.)

collect attorney fees that the husband had already partially paid in a divorce proceeding. This Court disciplined the lawyer for the mistakes and stated that even though an attorney cannot be held responsible for every detail of office procedure, he must accept responsibility to supervise the work of office staff.)

- *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161] (Lawyer relied on staff and a subordinate lawyer who failed to perform legal services for client. Even after a default judgment was entered and the client repeatedly sought assurances from lawyer that relief from default would be sought, lawyer failed to check on whether the subordinate lawyer and staff actually sought relief from default. This Court disciplined the lawyer for continued neglect in overly relying on, and failing to closely supervise, the subordinate lawyer and staff.)

B. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers,” revised December 8, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_1.authcheckdam.pdf [last checked 2/14/17]
- Thirty-one jurisdictions have adopted Model Rule 5.1 verbatim.² Fourteen jurisdictions have adopted a slightly modified version of Model Rule 5.1.³ Five jurisdictions have adopted a version of the rule that is substantially different from Model Rule 5.1.⁴ Only California has not adopted a version Model Rule 5.1.

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

This Rule is part of an interrelated set of Rules 5.1 – 5.3 that incorporates into separate rules lawyers’ duties to supervise subordinate lawyers and nonlawyer assistants, (Rules 5.1 and 5.3, respectively) and states the duties of subordinate lawyers (Rule 5.2).

² The thirty-one jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

³ The fourteen jurisdictions are: Alabama, Alaska, District of Columbia, Florida, Georgia, Michigan, Mississippi, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Vermont, and Virginia.

⁴ The five jurisdictions are: New Jersey, New York, Ohio, Oregon, and Texas.

A. Concepts Accepted (Pros and Cons):

1. General: Recommend adoption of standalone rules patterned on Model Rules 5.1, 5.2 and 5.3 rather than maintain a duty of supervision in the competence rule (proposed new Rule 1.1, and currently rule 3-110).
 - Pros: There are a number of reasons for adopting this change:
 1. Rule 3-110 works well when the supervising lawyer is a sole practitioner or in a firm that is small enough so that the duty to supervise easily can be ascribed to a particular lawyer. Holding any one lawyer responsible for supervision in a larger law firm is more difficult because responsibility can be diffused: Who would be responsible for a failure to supervise if there are ten or twenty or forty lawyers working on a major project?
 2. Model Rules 5.1(a) and 5.3(a) extend beyond the duty to supervise that is implicit in rule 3-110 and include imposing a duty on firm managers to have procedures and practices that foster ethical conduct within a law firm. A firm's procedures and practices are pertinent, not just to competent representation, but also to representation in compliance with other ethical standards. For example, a law firm must have conflict checking procedures, and firm-wide systems that reasonably assure compliance with those procedures, in order to avoid conflicts of interest. Model Rules 5.1 and 5.3 therefore have a considerably wider application than the supervision standard currently part of rule 3-110. There is additional client protection in adding definition to the duties of firm managers and supervisors.
 3. The broader application of Model Rules 5.1 and 5.3 to all Rule violations and not just competence extends not just to a firm's procedures and practices under paragraph (a) of each Rule but also to supervision and control of subordinate lawyers and nonlawyers under paragraphs (b) and (c) of each Rule.
 4. Rule 3-110 includes a duty to supervise but says nothing about the subordinate lawyer's duties, except the requirement of competence. Model Rule 5.2 addresses this by stating that a subordinate generally cannot defend a disciplinary charge by blaming the supervisor. While California's current Rules have no equivalent to Model Rule 5.2, there appears to be no conflict between Model Rule 5.2 and current California law in that there is no known California authority that permits a subordinate lawyer to defend a disciplinary charge based on clearly improper directions from a senior lawyer. Compare *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522 (That associate was following orders of a supervisor was no defense to a malicious prosecution claim). Adding a version of Model Rule 5.2 would provide fair notice to subordinate lawyers and provide a tangible basis for them to urge a senior lawyer to correct conduct and directions.

5. Model Rule 5.1 and 5.3 make clear that a lawyer's supervisory responsibility can extend to lawyers and non-lawyer personnel who are not within the first lawyer's law firm. Examples would include local counsel and contract lawyers who report to and are directed by a lawyer with primary responsibility so that the second lawyer operates much like an associate in the first lawyer's firm.
6. Proposed Rules 5.1, 5.2, and 5.3 complement one another in a logically consistent package. Also, Model Rule 5.2 strikes the proper balance between a subordinate's duties as a lawyer and the subordinate's duty to the organization.
7. Adopting these Rules would place the supervisory obligations of lawyers in the black letter rather than commentary. See public comment letter from Scott Garner, COPRAC, June 16, 2015.
- Cons: In its 9/2/2015 submission to the Commission, OCTC stated that the current rule and case law address the duty to supervise attorney staff and employees.
2. Recommend changing the title of the rule to conform to the paragraph (a) and (c) changes made to the corresponding Model Rule paragraphs by removing "partners" from the title and adding the term "managerial" to modify lawyers.
- Pros: It is important that there be no dissonance between the proposed Rule and its title so that there is no confusion about how the rule should be applied.
 - Cons: None identified.
3. Recommend adding to paragraph (b) the language "whether or not a member or employee of the same law firm".
- Pros: The concept is important because a lawyer who has direct supervisory responsibility should not be able to avoid application of the Rule when acting through a lawyer who is outside the first lawyer's firm.
 - Cons: The language should not be added for two reasons: First, the words are unnecessary (in that the Rule would have the same meaning without these words). Second, not including these words would remove the concept from the Rule (and doing so would avoid uncertain application in certain situations).
4. Recommend adding to paragraph (c)(1) the words "of the relevant facts and".
- Pros: This addition is intended to limit a supervisor's responsibility to the situation in which the supervisor knows of the relevant facts and not just the other lawyer's conduct. Due to the definition of "know" the supervisor's knowledge can be inferred from the circumstances. Adding these words

makes it clear that a supervising lawyer cannot be responsible for another lawyer's conduct unless the lawyer has knowledge of the relevant facts. The Commission believes it is important to balance the supervisor's affirmative obligation to supervise against the risk that overly-inclusive language might cause supervisors to be seen as guarantors of the proper conduct of all lawyers and nonlawyer assistants they supervise.

- Cons: These words are essential to the rule because a supervising lawyer cannot be held responsible for a subordinate's work unless the supervising lawyer knows both the subordinate's conduct and the facts showing that conduct to be wrongful.
5. Recommend editing the Model Rule Comments to eliminate material that is practice guidance or that merely repeats or describes the Rule content.
- Pros: This is required under the Commission Charter.
 - Cons: None identified.
6. Add new Comment [6] in order to clarify the scope of supervisor's responsibilities
- Pros: Consistent with the proposed addition of "of the relevant facts and" to paragraph (c)(1) and the Rule 5.2 recognition that some ethics issues have no single reasonable answer, the Commission recommends the addition of new Comment [6] to assure that paragraph (c)(1) is not interpreted as making a supervising lawyer the guarantor of the correctness of a subordinate's resolution of an ethics issue. The Commission believes this reading of paragraph (c)(1) would strike an appropriate and reasonable balance between the need for supervisors to be responsible for the conduct of those who are supervised and the need to recognize that ethics issues sometimes have no certain answer.
 - Cons: This concept, borrowed from proposed Rule 5.2, in that context has been criticized as undercutting personal responsibility.
7. Remove Model Rule, Comments [6] and [8].
- Pros: Neither Comment explains the proper interpretation of the Rule and therefore is unnecessary.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Include the language in Model Rule paragraph 5.1(a) that imposes a duty on each firm partner to take action to assure the firm has appropriate systems in place.
 - Pros: Each partner should take whatever action that lawyer can to achieve the goals of this Rule, even if a particular lawyer does not participate in management or has no independent management authority. No firm partner should be permitted to be blind to wrongful conduct.
 - Cons: Mid-level and other partners who lack management authority would be at unnecessary risk from imposing on them a duty that they cannot fulfill in a meaningful way. If they would not have disciplinary risk, including them in the rule would be only aspirational.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:

Proposed Rules 5.1 and 5.3 do not substantively change a lawyer's obligation to supervise, but they add responsibilities for those lawyers who control a law firm to create and enforce firm-wide policies, such as to check for possible conflicts of interest, in order to make it more likely that firms will institute policies that will prevent Rule violations by individual firm lawyers.

D. Non-Substantive Changes to the Current Rule:

None.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 5.1 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 5.1 in the form attached to this Report and Recommendation

Proposed Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers
Synopsis of Public Comments

TOTAL = 1 **A = 0**
D = 1
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-16	Bundy, Stephen (01-09-17)	N	M	Cmt. [6]	<p>New Comment [6] is a mistake and should be eliminated or revised. Borrowing from Rule 5.2, the Comment states that a lawyer will not be in violation of paragraph (c) (1) of the rule if the “lawyer’s decision to ratify a course of conduct is a reasonable resolution of an arguable question of professional duty.”</p> <p>This Comment is inconsistent with Supreme Court’s direction to avoid law making by Comment. The parallel language in Rule 5.2 is part of the Rule. If it is to be adopted as part of Rule 5.1, it should also adopted as part of the Rule. It is also inconsistent with national practice, since as I understand it, no other state has limited the concept of ratification in this way.</p> <p>Most important, the Comment is bad policy. In this context, ratification is the adoption of the past or ongoing act of an agent (for example, a partner or associate) as one’s own. Since paragraph (c) (1) only applies if</p>	Proposed Comment [6] is based on Rule 5.2(b). Both recognize the possibility of legitimate disagreements over the ethically correct course of conduct. It is the Commission’s view that in those circumstances the supervising or subordinate lawyer should not be at risk of disciplinary action for following the course laid out by the other person. In part this recognizes that the other person likely is the one with superior knowledge of the situation.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Proposed Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers
Synopsis of Public Comments

TOTAL = 1 **A = 0**
 D = 1
 M = 1
 NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>ratification occurs with “knowledge of the relevant facts and specific conduct,” the Comment necessarily implies that there are circumstances where a lawyer who makes a fully informed decision to adopt as her own (rather than overrule or correct) her agent’s violation of the rule has not herself violated the rule.</p> <p>The transplantation of the unique safe harbor provision of Rule 5.2 into the context of ratification by a principal is a mistake. The former provision reflects the pragmatic realities of practice in a hierarchical organization, including the need for a final decision and the junior lawyer’s lesser experience and limited power. At the same time, it is a basic assumption of Rule 5.2 that the supervising lawyer is in violation of the Rule, regardless of whether his conclusion that he is not in violation is reasonable.</p>	
Y-2016-21ab	State Bar Office of Chief Trial Counsel (Dresser) (01-09-17)	Y	D		<p>1. Supervision should remain a part of the rule addressing competence (Rule 1.1). Supervision by an attorney is an essential part of lawyer competence.</p>	<p>1. The duty to supervise currently is part of the competence rule, but the Commission believes that adoption of proposed Rule 5.1 will make clear to lawyers who manage law firms the importance</p>

Proposed Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers
Synopsis of Public Comments

TOTAL = 1	A = 0
	D = 1
	M = 1
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>of assuring ethical conduct within the firm and will make clear to supervising lawyers that supervision includes ethical conduct, and will clarify the limits on a supervisor's responsibilities. The Commission believes this sentence helps to explain the text of the proposed Rule.</p> <p>2. Comments 5, 8, and 9 are unnecessary and merely repeat the rule.</p> <p>3. The first sentence of Comment 7 is unnecessary.</p> <p>4. The term "knowingly" well established law providing that violations can be found based upon recklessness, gross negligence, or willful blindness, as well as "knowingly" or intentionally.</p>	<p>2. The Commission disagrees with the commenter as to Comments [5], [8] and [9]. The Commission believes each of those comments provide helpful explanation of the rule's application and so promotes compliance and facilitates enforcement.</p> <p>3. The Commission disagrees with the commenter's assessment. The sentence provides context for the following sentence.</p> <p>4. The definition of "knowingly" recognizes that a person's knowledge may be inferred from circumstances, and the Commission believes this will encompass the same field as currently covered by conduct previously labeled with other terms.</p>

Proposed Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers
Synopsis of Public Comments

TOTAL = 1 **A = 0**
D = 1
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>5. The Comment [9] discussion of subsections (a) through (c) merely repeats the rule and is unnecessary.</p> <p>6. The third sentence of Comment [9] states that paragraph (c) of this proposed Rule and proposed Rule 8.4 are the only time there is disciplinary liability for the conduct of a partner, associate, or subordinate lawyer. That comment is overly broad because Rule 8.4.1, Comment [1] states that Rule 8.4.1 imposes on all firm lawyers an obligation to advocate corrective action.</p>	<p>5. The Commission believes this sentence helps to explain the text of the proposed Rule.</p> <p>6. The Commission has not made the suggested change. Comment [1] of Rule 8.4.1 does not impose liability on a lawyer as only the black letter text can be a source of discipline. However, Comment [1] of Rule 8.4.1 does clarify that subparagraphs (b)(i) and (ii) of the rule prohibits a lawyer in a firm from “knowingly permit[ting]” discriminatory conduct prohibited by the rule. Under paragraph (c)(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).” Nevertheless, liability would not be imposed on the lawyer because of the conduct of others in the firm but because of the lawyer’s own failure to comply with the rule and engage in conduct that advocates corrective action.</p>

PROPOSED RULE OF PROFESSIONAL CONDUCT 5.2
(No Current Rule)
Responsibilities of a Subordinate Lawyer

EXECUTIVE SUMMARY

In connection with consideration of current rule 3-110 (Failing to Act Competently), the Commission has reviewed and evaluated American Bar Association ABA Model Rules 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer), and 5.3 (Responsibilities Regarding Nonlawyer Assistants). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. Although these proposed rules have no direct counterpart in the current California rules, the concept of the duty to supervise is found in the first Discussion paragraph to current rule 3-110, which states: “The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents.”¹ The result of this evaluation is proposed rules 5.1 (Responsibilities of Managerial and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer), and 5.3 (Responsibilities Regarding Nonlawyer Assistants).

Rule As Issued For 90-day Public Comment

The main issue considered when evaluating a lawyer’s duty to supervise was whether to adopt versions of ABA Model Rules 5.1, 5.2, and 5.3, or retain the duty to supervise only as an element of the duty of competence. The Commission concluded adopting these proposed rules provides important public protection and critical guidance to lawyers possessing managerial authority by more specifically describing a lawyer’s duty to supervise other lawyers (proposed rule 5.1) and non-lawyer personnel (proposed rule 5.3). Proposed rules 5.1 and 5.3 extend beyond the duty to supervise that is implicit in current rule 3-110 and include a duty on firm managers to have procedures and practices that foster ethical conduct within a law firm. Current rule 3-110 includes a duty to supervise but says nothing about the subordinate lawyer’s duties. Proposed rule 5.2 addresses this omission by stating a subordinate lawyer generally cannot defend a disciplinary charge by blaming the supervisor. Although California’s current rules have no equivalent to proposed rule 5.2, there appears to be no conflict with the proposed rule and current California law in that there is no known California authority that permits a subordinate lawyer to defend a disciplinary charge based on clearly improper directions from a senior lawyer.

The following is a summary of proposed rule 5.2 (Responsibilities of a Subordinate Lawyer).² This proposed rule has been adopted by the Commission for submission to the Board of

¹ The first Discussion paragraph to current rule 3-110 provides:

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)

² The Executive Summaries for proposed Rules 5.1 and 5.3 are provided separately.

Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 5.2 adopts the substance of ABA Model Rule 5.2. Paragraph (a) provides that a subordinate lawyer has an independent duty to comply with the Rules of Professional Conduct. For example, a lawyer cannot claim he or she was just following the orders of a supervisor and therefore is not subject to discipline. However, paragraph (b) provides that when the supervising lawyer reasonably resolves an “arguable question of professional duty,” the subordinate does not commit a violation by following the supervisor’s direction.

There is one comment to the rule. The comment explains how the rule should be applied when a subordinate lawyer encounters a question involving professional judgment as to the lawyers’ responsibilities under the Rules of Professional Conduct or the State Bar Act.

National Background – Adoption of Model Rule 5.2

As California does not presently have a direct counterpart to Model Rule 5.2, this section reports on the adoption of the Model Rule in United States’ jurisdictions. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 5.2: Responsibilities of a Subordinate Lawyer,” revised May 5, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_2.pdf

Forty-three jurisdictions have adopted Model Rule 5.2 verbatim.³ Five states have adopted a slightly modified version of Model Rule 5.2.⁴ Three states have not adopted a version of Model Rule 5.2.⁵

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

³ The forty-three jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

⁴ The five states are: Connecticut, Florida, Georgia, Ohio, and Texas.

⁵ The three states are: California, Kentucky, and Virginia.

COMMISSION REPORT AND RECOMMENDATION: RULE 5.2

Commission Drafting Team Information

Lead Drafter: Robert Kehr

Co-Drafters: Judge Karen Clopton, Howard Kornberg, Toby Rothschild

I. CURRENT ABA MODEL RULE 5.2

**[There is no California Rule that corresponds to Model Rule 5.2,
from which proposed Rule 5.2 is derived.]**

Rule 5.2 Responsibilities of a Subordinate Lawyer

- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 5.2

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 5.2

Vote: 11 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 5.2 Responsibilities of a Subordinate Lawyer

- (a) A lawyer shall comply with these Rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.
- (b) A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable* resolution of an arguable question of professional duty.

Comment

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these Rules or the State Bar Act and the question can reasonably* be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably* can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable* alternatives to select, and the subordinate may be guided accordingly. If the subordinate lawyer believes* that the supervisor's proposed resolution of the question of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 5.2)

Rule 5.2 Responsibilities of a Subordinate Lawyer

- (a) A lawyer ~~is bound by the Rules of Professional Conduct~~ shall comply with these Rules and the State Bar Act notwithstanding that the lawyer ~~acted~~ acts at the direction of another lawyer or other person.

- (b) A subordinate lawyer does not violate ~~the~~these Rules ~~of Professional Conduct~~or the State Bar Act if that lawyer acts in accordance with a supervisory ~~lawyer's~~lawyer's reasonable* resolution of an arguable question of professional duty.

Comment

~~[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.~~

~~[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the lawyers' responsibilities under these Rules or the State Bar Act and the question can reasonably* be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate~~Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably* can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable* alternatives to select, and the subordinate may be guided accordingly. ~~For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable~~If the subordinate lawyer believes* that the supervisor's proposed resolution of the question ~~should protect the subordinate professionally if the resolution is subsequently challenged.~~of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

V. RULE HISTORY

There are no current rule counterparts in the California Rules to Model Rules 5.1 to 5.3, however, there is predicate authority in the California Rules and case law that is in line with those rules. See Section XIII.A Related California Law, below.

Although the origin and history of Model Rule 5.2 was not the primary factor in the Commission's consideration of proposed Rule 5.2, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 595 - 597, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. As previously discussed [in comment concerning proposed Rule 5.1], this rule belongs as part of the duty of competence. OCTC, however, does not oppose having this rule to clarify the duty of a subordinate attorney. This is already the law in California.

Commission Response: Taking the former as a part of OCTC's general comment that it favors retaining a single competence rule that tracks the current rule in lieu of proposed Rules 1.1, 1.3 and 5.1-5.3, and the latter as a comment directed to Rule 5.2, no response is required as to the latter. See Rule 5.1 response to OCTC regarding the former.

2. OCTC is concerned that the Comment is unnecessary and merely repeats the rule.

Commission Response: The Commission has considered this objection but believes the Comment provides helpful explanation of the rule's application and so promotes compliance and facilitates enforcement.

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

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, two public comments were received. One comment agreed with the proposed Rule, and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Although there are no current rule counterparts in the California Rules to Model Rules 5.1 to 5.3, there is predicate authority in the California Rules and case law that is in line with those rules.

1. Discussion Paragraph To Rule 3-110 Identifies The Duty To Supervise

The first Discussion paragraph to current rule 3-110 states: "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and nonattorney employees and agents."¹ This Discussion paragraph provides citations to seven lawyer

¹ This first paragraph of the Discussion section was added operative May 26, 1989. (See Bar Misc. No. 5626, "Request that the Supreme Court of California Approve Amendments to

disciplinary cases, which are listed below with a brief statement of the context in which discipline was imposed at least in part for a breach of supervisory responsibilities.

2. Authorities Considered by the Commission

The following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- *Waysman v. State Bar* (1986) 41 Cal.3d 452, 458 [224 Cal.Rptr. 101] (Lawyer was disciplined for misappropriating client money for office expenses. Lawyer's negligence in supervising his office was a factor in the misconduct.)
- *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525] (Lawyer settled client's claim without the client's consent. Lawyer claimed that secretarial errors caused a failure to promptly deliver the settlement proceeds to the client. This Court found that even without deliberate wrongdoing, fiduciary violations resulting from lapses in office procedure may be deemed "wilful" for disciplinary purposes and the lawyer failed to show that office staff was properly supervised.)
- *Palomo v. State Bar* (1984) 36 Cal.3d 785, 796 [205 Cal.Rptr. 834] (Lawyer endorsed his client's name on a check payable to the client without client authorization and claimed that an office employee mistakenly deposited the check in the lawyer's payroll account instead of the client trust account. This Court found the evidence demonstrated the lawyer's pervasive carelessness in failing to give the office manager any supervision and that the lawyer generally failed to instruct the office manager on trust account requirements and procedures.)
- *Crane v. State Bar* (1981) 30 Cal.3d 117, 122 – 123 [177 Cal.Rptr. 670] (Lawyer claimed that letter communications with a party represented by counsel without that counsel's consent were sent inadvertently by office staff. This Court found that the attorney was responsible for the work product of his employees, which is performed pursuant to his direction and authority.)
- *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288] (Lawyer blamed secretary mismanagement for a disbursement from his client trust account when there were insufficient funds on deposit. This Court observed that the rule governing client trust accounts is binding upon attorneys – not lay personnel – and necessitates reasonable staff supervision in the handling of trust account matters.)
- *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857 – 858 [100 Cal.Rptr. 713] (Lawyer blamed his staff for mistakes in securing an execution against client's husband to collect attorney fees that the husband had already partially paid in a divorce proceeding. This Court disciplined the lawyer for the mistakes and stated that even

the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation," December 1987.)

though an attorney cannot be held responsible for every detail of office procedure, he must accept responsibility to supervise the work of office staff.)

- *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161] (Lawyer relied on staff and a subordinate lawyer who failed to perform legal services for client. Even after a default judgment was entered and the client repeatedly sought assurances from lawyer that relief from default would be sought, lawyer failed to check on whether the subordinate lawyer and staff actually sought relief from default. This Court disciplined the lawyer for continued neglect in overly relying on, and failing to closely supervise, the subordinate lawyer and staff.)

3. Case Law Precedent Is Consistent With Proposed Rule 5.2

Case law is consistent with the concept that a subordinate lawyer working at the direction of another lawyer remains accountable for complying with professional responsibilities.

In *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522 [161 Cal.Rptr.3d 700], at the direction of a supervising lawyer, an associate added new defendants to the action. The added defendants sued plaintiffs and their attorneys for malicious prosecution. In rejecting the associate's argument that she was merely following a supervising lawyer's instructions, the court of appeal stated:

We recognize that an associate attorney is not in the same position as an attorney associating into a case. There is a clear imbalance of power between an often younger associate and an older partner or supervisor, and situations may arise where an associate is put into a difficult position by questioning a more experienced attorney's choices. Nonetheless, however, *every attorney admitted to practice in this state has independent duties that are not reduced or eliminated because a superior has directed a certain course of action.* (See Bus. & Prof. Code, § 6068.) Thus, the fact that she was following a superior's instructions is not a valid defense to malicious prosecution.

(*Mahaffey* at p. 1546, emphasis added.)

In *In re Aguilar* (2004) 34 Cal.4th 386 [18 Cal.Rptr.3d 874], no one from appellant's law firm appeared at an oral argument scheduled before the California Supreme Court. Contempt proceedings were brought against the managing attorney (Aguilar) and a subordinate attorney (Kent), who had given notice to the Court of his anticipated appearance for the firm. Kent had terminated his employment with the firm days before the scheduled argument date and the managing attorney knew that another firm attorney would need to make the appearance. (*In re Aguilar, supra*, at pp. 391-392.)

The Supreme Court found Kent in contempt for failing, without adequate justification, to notify the Court that he would not appear for the firm. The Court acknowledged that the firm was attorney of record. Nevertheless, it focused on the subordinate attorney's personal accountability, stating: "Kent's decision to leave the firm did not automatically

terminate his professional responsibilities either to his former client or to this court.” The Court reasoned: “Although Kent might have been fortunate enough to avoid any sanction had another attorney been promptly reassigned to the case, been able adequately to prepare for oral argument, and appeared at and presented oral argument on behalf of [appellant], Kent cannot avoid his share of responsibility for the interference with this court’s operations that resulted when, without any advance notice, no attorney appeared” (*In re Aguilar, supra*, at pp. 391-392.) Model Rule 5.1 (Responsibilities Of Partners, Managers, And Supervisory Lawyers).

B. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 5.2: Responsibilities of a Subordinate Lawyer,” revised September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_2.authcheckdam.pdf [last checked 2/14/17]
- Forty-four jurisdictions have adopted Model Rule 5.2 verbatim.² Five jurisdictions have adopted a slightly modified version of Model Rule 5.2.³ Two jurisdictions have not adopted a version of Model Rule 5.2.⁴

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

This Rule is part of an interrelated set of Rules 5.1 – 5.3 that incorporates into separate rules lawyers’ duties to supervise subordinate lawyers and nonlawyer assistants, (Rules 5.1 and 5.3, respectively) and states the duties of subordinate lawyers (Rule 5.2).

A. Concepts Accepted (Pros and Cons):

1. General: Recommend adoption of standalone rules patterned on Model Rules 5.1, 5.2 and 5.3 rather than maintain a duty of supervision in the competence rule (proposed new Rule 1.1, and currently rule 3-110).
 - Pros: There are a number of reasons for adopting this change in approach:
 1. Rule 3-110 includes a duty to supervise but says nothing about the

² The forty-four jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

³ The five jurisdictions are: Connecticut, Florida, Georgia, Ohio, and Texas.

⁴ The two jurisdictions are: California and Virginia.

subordinate lawyer's duties, except the requirement of competence. Model Rule 5.2 addresses this by stating that a subordinate generally cannot defend a disciplinary charge by blaming the supervisor. While California's current Rules have no equivalent to Model Rule 5.2, there appears to be no conflict between Model Rule 5.2 and current California law in that there is no known California authority that permits a subordinate lawyer to defend a disciplinary charge based on clearly improper directions from a senior lawyer. Compare *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522 (That associate was following orders of a supervisor was no defense to a malicious prosecution claim). Adding a version of Model Rule 5.2 would provide fair notice to subordinate lawyers and provide a tangible basis for them to urge a senior lawyer to correct conduct and directions. This provides added client protection.

2. Rule 3-110 works well when the supervising lawyer is a sole practitioner or in a firm that is small enough so that the duty to supervise easily can be ascribed to a particular lawyer. Holding any one lawyer responsible for supervision in a larger law firm is more difficult because responsibility can be diffused: Who would be responsible for a failure to supervise if there are ten or twenty or forty lawyers working on a major project?

3. Model Rules 5.1(a) and 5.3(a) extend beyond the duty to supervise that is implicit in rule 3-110 and include a duty imposed on firm managers to have procedures and practices that foster ethical conduct within a law firm. A firm's procedures and practices are pertinent, not just to competent representation, but also to representation in compliance with other ethical standards. For example, a law firm must have conflict checking procedures, and firm-wide systems that reasonably assure compliance with those procedures, in order to avoid conflicts of interest. Model Rules 5.1 and 5.3 therefore have a considerably wider application than the supervision standard currently part of rule 3-110. Again, there is additional client protection in adding definition to the duties of firm managers and supervisors.

4. The broader application of Model Rules 5.1 and 5.3 to all Rule violations and not just competence extends not just to a firm's procedures and practices under paragraph (a) of each Rule but also to supervision and control of subordinate lawyers and nonlawyers under paragraphs (b) and (c) of each Rule.

5. Model Rule 5.1 and 5.3 make clear that a lawyer's supervisory responsibility can extend to lawyers and non-lawyer personnel who are not within the first lawyer's law firm. Examples would include local counsel and contract lawyers who report to and are directed by a lawyer with primary responsibility, so that the second lawyer operates much like an associate in the first lawyer's firm.

6. Proposed Rules 5.1, 5.2, and 5.3 complement one another in a logically consistent package. Also, Model Rule 5.2 strikes the proper balance between

a subordinate's duties as a lawyer and the subordinate's duty to the organization.

7. Adopting these Rules would place the supervisory obligations of lawyers in the black letter rather than commentary. See public comment letter from Scott Garner, COPRAC, June 16, 2015.

- Cons: In its 9/2/2015 submission to the Commission, OCTC stated that the [current] rule and case law address the duty to supervise attorney staff and employees." In particular, there is abundant case law that sets forth the duties of a subordinate lawyer. See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522 [161 Cal.Rptr.3d 700]; *In re Aguilar* (2004) 34 Cal.4th 386 [18 Cal.Rptr.3d 874]; *Moser v. Bret Harte Union High School District* (E.D. Cal. 2005) 366 Fed.Supp.2d 944.
- 2. Recommend editing Model Rule 5.2's language to include an obligation to comply with the State Bar Act and to further refine the language to make it declarative and mandatory rather than descriptive.
 - Pros: The substitution of "shall comply with" for "is bound by" more clearly signals the mandatory nature of the rule, which is more appropriate in a disciplinary rule. The other changes conform to the style of other proposed rules.
 - Cons: None identified.
- 3. Recommend editing the Model Rule Comments to eliminate material that is practice guidance or that merely repeats or describes the Rule content.
 - Pros: This conforms to the Commission Charter.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

None. However, other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:

There is no current rule that addresses duties of subordinate lawyers. However, proposed Rule 5.2 does not alter the current standard that each lawyer is responsible for acting ethically. Rather, it strikes an appropriate balance between those responsibilities and a subordinate lawyer's organizational obligation to follow directions. Further, including a rule in the Rules of Professional Conduct that expressly states a

subordinate lawyer's obligations should, where appropriate, facilitate the ability of a subordinate lawyer to influence the decisions of the subordinate's supervisors.

D. Non-Substantive Changes to the Current Rule:

None.

E. Alternatives Considered:

None.

X. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

The Commission recommends adoption of proposed Rule 5.2 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 5.2 in the form attached to this Report and Recommendation.

**Proposed Rule 5.2 Responsibilities of a Subordinate Lawyer
Synopsis of Public Comments**

TOTAL = 2	A = 1
	D = 0
	M = 1
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43af	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-12-16)	Y	A	5.2	COPRAC supports the adoption of proposed Rule 5.2.	No response required
X-2016-104ax	OCTC (Dresser) (09-24-16)	Yes	M	5.2	<p>1. OCTC says the rule should be part of the duty of competence under Rule 1.1 but also says that it does not oppose having this ruler to clarify the duty of a subordinate lawyer.</p> <p>2. The Comment is unnecessary and merely repeats the Rule.</p>	<p>1. Taking the former as a part of OCTC's general comment that it favors retaining a single competence rule that tracks the current rule in lieu of proposed Rules 1.1, 1.3 and 5.1-5.3, and the latter as a comment directed to Rule 5.2, no response is required as to the latter. See Rule 5.1 response to OCTC regarding the former.</p> <p>2. The Commission has considered this objection but believes the Comment provides helpful explanation of the rule's application and so promotes compliance and facilitates enforcement.</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

PROPOSED RULE OF PROFESSIONAL CONDUCT 5.3
(Current Rule 3-110 Disc.)
Responsibilities Regarding Nonlawyer Assistants

EXECUTIVE SUMMARY

In connection with consideration of current rule 3-110 (Failing to Act Competently), the Commission has reviewed and evaluated ABA Model Rules 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer), and 5.3 (Responsibilities Regarding Nonlawyer Assistants). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. Although these proposed rules have no direct counterpart in the current California rules, the concept of the duty to supervise is found in the first Discussion paragraph to current rule 3-110, which states: "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents."¹ The result of this evaluation is proposed rules 5.1 (Responsibilities of Managerial and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer), and 5.3 (Responsibilities Regarding Nonlawyer Assistants).

Rule As Issued For 90-day Public Comment

The main issue considered when evaluating a lawyer's duty to supervise was whether to adopt versions of ABA Model Rules 5.1, 5.2, and 5.3, or retain the duty to supervise only as an element of the duty of competence. The Commission concluded adopting these proposed rules provides important public protection and critical guidance to lawyers possessing managerial authority by more specifically describing a lawyer's duty to supervise other lawyers (proposed rule 5.1) and non-lawyer personnel (proposed rule 5.3). Proposed rules 5.1 and 5.3 extend beyond the duty to supervise that is implicit in current rule 3-110 and include a duty on firm managers to have procedures and practices that foster ethical conduct within a law firm. Current rule 3-110 includes a duty to supervise but says nothing about the subordinate lawyer's duties. Proposed rule 5.2 addresses this omission by stating a subordinate lawyer generally cannot defend a disciplinary charge by blaming the supervisor. Although California's current rules have no equivalent to proposed rule 5.2, there appears to be no conflict with the proposed rule and current California law in that there is no known California authority that permits a subordinate lawyer to defend a disciplinary charge based on clearly improper directions from a senior lawyer.

The following is a summary of proposed rule 5.3 (Responsibilities Regarding Nonlawyer Assistants).² This proposed rule has been adopted by the Commission for submission to the

¹ The first Discussion paragraph to current rule 3-110 provides:

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)

² The Executive Summaries for proposed Rules 5.1 and 5.2 are provided separately.

Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 5.3 adopts the substance of ABA Model Rule 5.3. Proposed rule 5.3 is very similar to proposed rule 5.1. The major difference is that proposed rule 5.3 applies to the supervision of nonlawyer assistants and other legal support services, whereas proposed rule 5.1 applies to the supervision of lawyers. Proposed rule 5.3(a) requires that managing lawyers make “reasonable efforts to ensure” the law firm has measures that provide reasonable assurance that a nonlawyer’s conduct is compatible with the professional obligations of the lawyer. Paragraph (b) requires that a lawyer who directly supervises a nonlawyer make “reasonable efforts to ensure” the nonlawyer’s conduct is compatible with the professional obligations of the lawyer, whether or not the nonlawyer is an employee of the same firm. Neither provision imposes vicarious liability. However, a lawyer will be responsible for the conduct of a nonlawyer under paragraph (c) if a lawyer either ordered or, with knowledge of the relevant facts and specific conduct, ratifies the conduct of the nonlawyer, ((c)(1)), or knowing of the misconduct, failed to take remedial action when there was still time to avoid or mitigate the consequences, ((c)(2)).

There is one comment to the rule. The comment states the policy underlying the rule and explains the lawyer’s obligation in complying with the rule.

National Background – Adoption of Model Rule 5.3

As California does not presently have a direct counterpart to Model Rule 5.3, this section reports on the adoption of the Model Rule in United States’ jurisdictions. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 5.3: Responsibilities Regarding Nonlawyer Assistants,” revised May 5, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_3.pdf

Thirty-four states have adopted Model Rule 5.3 verbatim.³ Ten jurisdictions have adopted a slightly modified version of Model Rule 5.3.⁴ Seven states have adopted a version of the rule that is substantially different to Model Rule 5.3.⁵ One state has not adopted a version Model Rule 5.1.⁶

³ The thirty-four states are: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Following Ethics 20-20, there were no amendments made to the black letter of Model Rule 5.3, only the Comments.

⁴ The ten jurisdictions are: Alabama, Alaska, District of Columbia, Hawaii, Kentucky, New Hampshire, Ohio, Oregon, Tennessee, and Virginia.

⁵ The six states are: Florida, Georgia, New Jersey, New York, North Dakota, and Texas.

⁶ The one state is California.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 5.3

Commission Drafting Team Information

Lead Drafter: Robert Kehr

Co-Drafters: Judge Karen Clopton, Howard Kornberg, Toby Rothschild

I. CURRENT ABA MODEL RULE 5.3

**[There is no California Rule that corresponds to Model Rule 5.3,
from which proposed Rule 5.3 is derived.]**

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers Within the Firm

[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 5.3

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 5.3

Vote: 11 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)**Rule 3-110 [5.3] Responsibilities Regarding Nonlawyer Assistance**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

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

Comment

Lawyers often utilize nonlawyer personnel, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning all ethical aspects of their employment. The measures employed in instructing and supervising nonlawyers should take account of the fact that they might not have legal training.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 5.3)

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a ~~partner, and a~~ lawyer who individually or together with other lawyers possesses ~~comparable~~ managerial authority in a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that the ~~person's~~nonlawyer's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm,* shall make reasonable* efforts to ensure that the ~~person's~~person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person* that would be a violation of ~~the~~these Rules ~~of Professional Conduct~~or the State Bar Act if engaged in by a lawyer if:
 - (1) the lawyer orders or, with ~~the~~ knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer ~~is a partner or has comparable,~~ individually or together with other lawyers, possesses managerial authority in the law firm* in which the person* is employed, or has direct supervisory authority over the person,* whether or not an employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.

Comment

[1] Lawyers ~~generally employ assistants in their practice~~often utilize nonlawyer personnel, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the ~~lawyer's~~lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning ~~the~~all ethical aspects of their employment, ~~particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.~~ The measures employed in instructing and supervising nonlawyers should take account of the fact that they ~~demight~~demight not have legal training ~~and are not subject to professional discipline.~~

[2] Paragraph (a) ~~requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to~~

~~lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.~~

V. RULE HISTORY

There are no current rule counterparts in the California Rules to Model Rules 5.1 to 5.3, however, there is predicate authority in the California Rules and case law that is in line with those rules. See Section XIII.A Related California Law, below.

For background on the concepts relating to the duty to supervise refer to Report and Recommendation for proposed Rule 1.1, Section V.

Although the origin and history of Model Rule 5.3 was not the primary factor in the Commission's consideration of proposed Rule 5.3, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 599 - 607, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. This rule also belongs as part of the duty of competence. OCTC, however, does not oppose having this rule to clarify the duty of a subordinate attorney. This is already the law in California.

Commission Response: Taking the former as a part of OCTC's general comment that it favors retaining a single competence rule that tracks the current rule in lieu of proposed Rules 1.1, 1.3 and 5.1-5.3, and the latter as a comment directed to Rule 5.2, no response is required as to the latter. See Rule 5.1 response to OCTC regarding the former.

2. OCTC is concerned that the Comment to this Rule is unnecessary and merely repeats the rule.

Commission Response: The Commission has considered this objection but believes the Comment provides helpful explanation of the rule's application and so promotes compliance and facilitates enforcement.

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

VII. PUBLIC COMMENT & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, four public comments were received. Two comments agreed with the proposed Rule, one comment disagreed, and one comment

agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Although there are no current rule counterparts in the California Rules to Model Rules 5.1 to 5.3, there is predicate authority in the California Rules and case law that is in line with those rules.

1. Discussion Paragraph To Rule 3-110 Identifies The Duty To Supervise

The first Discussion paragraph to current rule 3-110 states: "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and nonattorney employees and agents."¹ This Discussion paragraph provides citations to seven lawyer disciplinary cases, which are listed below with a brief statement of the context in which discipline was imposed at least in part for a breach of supervisory responsibilities.

2. Authorities Considered by the Commission

The following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- *Waysman v. State Bar* (1986) 41 Cal.3d 452, 458 [224 Cal.Rptr. 101] (Lawyer was disciplined for misappropriating client money for office expenses. Lawyer's negligence in supervising his office was a factor in the misconduct.)
- *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525] (Lawyer settled client's claim without the client's consent. Lawyer claimed that secretarial errors caused a failure to promptly deliver the settlement proceeds to the client. This Court found that even without deliberate wrongdoing, fiduciary violations resulting from lapses in office procedure may be deemed "wilful" for disciplinary purposes and the lawyer failed to show that office staff was properly supervised.)
- *Palomo v. State Bar* (1984) 36 Cal.3d 785, 796 [205 Cal.Rptr. 834] (Lawyer endorsed his client's name on a check payable to the client without client authorization and claimed that an office employee mistakenly deposited the check in the lawyer's payroll account instead of the client trust account. This Court found the evidence demonstrated the lawyer's pervasive carelessness in failing to give the office manager any supervision and that the lawyer generally failed to instruct the office manager on trust account requirements and procedures.)

¹ This first paragraph of the Discussion section was added operative May 26, 1989. (See Bar Misc. No. 5626, "Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation," December 1987.)

- *Crane v. State Bar* (1981) 30 Cal.3d 117, 122 – 123 [177 Cal.Rptr. 670] (Lawyer claimed that letter communications with a party represented by counsel without that counsel's consent were sent inadvertently by office staff. This Court found that the attorney was responsible for the work product of his employees, which is performed pursuant to his direction and authority.)
- *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288] (Lawyer blamed secretary mismanagement for a disbursement from his client trust account when there were insufficient funds on deposit. This Court observed that the rule governing client trust accounts is binding upon attorneys – not lay personnel – and necessitates reasonable staff supervision in the handling of trust account matters.)
- *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857 – 858 [100 Cal.Rptr. 713] (Lawyer blamed his staff for mistakes in securing an execution against client's husband to collect attorney fees that the husband had already partially paid in a divorce proceeding. This Court disciplined the lawyer for the mistakes and stated that even though an attorney cannot be held responsible for every detail of office procedure, he must accept responsibility to supervise the work of office staff.)
- *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161] (Lawyer relied on staff and a subordinate lawyer who failed to perform legal services for client. Even after a default judgment was entered and the client repeatedly sought assurances from lawyer that relief from default would be sought, lawyer failed to check on whether the subordinate lawyer and staff actually sought relief from default. This Court disciplined the lawyer for continued neglect in overly relying on, and failing to closely supervise, the subordinate lawyer and staff.)

B. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 5.3: Responsibilities Regarding Nonlawyer Assistants,” revised December 8, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_3.authcheckdam.pdf [Last visited 2/6/17]
- Thirty-four jurisdictions have adopted Model Rule 5.3 verbatim.² Ten jurisdictions have adopted a slightly modified version of Model Rule 5.3.³ Seven jurisdictions

² The thirty-four jurisdictions are: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Following Ethics 20-20, there were no amendments made to the black letter of Model Rule 5.3, only the Comments.

have adopted a version of the rule that is substantially different to Model Rule 5.3.⁴ One jurisdiction has not adopted a version Model Rule 5.3: California.

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

This Rule is part of an interrelated set of Rules 5.1 – 5.3 that incorporate into separate rules lawyers' duties to supervise subordinate lawyers and nonlawyer assistants, (Rules 5.1 and 5.3, respectively) and states the duties of subordinate lawyers (Rule 5.2).

A. Concepts Accepted (Pros and Cons):

1. General: Recommend adoption of standalone rules patterned on Model Rules 5.1, 5.2 and 5.3 rather than maintain a duty of supervision in the competence rule (proposed new Rule 1.1, and currently rule 3-110).
 - Pros: There are a number of reasons for adopting this change in approach:
 1. Rule 3-110 works well when the supervising lawyer is a sole practitioner or in a firm that is small enough so that the duty to supervise easily can be ascribed to a particular lawyer. Holding any one lawyer responsible for supervision in a larger law firm is more difficult because responsibility can be diffused: Who would be responsible for a failure to supervise if there are ten or twenty or forty lawyers working on a major project?
 2. Model Rules 5.1(a) and 5.3(a) extend beyond the duty to supervise that is implicit in rule 3-110 and include a duty imposed on firm managers to have procedures and practices that foster ethical conduct within a law firm. A firm's procedures and practices are pertinent, not just to competent representation, but also to representation in compliance with other ethical standards. For example, a law firm must have conflict checking procedures, and firm-wide systems that reasonably assure compliance with those procedures, in order to avoid conflicts of interest. Model Rules 5.1 and 5.3 therefore have a considerably wider application than the supervision standard currently part of rule 3-110. There is additional client protection in adding definition to the duties of firm managers and supervisors.
 3. The broader application of Model Rules 5.1 and 5.3 to all Rule violations and not just competence extends not just to a firm's procedures and practices under paragraph (a) of each Rule but also to supervision and control of subordinate lawyers and nonlawyers under paragraphs (b) and (c) of each Rule.

³ The ten jurisdictions are: Alabama, Alaska, District of Columbia, Hawaii, Kentucky, New Hampshire, Ohio, Oregon, Tennessee, and Virginia.

⁴ The six jurisdictions are: Florida, Georgia, New Jersey, New York, North Dakota, and Texas.

4. Rule 3-110 includes a duty to supervise but says nothing about the subordinate lawyer's duties, except the requirement of competence. Model Rule 5.2 addresses this by stating that a subordinate generally cannot defend a disciplinary charge by blaming the supervisor. While California's current Rules have no equivalent to Model Rule 5.2, there appears to be no conflict between Model Rule 5.2 and current California law in that there is no known California authority that permits a subordinate lawyer to defend a disciplinary charge based on clearly improper directions from a senior lawyer. Compare *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522 (That associate was following orders of a supervisor was no defense to a malicious prosecution claim). Adding a version of Model Rule 5.2 would provide fair notice to subordinate lawyers and provide a tangible basis for them to urge a senior lawyer to correct conduct and directions.
 5. Model Rule 5.1 and 5.3 make clear that a lawyer's supervisory responsibility can extend to lawyers and non-lawyer personnel who are not within the first lawyer's law firm. Examples would include local counsel and contract lawyers who report to and are directed by a lawyer with primary responsibility so that the second lawyer operates much like an associate in the first lawyer's firm.
 6. Proposed Rules 5.1, 5.2, and 5.3 complement one another in a logically consistent package. Also, Model Rule 5.2 strikes the proper balance between a subordinate's duties as a lawyer and the subordinate's duty to the organization.
 7. Adopting these Rules would place the supervisory obligations of lawyers in the black letter rather than commentary. See public comment letter from Scott Garner, COPRAC, June 16, 2015.
- Cons: In its 9/2/2015 submission to the Commission, OCTC stated that the [current] rule and case law address the duty to supervise attorney staff and employees."
2. Recommend retaining the title of the pre-Ethics 2000 rule, "Responsibilities Regarding Nonlawyer Assistants," rather than the current Model Rule 5.3 title, which refers to "Assistance." The
 - Pros: It will conform the Rule's title to its content, given that the Commission recommends not including the lengthy discourse in the Comments to Model Rule 5.3 (Comments [3] and [4]) concerning outsourcing and offshoring. (See Section IX.B.2, below.)
 - Cons: None identified.

3. Recommend adding to paragraph (b) the language “whether or an employee of the same law firm”.
 - Pros: The concept is important because a lawyer who has direct supervisory responsibility should not be able to avoid application of the Rule when acting through a nonlawyer who is outside the first lawyer’s firm.
 - Cons: The language should not be added for two reasons: First, the words are unnecessary (in that the Rule would have the same meaning without these words). Second, not including these words would remove the concept from the Rule (and doing so would avoid uncertain application in certain situations).
4. Recommend adding to paragraph (c)(1) the words “of the relevant facts and”.
 - Pros: This addition is intended to limit a supervisor’s responsibility to the situation in which the supervisor knows of the relevant facts and not just the other lawyer’s conduct. Due to the definition of “know” in proposed Rule 1.0.1(f), the supervisor’s knowledge can be inferred from the circumstances. Adding these words makes it clear that a supervising lawyer cannot be responsible for another lawyer’s conduct unless the lawyer has knowledge of the relevant facts, and that knowledge can be inferred from the circumstances. The Commission believes it is important to balance the supervisor’s affirmative obligation to supervise against the risk that overly-inclusive language might cause supervisors to be seen as guarantors of the proper conduct of all lawyers and nonlawyer assistants they supervise. .
 - Cons: These words are essential to the rule because a supervising lawyer cannot be held responsible for a nonlawyer employee’s work unless the supervising lawyer knows both the nonlawyer employee’s conduct and the facts showing that conduct to be wrongful.
5. Recommend editing the Model Rule Comments to eliminate material that is practice guidance or that merely repeats or describes the Rule content.
 - Pros: This conforms to the Commission Charter.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Include the language in Model Rule 5.3 paragraph (a) that imposes a duty on each firm partner to take action to assure the firm has appropriate systems in place.
 - Pros: Each partner should take whatever action that lawyer can to achieve the goals of this Rule, even if a particular lawyer does not participate in

management or has no independent management authority. No firm partner should be permitted to be blind to wrongful conduct.

- Cons: Mid-level and other partners who lack management authority would be at unnecessary risk from imposing on them a duty that they cannot fulfill in a meaningful way. If they would not have disciplinary risk, including them in the rule would be only aspirational.

2. Recommend that proposed Rule 5.3 address outsourcing or offshoring of legal services.

- Pros: On the recommendation of the ABA Ethics 20/20 Commission, the ABA added new Comments [3] and [4] that address a lawyer using “nonlawyers outside the firm to assist the lawyer in rendering legal services to the client.” In part, this guidance alerts lawyers that they have supervisory responsibilities over such nonlawyers. Including a similar advisement might lead to better decision making by lawyers who outsource legal-related services.
- Cons: The Commission concluded that there was nothing in this topic that would make the proposed rule more complete. These Comments would not explain the rule but instead would provide practice guidance on the possible risks of using nonlawyer outside of the law firm.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:

Proposed Rules 5.1 and 5.3 do not substantively change a lawyer’s obligation to supervise, but they add responsibilities for those lawyers who control a law firm to create and enforce firm-wide policies, such as to check for possible conflicts of interest, in order to make it more likely that firms will institute policies that will prevent Rule violations by individual firm lawyers.

D. Non-Substantive Changes to the Current Rule:

None.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 5.3 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 5.3 in the form attached to this Report and Recommendation.

Proposed Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
Synopsis of Public Comments

TOTAL = 4 **A = 2**
D = 1
M = 1
NI = 0

No No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43ag	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-12-16)	Y	A	5.3	COPRAC supports the adoption of proposed Rule 5.3.	No response required
X-2016-66x	S.D. Bar Assoc. (Riley) (09-15-16)	Yes	A	5.3	S.D. supports the adoption of proposed Rule 5.3	No response required
X-2016-76o	L. A. County Bar Assoc. (Schmid) (09-24-16)	Yes	M	(a), (c)(2)	Paragraphs (a) and (c)(2) use of the phrase “managerial authority in a law firm” without defining the term, resulting in a lack of notice on who might have liability under the Rule.	The Commission believes that the term “managerial authority” as applied to a law firm, which applies to a wide variety of organizations, including private law firms, government and corporate law offices, and legal services organizations, is not susceptible to a succinct definition appropriate in rules of professional conduct. Moreover, the Commission believes that the concept – those with authority to set the policies for compliance with the Rules, is not a foreign concept that requires a detailed exposition.
X-2016-104ay	OCTC (Dresser) (09-27-16)	Yes	D	5.3, comment	1. OCTC says the rule should be part of the duty of competence under Rule 1.1 but also says that it does not oppose having this rule to clarify the duty of a subordinate lawyer.	1. Taking the former as a part of OCTC’s general comment that it favors retaining a single competence rule that tracks the current rule in lieu of proposed Rules 1.1, 1.3 and

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Proposed Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
Synopsis of Public Comments

TOTAL = 4 **A = 2**
 D = 1
 M = 1
 NI = 0

No No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					2. The Comment is unnecessary and merely repeats the Rule	5.1-5.3, and the latter as a comment directed to Rule 5.2, no response is required as to the latter. See Rule 5.1 response to OCTC regarding the former. The Commission has considered this objection but believes the Comment provides helpful explanation of the rule's application and so promotes compliance and facilitates enforcement.

PROPOSED RULE OF PROFESSIONAL CONDUCT 5.3.1
(Current Rule 1-311)
Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member

EXECUTIVE SUMMARY

The Commission evaluated current rule 1-311 (Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member) in accordance with the Commission Charter. There is no counterpart to rule 1-311 in the ABA Model Rules. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The result of the Commission's evaluation is proposed rule 5.3.1 (Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member).

Rule As Issued For 90-day Public Comment

Current rule 1-311 governs the employment activities of certain lawyers who are not entitled to practice law, specifically disbarred, suspended, resigned, or involuntary inactive members who work in law offices. The rule imposes duties on an attorney employing, or professionally associating with, a lawyer who is not entitled to practice. These duties include a requirement to give notice to both the State Bar as well as to each client on whose specific matter such person will work. The notice to the State Bar ensures that the bar can provide oversight while the notice to client ensures greater transparency by giving the client an opportunity to object to the restricted attorney working on his or her case. In proposed rule 5.3.1, the Commission made no substantive changes to current rule 1-311. The Commission reasoned that having this rule serves a valuable public protection benefit as well as provides an opportunity for the restricted attorney to work in a law office (within the parameters established by the rule) and to assist with his or her rehabilitation and potential reinstatement to active status.¹

The non-substantive changes proposed were intended to clarify, update and streamline the existing rule. Throughout the rule, conforming language changes include: the phrase "associate in practice" is substituted for "associate professionally with" the word "assist" is substituted for "aid" and "restricted lawyer" is defined. Other changes include the deletion of all the Discussion sections of the current rule except for language that clarifies a hiring lawyer's obligation to give notice to a client when the client is an organization.

National Background – Adoption of Rule Addressing Law-related Activities of Disbarred, Suspended, Resigned or Involuntarily Inactive Attorneys

As there is currently no ABA Model Rule counterpart to the current or proposed California rules on this topic, this section reports on the adoption of a similar rule in other United States' jurisdictions. Three states have adopted a rule of professional conduct similar to current rule 1-311 in that they require the employing attorney to provide notice when employing a suspended or disbarred attorney: Colorado, Maryland, Minnesota, and Alaska. Alaska incorporates a bar rule that similarly requires an employing attorney to serve upon the Alaska

¹ One member of the Commission submitted a written dissent disagreeing with the Commission's threshold determination that the current rule should be retained. The full text of the dissent is attached to this summary.

Bar Association written notice of the employment of a disbarred, suspended, resigned, or involuntarily inactive attorney.²

Seven states prohibit suspended or disbarred attorneys from working in law-related activities: Idaho, Illinois, Indiana, Massachusetts, New Jersey, South Carolina, and Washington.

Nine states partially restrict the work of suspended or disbarred lawyers in law-related activities in their rules of professional conduct. For example, Georgia and Hawaii prohibit a suspended or disbarred attorney from contacting another lawyer's clients "either in person, by telephone or in writing." (See, Georgia Rule of Professional Conduct 5.3(d) (Responsibilities Regarding Nonlawyer Assistants); and Hawaii Rule of Professional Conduct 5.5(c) (Unauthorized Practice of Law.))³

Finally, twenty states have no rule or regulation addressing law-related activities of disbarred, suspended, resigned or involuntarily inactive attorneys.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission, the Commission made no changes to the text of the rule or the comments.

Proposed Rule as Amended by the Board of Trustees on November 17, 2016

After public comment, the Commission's proposed rule was considered by the Board of Trustees at its meeting on November 17, 2016. The Board specifically evaluated the Commission's defined term "restricted lawyer" and substituted the term with "ineligible person." This was done to avoid any unintended inference that a disbarred or resigned member remains a person who should be designated as a "lawyer." With this change, the Board voted to adopt the proposed rule.

The redline strikeout text below shows the changes made by the Board:

(a) For purposes of this Rule:

* * * * *

- (5) "~~Restricted lawyer~~ineligible person" means a member whose current status with the State Bar of California is disbarred, suspended, resigned, or involuntarily inactive.

² See, Colorado Rule of Professional Conduct 5.5; Maryland Rule of Professional Conduct 5.3; and Minnesota Rule of Professional Conduct 5.8; Alaska Bar Rule 15(c): Employment of Disbarred, Suspended or Resigned Attorney. Maryland and Minnesota require notice to be served upon the state bar, while Colorado requires written notice to be provided to the client.

³ Other states partially restricting the employment of suspended or disbarred members include: Florida (Rule of Discipline 3-6.1), Louisiana (Rule of Professional Conduct 5.5(e)), New Mexico (Rule of Professional Conduct 16-505(B) and (C)), North Carolina (Rule of Professional Conduct 5.5(e) and (f)), Virginia (Rule of Professional Conduct 5.5 (a) and (b)), Washington (Rule of Professional Conduct 5.8(b)), and Wyoming (Rules of Professional Conduct 8.4(g)).

- (b) A lawyer shall not employ, associate in practice with, or assist a person* the lawyer knows* or reasonably should know* is ~~a restricted lawyer~~ 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 ~~a restricted lawyer~~ 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 ~~a restricted lawyer~~ 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 ~~restricted lawyer~~ 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 ~~a restricted lawyer~~ 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 ~~restricted lawyer~~ ineligible person, the lawyer shall promptly serve upon the State Bar written* notice of the termination.

* * * * *

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 5.3.1 [1-311]

Commission Drafting Team Information

Lead Drafter: Toby Rothschild

Co-Drafters: James Ham, Tobi Inlender

I. CURRENT CALIFORNIA RULE

Rule 1-311 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member

(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) “Involuntarily inactive member” means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code sections 6007, 6203(c), or California Rule of Court 9.31; and
- (3) “Resigned member” means a member who has resigned from the State Bar while disciplinary charges are pending.

(B) A member shall not employ, associate professionally with, or aid a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the member’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 which constitute the practice of law.

- (C) A member may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member 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 member in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active member who will appear as the representative of the client.
- (D) Prior to or at the time of employing a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the member 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 disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The member shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The member 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 member's employment with the client.
- (E) A member may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member 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) Upon termination of the disbarred, suspended, resigned, or involuntarily inactive member, the member shall promptly serve upon the State Bar written notice of the termination.

Discussion:

For discussion of the activities that constitute the practice of law, see *Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford v. State Bar* (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants Protective Corporation* (1922) 189 Cal. 531, 535 [209 P. 363]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].)

Paragraph (D) is not intended to prevent or discourage a member from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a member's client is an organization, then the written notice required by paragraph (D) shall be served upon the highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule 3-600).

Nothing in rule 1-311 shall be deemed to limit or preclude any activity engaged in pursuant to rules 9.40, 9.41, 9.42, and 9.44 of the California Rules of Court, or any local rule of a federal district court concerning admission *pro hac vice*.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 5.3.1 [1-311]

Vote: 14 (yes) – 1 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 5.3.1 [1-311]

Vote: X (yes) – X (no) – X (abstain))

III. COMMISSION'S PROPOSED RULE (CLEAN)

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

(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.)

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-311)

Rule 5.3.1 [1-311] Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive ~~Member~~Lawyer

(Aa) For purposes of this ~~rule~~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.

(23) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code ~~sections~~§§ 6007, 6203(~~ed~~(1)), or California Rule of Court 9.31; ~~and~~(d).

(34) "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.

(Bb) A ~~member~~lawyer shall not employ, associate ~~professionally~~in practice with, or ~~aid~~assist a person* the ~~member~~lawyer knows* or reasonably should know* is ~~a an~~an ~~disbarred, suspended, resigned, or involuntarily inactive member~~ineligible person to perform the following on behalf of the ~~member's~~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 ~~which~~that constitute the practice of law.
- (Cc) A ~~member~~lawyer may employ, associate ~~professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member~~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 ~~member~~lawyer in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active ~~member~~lawyer who will appear as the representative of the client.
- (Dd) Prior to or at the time of employing, associating in practice with, or assisting a person* the ~~member~~lawyer knows* or reasonably should know* is ~~an disbarred, suspended, resigned, or involuntarily inactive member, the member~~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 ~~disbarred, suspended, resigned, or involuntarily inactive member~~ineligible person will not perform such activities. The ~~member~~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 ~~member~~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 ~~member's~~lawyer's employment ~~with~~by the client.

- (Ee) A ~~member~~lawyer may, without client or State Bar notification, employ ~~a disbarred, suspended, resigned, or involuntarily inactive member,~~ 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.
- (Ff) ~~Upon termination of the disbarred, suspended, resigned, or involuntarily inactive member, the member~~When the lawyer no longer employs, associates in practice with, or assists the ineligible, the lawyer shall promptly serve upon the State Bar written* notice of the termination.

DiscussionComment

~~For discussion of the activities that constitute the practice of law, see *Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford v. State Bar* (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants Protective Corporation* (1922) 189 Cal. 531, 535 [209 P. 363]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].)~~

~~Paragraph (D) is not intended to prevent or discourage a member from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a member's client~~If the client is an organization, ~~then the written~~lawyer shall serve the notice required by paragraph (Dd) ~~shall be served upon the~~ on its highest authorized officer, employee, or constituent overseeing the particular engagement. (See ~~rule~~Rule 3-6001.13.)

~~Nothing in rule 1-311 shall be deemed to limit or preclude any activity engaged in pursuant to rules 9.40, 9.41, 9.42, and 9.44 of the California Rules of Court, or any local rule of a federal district court concerning admission *pro hac vice*.~~

V. RULE HISTORY

The rule was originally conceived and recommended by the State Bar's Board Committee on Discipline in 1993. Rule 1-311 is intended to address public protection and disciplinary enforcement concerns by (1) preventing a licensed member from acting as a screen behind which a former member could continue practicing law, (2) disclosing to the client the former member's role in the client's matter, (3) delineating the kinds of activities in which an employed but former member is permitted to engage, and (4) requiring notice to the State Bar of the former member's employment and termination.

Rule 1-311 regulates the employing/associating attorney, rather than the disbarred, suspended, resigned, or involuntarily inactive lawyer. This is because the State Bar does not have disciplinary jurisdiction over former members who have been disbarred or who have resigned from the State Bar. As such, the rule only imposes duties on the employing lawyer and not the employed, disciplined lawyer and does not address, regulate or limit the activities in which a disbarred, suspended, resigned, or voluntarily

inactive lawyer, acting alone, might engage. (See “Request that the Supreme Court of California Approve Proposed Rule 1-311 of the Rules of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation,” December 1995, at pages 2-3.)

Current rule 1-311 became operative on August 1, 1996. It was amended in 2008 but those amendments were non-substantive changes that updated the cross-references to several renumbered California Rules of Court contained in the rule.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule and its Comments.

Commission Response: No response required.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, four public comments were received. Two comments agreed with the proposed rule, one comment disagreed, one comment agreed only if modified. During the 45-day public comment period, one public comment was received, and that commenter disagreed with the proposed rule. Public comment synopsis tables, with the Commission’s responses to each public comment, are provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Unauthorized Practice of Law. Aspects of rule 1-311 overlap with the regulation of the unauthorized practice of law in California. (See, e.g., rule 1-311(B) restricting the provision of legal advice to a client.) Other California laws prohibit the unauthorized practice of law in California. Among these other laws are Business and Professions Code section 6125 et. seq. stating that perpetrators are guilty of a misdemeanor punishable by a fine, imprisonment, or both. Unauthorized practice of law may also be enforced under laws prohibiting unfair competition. (See: *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599, applying the Unfair Competition Act, Business and Professions Code sections 17200 – 17208. See also: Opinion of the California Attorney General No. 93-303 (August 30, 1993).) Similar to the policy underlying rule 1-311, rule 1-300(A) prohibits a lawyer from aiding any person or entity in the unauthorized practice of law. See also, Business and Professions Code section 6133 providing that a law firm 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 hold himself or herself out as being available to practice law, and shall supervise any other duties of the disciplined lawyer.

Court Orders in Disciplinary Proceedings. Under Rule of Court 9.20, the Supreme Court may include in an order disbaring or suspending a member of the State Bar, or in accepting his or her resignation, a direction that the member must: (1) notify all clients about the discipline or resignation and the consequent inability to practice law; (2) deliver to clients their files and property and refund any unearned fees; (3) notify any co-counsel; and (4) notify any opposing counsel. Rule 1-311 similarly requires certain notices (to clients and to the State Bar) but the obligation is imposed on the attorney who is employing or professionally associating with a disbarred, suspended, resigned, or involuntary inactive member.

See Section V. on the history of the current rule. In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- *People ex rel. Herrera v. Stender* (2012) 212 Cal.App.4th 614 [152 Cal.Rptr.3d 16]
- *In the Matter of Tamir Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920
- *In re White* (2004) 121 Cal.App.4th 1453 [18 Cal.Rptr.3d 444]
- *In re the Marriage of Bianco* (2013) 221 Cal.App.4th 826 [164 Cal.Rptr.3d 785]

B. ABA Model Rule Adoptions

There is no corresponding ABA model rule. Several states have related rules, sometimes in the Rules of Professional Responsibility and sometimes in Bar rules or other contexts.

Three jurisdictions have adopted a rule of professional conduct similar to current rule 1-311 in that they require the employing lawyer to provide notice when employing a suspended or disbarred lawyer: Colorado, Maryland, and Minnesota. Alaska incorporates a bar rule that similarly requires an employing lawyer to serve upon the Alaska Bar Association written notice of the employment of a disbarred, suspended, resigned, or involuntarily inactive lawyer.

Seven jurisdictions prohibit suspended or disbarred lawyers from working in law-related activities: Idaho, Illinois, Indiana, Massachusetts, New Jersey, South Carolina, and Washington.

Nine jurisdictions partially restrict the work of suspended or disbarred lawyers in law-related activities in their rules of professional conduct. For example, Georgia and Hawaii prohibit a suspended or disbarred lawyer from contacting another lawyer's clients "either in person, by telephone or in writing." (See, Georgia Rule of Professional Conduct 5.3(d) (Responsibilities Regarding Nonlawyer Assistants); and Hawaii Rule of Professional Conduct 5.5(c) (Unauthorized Practice of Law). Other states in this

category are Florida, Louisiana, New Mexico, North Carolina, Virginia, Washington, and Wyoming.)

Finally, thirty jurisdictions have no rule or regulation addressing law-related activities of disbarred, suspended, resigned or involuntarily inactive lawyers.

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

A. Concepts Accepted (Pros and Cons):

1. No substantive changes to the rule are recommended. The recommended changes to the rule proper and the deletion of current Discussion text are not intended to be substantive changes to the current rule or changes a lawyer's duties under the current rule. The changes are intended to clarify and streamline the existing rule.

B. Concepts Rejected (Pros and Cons):

1. Specify whether notice to State Bar of hiring is available to the public or not.
 - Pros: More information available to the public about disbarred, suspended, resigned or involuntarily inactive lawyers.
 - Cons: Not a disciplinary issue and therefore not appropriate for Rules of Professional Conduct.
 - Status of such lawyers is already available on the website;
 - Any affected clients are given notice by the hiring lawyer;
2. Require disbarred, suspended, resigned or involuntarily inactive lawyer to give notice of employment to the State Bar, either along with or in addition to hiring lawyer giving such notice.
 - Pros: State Bar has more information about such lawyers.
 - Cons: Notice of employment is already given by the hiring lawyer.
 - Gathering additional data, which is possibly useful to the State Bar, is not a disciplinary issue and therefore inclusion of requirement is not appropriate for Rules of Professional Conduct.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. No changes in duties/substantive changes are recommended to the current rule.

D. Non-Substantive Changes to the Current Rule:

1. Proposed paragraph (a)(3) – Code cites corrected.
2. Throughout the rule, substituted the phrase “associate in practice” for “associate professionally with” and substituted “assist” for “aid.”
3. Added to the proposed rule a definition of “member” that is the same as the existing definition of “member” in current rule 1-100(B)(2).
4. Deleted all of the current rule Discussion except for the current language that clarifies a hiring lawyer’s obligation to give notice to a client when the client is an organization
5. Various conforming language changes to implement the use of the terms, “associate in practice with” and “ineligible person.”
6. Current rule draft uses the term “ineligible person” as opposed to “ineligible person.”

E. Alternatives Considered:

1. The Commission considered but rejected the concept of expanding the scope of the rule to include the same or similar restrictions on members with regard to disbarred, suspended, resigned or involuntarily inactive lawyers *from non-California jurisdictions*.
 - Pros: If the concerns for client protection require notice to clients of California lawyers who are ineligible to practice, similar concerns should require notice of the hiring of non-California disbarred or suspended lawyers.
 - Cons: Both the research required of the hiring attorney and the enforcement requirements on the State Bar would be more extensive than the benefits would justify. Limiting the rule to California lawyers who are ineligible to practice keeps it within the scope of authority of the State Bar and the core focus of the rule.
2. The Commission considered but rejected the concept of recommending the retention of current rule 1-311 without any revisions pursuant to OCTC’s recommendation. (See Section V, above.)
 - Pros: This rule is not controversial and there is no need to change it.
 - Cons: The recommended rule makes no substantive changes to the rule. It merely updates the rule with clearer language to make compliance easier. It also eliminates unnecessary Comments.

3. The Commission considered but rejected the concept of using the term “restricted lawyer” rather than “ineligible person.”
 - Pros: The term “restricted lawyer” denotes that activities as a lawyer are limited and controlled.
 - Cons: The term “restricted lawyer” is at best a confusing misnomer and at worst a trap that might lead a law firm to improperly hold-out an ineligible person by using the word “lawyer.”
4. The Commission considered but rejected the concept of recommending the complete deletion of the entirety of current rule 1-311. This recommendation was recorded in the form of a written dissent from a Commission member.

X. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Mr. Eaton submitted a written dissent. See attached for the full text of the dissent and the Commission’s response to the dissent.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 5.3.1 [1-311] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 5.3.1 [1-311] in the form attached to this Report and Recommendation.

**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.

**Proposed Rule 5.3.1 [1-311] Employment of Disbarred, Suspended,
Resigned, or Involuntarily Inactive Lawyer
Synopsis of Public Comments**

TOTAL = 1	A = 0
	D = 1
	M = 0
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-26	Birkley, Dain (dated 11/18/16; received 01/17/17)	No	D		<p>All but paragraph (b) of Rule 5.3.1 should be deleted. The remaining provisions are redundant and superfluous.</p> <p>The written notice requirement to each client in paragraph (d) "positively and instantly ends job possibilities." If the law firm is of substantial size, with hundreds of clients, the costs associated with drafting a letter for each client, postage, collecting and obtaining proofs of service, and record management is too prohibitive for the firm.</p> <p>Over and above the penalty that a restricted attorney has paid in loss of freedom and assets, Rule 5.3.1(d) effectively renders restricted attorneys unemployable and robs them of their right to earn a living for life. Rule 5.3.1(d) is not just.</p>	<p>The proposed rule carries forward, without any substantive changes, the policy of current rule 1-311 by imposing duties on an attorney employing, or professionally associating with, a lawyer who is not entitled to practice. These duties include the requirement in paragraph (d). The notice to the State Bar ensures that the Bar can provide oversight. The notice to client ensures greater transparency by giving the client an opportunity to object to the restricted lawyer working on his or her case. The Commission concluded that having this rule serves a valuable public protection benefit as well as provides an opportunity for the restricted lawyer to work in a law office (within the parameters established by the rule) and to assist with his or her rehabilitation and potential reinstatement to active status. The rule is tailored to provide that opportunity.</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

PROPOSED RULE OF PROFESSIONAL CONDUCT 5.4
(Current Rules 1-310; 1-320; 1-600)
Financial and Similar Arrangements with Nonlawyers

EXECUTIVE SUMMARY

The Commission reviewed and evaluated current rules 1-310 (Forming a Partnership With a Non-lawyer), 1-320 (Financial Arrangements With Non-Lawyers), and 1-600 (Legal Service Programs) in accordance with the Commission Charter. In addition, the Commission considered the national standard of the ABA counterpart which contains many of the concepts included in these three California rules in a single rule, Model Rule 5.4 (Professional Independence Of A Lawyer). The Commission also reviewed relevant California statutes, rules, and case law relating to issues addressed by the proposed rule. The result of the Commission's evaluation is proposed rule 5.4 (Financial and Similar Arrangements with Nonlawyers).

Rule As Issued For 90-day Public Comment

The main issue considered when evaluating these rules was whether to retain the existing rules separately, or to recommend adoption of a rule derived from ABA Model Rule 5.4. The recommendation is for a rule derived from ABA Model Rule 5.4 because the proposed rule gathers together in a single rule concepts that are intended to promote the independence of a lawyer's professional judgment, as opposed to retaining these concepts in three separate rules. The proposed rule will improve public protection by providing broader prohibitions on a lawyer's conduct and on relationships into which a lawyer might enter that could pose a threat to the lawyer's exercise of independent professional judgment. In addition, the proposed rule provides greater public protection by expanding upon current rule 1-310¹ through not only prohibiting a lawyer from forming a partnership with a nonlawyer, but also any other organization with a nonlawyer if any of the activities of the organization consist of the practice of law. Finally, the proposed rule ensures California's existing laws permitting lawyers to participate with governmental entities, legal services programs and certain other organizations continue to be honored.

Paragraph (a) prohibits a lawyer or law firm from sharing legal fees with a nonlawyer or with an organization that is not authorized to practice law. Paragraph (a) contains five subparagraphs providing guidance on the exceptions to the prohibition permitted under the rule. Paragraph (a) contains the substance of current rule 1-320(A).

Paragraph (b) prohibits a lawyer from forming a partnership or other organization with a nonlawyer if any of the activities of the partnership or organization consist of the practice of law. Paragraph (b) contains the substance of current rule 1-310 but, as stated above, expands upon the current rule by prohibiting a lawyer from forming any other organization, in addition to a partnership, with a nonlawyer to conduct the practice of law.

Paragraph (c) prohibits a lawyer from allowing a person who recommends, employs, or pays the lawyer to provide legal services for another to interfere with either the lawyer's independent professional judgment or with the lawyer-client relationship in rendering legal services.

¹ Current Rule 1-310 (Forming a Partnership With a Non-Lawyer) provides:

A member shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law.

Paragraph (d) prohibits a lawyer from practicing law with or in the form of a professional corporation or other organization authorized to practice law for a profit if: (1) a nonlawyer owns any interest in it;² (2) a nonlawyer is a director or officer of the corporation or holds a similar position of responsibility in any other form of organization; or (3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.

Paragraph (e) requires the Board of Trustees of the State Bar of California to formulate and adopt Minimum Standards for Lawyer Referral Services which are binding on lawyers in California. This paragraph also prohibits a lawyer from accepting a referral from, or otherwise participating in, a lawyer referral service unless it complies with the Minimum Standards for Lawyer Referral Services as adopted by the Board. Paragraph (e) contains the substance of current rule 1-600(B).

Paragraph (f) prohibits a lawyer from practicing law with or in the form of a nonprofit legal aid, mutual benefit, or advocacy group if such organization allows any third person or organization to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or helps any person or organization to practice law in violation of the Rules of Professional Conduct or the State Bar Act. Paragraph (f) contains the substance of current rule 1-600(A).

There are four comments to the rule. Comment [1] states that paragraph (a) does not prohibit a lawyer or law firm from paying a bonus to a nonlawyer employee so long as the arrangement does not interfere with the lawyer's independent professional judgment; however, the nonlawyer's compensation may not be based on a percentage or share of fees in specific cases or legal matters. Comment [2] states that paragraph (a) also does not prohibit payment to a nonlawyer third party for goods and services provided to the lawyer so long as the compensation is not determined as a percentage or share of the lawyer's overall revenues, or tied to fees in specific cases or legal matters. Comment [3] clarifies that paragraph (a)(5) permits sharing with or paying court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. Comment [4] states that the rule is not intended to affect case law regarding the relationship between insurers and lawyer providing legal services to insureds.

² Proposed paragraph (d)(1) contains a limited exception which states: "except for allowing a fiduciary representative of a lawyer's estate to hold the lawyer's stock or interest for a reasonable time during administration." This is consistent with State Bar Rule 3.157(C) and Business and Professions Code section 6171(a).

State Bar Rule 3.157(C): "The shares of a deceased shareholder must be sold or transferred to the law corporation or its shareholders within six months and one day following the date of death."

Bus. & Prof. Code § 6171(a):

With the approval of the Supreme Court, the State Bar may formulate and enforce rules and regulations to carry out the purposes and objectives of this article, including rules and regulations requiring all of the following:

- (a) That the articles of incorporation or bylaws of a law corporation shall include a provision whereby the capital stock of the corporation owned by a disqualified person (as defined in the Professional Corporation Act) or a deceased person shall be sold to the corporation or to the remaining shareholders of the corporation within such time as the rules and regulations may provide.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

**COMMISSION REPORT AND RECOMMENDATION:
RULE 5.4 [1-320, 1-310, 1-600]**

Commission Drafting Team Information

Lead Drafter: Lee Harris

Co-Drafters: Danny Chou, Robert Kehr, Toby Rothschild, Mark Tuft

I. CURRENT CALIFORNIA RULE

Rule 1-320 Financial Arrangements With Non-Lawyers

- (A) Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that:
- (1) An agreement between a member and a law firm, partner, or associate may provide for the payment of money after the member's death to the member's estate or to one or more specified persons over a reasonable period of time; or
 - (2) A member or law firm undertaking to complete unfinished legal business of a deceased member may pay to the estate of the deceased member or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member; or
 - (3) A member or law firm may include non-member employees in a compensation, profit-sharing, or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement, if such plan does not circumvent these rules or Business and Professions Code section 6000 et seq.; or
 - (4) A member may pay a prescribed registration, referral, or participation fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California.
- (B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

- (C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.

Discussion:

Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment.

Rule 1-310 Forming a Partnership With a Non-Lawyer

A member shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law.

Discussion:

Rule 1-310 is not intended to govern members' activities which cannot be considered to constitute the practice of law. It is intended solely to preclude a member from being involved in the practice of law with a person who is not a lawyer.

Rule 1-600 Legal Service Programs

- (A) A member shall not participate in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services, which allows any third person or organization to interfere with the member's independence of professional judgment, or with the client-lawyer relationship, or allows unlicensed persons to practice law, or allows any third person or organization to receive directly or indirectly any part of the consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules.
- (B) The Board of Governors of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on members.

Discussion:

The participation of a member in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of these rules.

Rule 1-600 is not intended to override any contractual agreement or relationship between insurers and insureds regarding the provision of legal services.

Rule 1-600 is not intended to apply to the activities of a public agency responsible for providing legal services to a government or to the public.

For purposes of paragraph (A), “a nongovernmental program, activity, or organization” includes, but is not limited to group, prepaid, and voluntary legal service programs, activities, or organizations.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 5.4 [1-320, 1-310, 1-600]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 5.4 [1-320, 1-310, 1-600]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION’S PROPOSED RULE (CLEAN)

Rule 5.4 Financial and Similar Arrangements with Nonlawyers

- (a) A lawyer or law firm* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:
 - (1) an agreement by a lawyer with the lawyer’s firm,* partner,* or associate may provide for the payment of money or other consideration over a reasonable* period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;
 - (2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to Rule 1.17, to the lawyer’s estate or other representative;
 - (3) a lawyer or law firm* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these Rules or the State Bar Act;
 - (4) a lawyer or law firm* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California’s Minimum Standards for Lawyer Referral Services; or

- (5) a lawyer or law firm* may share with or pay a court-awarded legal fee to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm in the matter.
- (b) A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.
- (c) A lawyer shall not permit a person* who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or other organization authorized to practice law for a profit if:
 - (1) a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest for a reasonable* time during administration;
 - (2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or
 - (3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.
- (e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.
- (f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person* or organization to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person,* organization or group to practice law in violation of these Rules or the State Bar Act.

Comment

[1] Paragraph (a) does not prohibit a lawyer or law firm* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm* and does not violate these Rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5) permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]. See also Rule 6.3. Regarding a lawyer's contribution of legal fees to a legal services organization, see Rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

[4] This Rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULES 1-320, 1-310, 1-600)

Rule 5.4 [1-320] Financial and Similar Arrangements ~~With Non-Lawyers~~with Nonlawyers

~~(a)~~~~(A) Neither a member nor a~~A lawyer or law firm* shall ~~directly or indirectly~~not share legal fees ~~with a person who is not a lawyer~~directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:

- (1) ~~An~~An agreement ~~between a member and a law~~by a lawyer with the lawyer's firm,* partner,* or associate may provide for the payment of money or other consideration over a reasonable* period of time after the ~~member's~~lawyer's death, to the ~~member's~~lawyer's estate or to one or more specified persons ~~over a reasonable period of time~~; ~~or~~
- (2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to Rule 1.17, to the lawyer's estate or other representative;
- ~~(2) A member or law firm undertaking to complete unfinished legal business of a deceased member may pay to the estate of the deceased member or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member; or~~
- (3) ~~A member~~a lawyer or law firm* may include ~~non-member~~nonlawyer employees in a compensation, ~~profit-sharing~~, or retirement plan, even though the plan is based in whole or in part on a profit-sharing

arrangement, ~~if such~~provided the plan does not ~~circumvent these rules or Business and Professions Code section 6000 et seq.; or otherwise violate these Rules or the State Bar Act;~~

- (4) ~~A member~~a lawyer or law firm* may pay a prescribed registration, referral, or ~~participation~~other fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California's Minimum Standards for ~~a Lawyer Referral Service in California.~~Services; or
- (5) a lawyer or law firm* may share with or pay a court-awarded legal fee to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm* in the matter.
- ~~(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.~~
- ~~(C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.~~

Rule 1-310 Forming a Partnership With a Non-Lawyer

- (b) A member~~lawyer~~ shall not form a partnership or other organization with a ~~person who is not a lawyer~~nonlawyer if any of the activities of ~~that~~the partnership or other organization consist of the practice of law.
- (c) A lawyer shall not permit a person* who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or other organization authorized to practice law for a profit if:
- (1) a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest for a reasonable* time during administration;

- (2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or
- (3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.
- (e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.

~~Rule 1-600 Legal Service Programs~~

- ~~(A) A member shall not participate in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services, which allows any third person or organization to interfere with the member's independence of professional judgment, or with the client lawyer relationship, or allows unlicensed persons to practice law, or allows any third person or organization to receive directly or indirectly any part of the consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules.\~~
- (e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.
- ~~(B) The Board of Governors of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on members.~~
- (f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person* or organization to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person,* organization or group to practice law in violation of these Rules or the State Bar Act.

Discussion: COMMENT

~~[Discussion paragraph for Rule 1-320]~~

~~Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment.~~

[1] Paragraph (a) does not prohibit a lawyer or law firm* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for

legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm* and does not violate these Rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5) permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]. See also Rule 6.3. Regarding a lawyer's contribution of legal fees to a legal services organization, see Rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

~~*[Discussion paragraph for Rule 1-310]*~~

~~Rule 1-310 is not intended to govern members' activities which cannot be considered to constitute the practice of law. It is intended solely to preclude a member from being involved in the practice of law with a person who is not a lawyer.~~

~~*[Discussion paragraph for Rule 1-600]*~~

~~The participation of a member in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of these rules.~~

~~Rule 1-600 is not intended to override any contractual agreement or relationship between insurers and insureds regarding the provision of legal services.~~

~~Rule 1-600 is not intended to apply to the activities of a public agency responsible for providing legal services to a government or to the public.~~

~~For purposes of paragraph (A), "a nongovernmental program, activity, or organization" includes, but is not limited to group, prepaid, and voluntary legal service programs, activities, or organizations.~~

[4] This Rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].

V. RULE HISTORY

A. Introduction

The three rules being considered together under the rubric of a new proposed Rule 5.4 that would be patterned after Model Rule 5.4 all deal to some extent with a lawyer's duty of exercising independent professional judgment in representing a client. Specifically, each rule incorporates prohibitions on lawyer conduct that are intended to *avoid interference* by nonlawyers with a lawyer's exercise of independent judgment in providing legal services to a client.

B. History of Current Rule 1-310

The predecessor to current Rule 1-310, former Rule 3-103, became operative on January 1, 1975, under the current title, "Forming a Partnership With a Non-Lawyer." That rule contained the substance of Disciplinary Rule (DR) 3-103 of the ABA Model Code of Professional Responsibility".¹

Former rule 3-103 was amended in 1989 as part of a comprehensive revision of the Rules of Professional Conduct. The rule was renumbered rule 1-310, a new Discussion section was added, and non-substantive were made to streamline the black letter text of the rule. As revised, rule 1-310 provided:

Rule 1-310. ~~3-103.~~ Forming a Partnership With a Non-Lawyer

A member of the ~~State Bar~~ shall not form a partnership with a person not licensed to practice law if any of the activities of the that partnership consist of the practice of law.

Discussion:

Rule 1-310 is not intended to govern members' activities which cannot be considered to constitute the practice of law. It is intended solely to preclude a member from being involved in the practice of law with a person not licensed to practice law.

In 1992, rule 1-310 was revised to conform to the use of "member" and "lawyer" under a then new definition of those terms. The proposed amendments to rule 1-310 and the Discussion section, in conjunction with the proposed amendment to rule 1-100(B)(3), intended to correct an ambiguity in the then-operative rules. At that time, rule 1-100(B)(3) defined "lawyer" as a person licensed to practice law in a United States

¹ DR 3-103 provided:

DR 3-103 Forming a Partnership with a Non-Lawyer.

(A) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

jurisdiction. Then-operative rule 1-310 was titled “Forming a Partnership With a Non-Lawyer” and prohibited the formation of a partnership “with a person not licensed to practice law” if any of the activities of that partnership consisted of the practice of law. However, lawyers from other countries may be licensed to practice law, but did not fit within the then-operative definition of “lawyer.” Thus, an ambiguity existed between the title and the text of rule 1-310 (and the Discussion section) regarding foreign-licensed attorneys.

The amendments to rule 1-310 and to the Discussion section conformed the title of the rule to the text and the Discussion section and conformed the rule to the definition of “lawyer” proposed in rule 1-100(B)(3). These amendments clarified that formation of partnerships (to engage in the practice of law) with foreign-licensed attorneys were not prohibited under rule 1-310. As revised, rule 1-310 provided:

Rule 1-310. Forming a Partnership With a Non-Lawyer

A member shall not form a partnership with a person ~~not licensed to practice law~~ who is not a lawyer if any of the activities of that partnership consist of the practice of law.

Discussion:

Rule 1-310 is not intended to govern members’ activities which cannot be considered to constitute the practice of law. It is intended solely to preclude a member from being involved in the practice of law with a person ~~not licensed to practice law~~ who is not a lawyer.

Rule 1-310 has not been amended since 1992.

C. History of Current Rule 1-320

The concept of current rule 1-320 was included in the original 1928 Rules as a part of former rule 3, operative on July 24, 1928. Rule 3, in relevant part, provided:

Rule 3

A member of The State Bar shall not employ another to solicit . . . ; nor shall he directly or indirectly share with an unlicensed person compensation arising out of or incidental to professional employment;

In 1972, the Special Committee to Study the ABA Code of Professional Responsibility recommended the adoption of proposed rule 3-102, which was derived from ABA Code, DR 3-102 (Dividing Legal Fees with a Nonlawyer). The DR was modified to carry forward the Rule 3 prohibition against *direct or indirect* fee sharing except with a person licensed to practice law.

The rule that was adopted, effective 1975, was identical to the rule with one slight revision.²

The rule was again amended effective April 1979. These amendments rendered the rule gender neutral, and also added new paragraphs (B) and (C), concerning payments for referrals or recommendations of the lawyer's services.³ Further amendments were made effective October 1979 to add a sentence to paragraph (B).⁴

In 1989, several amendments were made. The rule number was changed to 1-320 as part of the comprehensive revision of the Rules. Paragraph (A) continued the prohibition and exceptions found in current rule 3-102(A) regarding sharing legal fees with persons not licensed to practice law. Subparagraph (A)(4) was added to clarify that payments to a State Bar Certified Lawyer Referral Service does not violate the rule. Finally, paragraph (B) was amended to make it consistent with proposed rule 2-200(B).

No amendments have been made to rule 1-320 since 1989.

D. History of Current Rule 1-600

Rule 1-600 was originally adopted and approved as rule 2-102, effective April 1, 1979. The State Bar explained the rationale for the rule:

² The change was as follows:

(2) A member of the State Bar who undertakes to complete unfinished legal business of a deceased member of the State Bar may pay to the estate of the deceased member of the State Bar or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member of the State Bar.

³ New paragraphs (B) and (C) provided:

(B) A member of the State Bar shall not compensate or give or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's firm by a client.

(C) A member of the State Bar shall not compensate or give or promise anything of value to any representative of the press, radio, television or other communication medium in anticipation of or in return for publicity of the member, the member's firm, or any other attorney as such in a news item, but the incidental provision of food or beverages shall not of itself violate this subdivision.

⁴ The sentence provided:

A member's offering of or giving a gift or gratuity to any person or entity, which has made a recommendation resulting in the employment of the member or the member's firms, shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

It has long been recognized that “[t]here are situations . . . when an attorney’s association with a lay organization fulfills a legitimate interest of the organization or its members, and presents no risk of conflicting interests or other abuses.”

In a series of four landmark decisions, the United States Supreme Court clearly established that “collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.” (*United Transportation Union v. State Bar of Michigan* (1971) 401 U.S. 576, 585, 91 S.Ct. 1076, 1082; *United Mine Workers of America v. Illinois State Bar Association* (1967) 389 U.S. 217, 88 S.Ct. 353 [hereinafter “*United Mine Workers*”]; *Brotherhood of Railroad Trainmen v. Virginia* (1964) 377 U.S. 1, 84 S.Ct. 1113 [hereinafter “*Railroad Trainmen*”]; *National Association of the Advancement of Colored People v. Button* (1963) 371 U.S. 415, 83 S.Ct. 328 [hereinafter “*NAACP*”].) The Court recently reaffirmed this position in *In re Primus* (1978) 436 U.S. 412, 98 S.Ct. 1893.

In doing so, however, the Court did not invalidate the fundamental prohibition against attorneys soliciting professional employment for their own purposes. Instead, the Court recognized a distinction between solicitation and the activities involved in the cases, and held that the prohibition against solicitation could not be applied so as to prohibit legitimate collective activity undertaken to obtain meaningful access to the courts. (See, e.g., *United Mine Workers*, 389 U.S. at pp. 222-223, 88 S.Ct., at pp. 356-357; *Railroad Trainmen*, 377 U.S., at pp. 6-7, 84 S.Ct., at pp. 1116-1117; *NAACP*, 371 U.S., at pp. 439-444, 83 S.Ct., at pp. 341-343; *In re Primus*, 436 U.S. 412, 98 S.Ct., at p. 1893, 1906.)

Thus, constitutionally protected activity constitutes an exception to the prohibition against solicitation; the exception coexists with the prohibition.

Subdivision (A) is intended to continue and to expand the current exception for attorney participation in legal aid and similar programs for the furnishing of services to indigents (present rule 2-101 (F)), in plans or programs of nonprofit organizations furnishing legal services to persons in respect of their civic, political or constitutional rights (present rule 2-104(F)), and in group and prepaid legal service arrangements (present rule 2-104(D) and (E)).

Proposed rule 2-102(A) also changes the previous rule approach to group and prepaid legal service arrangements by focusing on attorney’s conduct rather than on the structure of the arrangement itself.

Given the relatively recent history of group and prepaid legal service programs, we believe that the public interest is best served by permitting flexibility and experimentation, coupled with an on-going study by the Legal Services Section of the need for regulation.

The proposed rule thus eliminates all current distinctions between “group” and “prepaid” programs, open and closed panel programs, and all requirements for reporting to the State Bar the fact of an attorney’s participation in a plan contained in present rule 2-104(D) and (E).

In this respect it should be noted that this proposal contemplates the repeal of sections (D) and (E) of existing rule 2-104, relating to open and closed panel programs.

Present rule 2-104(E) sets out certain requirements for open panel programs. Your Committee believes that this provision has not served to foster the growth of legal services programs, and, in light of the change in the advertising rules, it no longer seems viable. Existing requirements in present rule 2-104 for registration with the State Bar by an attorney participating in a group legal service program are also repealed.

Subdivision (B) of proposed rule 2-102 continues the exception for attorneys who participate in lawyer referral services contained in present rule 2-104(C). The extent to which lawyer referral services are constitutionally permitted to solicit cases in-person is unclear. (See appendix F.) Your Committee recommends that you refer this issue to the appropriate committee for further research and study.

It provides for filing of minimum standards for such services with the Court and approval thereof by the Court. This is the same procedure proposed with respect to advertising standards promulgated under proposed rule 2-101(D).

There is no intent, by these changes, to lessen the responsibility of the attorney who participates in such programs to adhere to the requirements of the State Bar Act or of the Rules of Professional Conduct, including, for example, the prohibitions on aiding the unauthorized practice of law (*Bluestein v. State Bar* (1974) 13 Cal.3d 162; *People v. California Protection Corp.* (1926) 76 Cal.App. 354; rule 3-101); allowing a third party to receive part of the consideration paid to a member of the State Bar, (including kickbacks or other fees paid in consideration for a union or group representative’s having referred legal business to an attorney) (rules 4-101, 5-101, 5-102 and 5-103); and false, deceptive or misleading advertising placed by or on behalf of the member (proposed rule 2-101). In other words, the attorney must not permit a group or its agents to interfere with or control his or her performance of duties owed a client, the courts or the administration of justice.

[1978 Final Report, Pages 37-41].

In 1989 non-substantive amendments were made to the rule for brevity and clarity. Language making clear that a member may participate in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California was deleted from the black letter text and moved to the rule Discussion section.

This Discussion section also clarified that the rule was not intended to override any contractual agreement or relationship between insurers and insureds regarding the provision of legal services. This recognized that the insurer-insured relationship was subject to a developing body of case law. (See e.g., *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358.)

The word “non governmental” was added in paragraph (A) to make clear that the rule was not intended to apply to activities of a public agency charged with the obligation of providing legal services to the government or to the public. Examples of such agencies include the offices of public defenders and district attorneys.

Lastly, amendments were incorporated that conformed the rule to the definition of “member” established by then proposed rule 1-100 and to delete gender references.

Since 1989, no further amendments have been made to the rule.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule and its Comments.

Commission Response: No response required.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, four public comments were received. One comment agreed with the proposed Rule, one comment disagreed, and two comments agreed only if modified. A public comment synopsis table, with the Commission’s responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was not in support of the proposed rule. That testimony and the Commission’s response is also in the public comment synopsis table.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. Protection of Independent Judgment in the Context of Lawyer Referrals.

Rule 1-600 includes the policy that regulation is needed to assure public protection in lawyer referral activities. This policy is implemented both in statute and in State Bar

rules (see: Bus. & Prof. §§ 6155 et. seq. regarding State Bar registration; and the Board adopted Minimum Standards for Lawyer Referral Services that are “binding on members”). These regulations prohibit an attorney from participating in a lawyer referral service that is not operated in conformity with applicable rules, codes and standards, and also render unlawful the operation of an unregistered lawyer referral service. According to State Bar lawyer referral service staff, the total number of lawyer referral service clients reported from 2013 to 2014 is 156,997.

Over 100 years ago, the Supreme Court articulated the public harm that is triggered by a lawyer's contract with a lay person to secure clients in exchange for a share of the lawyer's fees. In *Alpers v. Hunt* (1890) 86 Cal. 78 [24 Pac. 846], the Court held such a contract to be invalid because it would tend to increase the cost of delivery of legal services. The Court said, "Such a practice would tend to increase the amounts demanded for professional services. In such a case an attorney would be induced to demand a larger sum for his services, as he would have to divide such sum with a third person." About 80 years later, the California Court of Appeal considered the issue of a lawyer's participation in bar association lawyer referral program in *Emmons, Williams, Mires & Leech v. State Bar* (1970) 6 Cal.3d 565. The bar association program operated under Minimum Standards adopted by the Board in 1956 (note that the Board's adoption was 30 years before the legislature enacted Bus. & Prof. Code § 6155 in 1987). Citing to *Alpers*, the court held that only certain types of lawyer referral service activities are not rendered illegal due to the ethical duties of lawyers to avoid fee splits with nonlawyers, lay interference with professional independent judgment, and aiding in the unauthorized practice of law. The Court said:

Whether the Minimum Standards actually work a modification of rules 2 and 3 is a question not affecting entitlement to the money in suit. It is enough that the basic features of the San Joaquin County arrangement do not offend the public policy underlying these canons. There are wide differences - in motivation, technique and social impact - between the lawyer reference service of the bar association and the discreditable fee-splitting featured in the disciplinary decision. Prohibited fee-splitting between lawyer and layman carries with it the danger of competitive solicitation (*Crawford v. State Bar*, 54 Cal.2d 659, 666 [7 Cal.Rptr. 746, 355 P.2d 490]); poses the possibility of control by the lay person, interested in his own profit rather than the client's fate (*Utz v. State Bar*, 21 Cal.2d 100, 108 [130 P.2d 377]); facilitates the lay intermediary's tendency to select the most generous, not the most competent, attorney (*Linnick v. State Bar*, 62 Cal.2d 17, 21 [41 Cal.Rptr. 1, 396 P.2d 33]; *Hildebrand v. State Bar*, 36 Cal.2d 504, 523 [225 P.2d 508], separate opinion of Traynor, J.). Rule 3's prohibition against lay intermediaries seeks to bar both solicitation and the presence of a party demanding allegiance the lawyer owes his client. (*People v. Merchants Protective Corp.* (1922) 189 Cal. 531, 539 [209 P. 363].) None of these dangers or disadvantages characterizes the San Joaquin County Bar Association's lawyer reference activity. The bar association seeks not individual profit but the fulfillment of public and professional objectives. It has a legitimate, nonprofit interest in making legal services more readily available to the public. When conducted within the framework conceived for such facilities, its reference

service presents no risks of collision with the objectives of the canons on fee-splitting and lay interposition.

(*Emmons* at pp. 573 -574.)

Recent enhancements to the regulation of lawyer referral activities affirm the longstanding tradition of assuring public protection in this area. Enacted in 2013, Evidence Code §§ 965 et. seq. established the “lawyer referral service-client privilege.” This privilege facilitates the confidentiality of information that might ultimately be shared with a lawyer in due recognition of the fact that access to legal services can begin with a client seeking assistance from a lawyer referral service and sharing information with the service’s nonlawyer staff.

State Bar Act regulation of lawyer referral services includes express exceptions. Business and Professions Code § 6155(h) provides that: “This section shall not be construed to prohibit attorneys from jointly advertising their services.” Paragraph (h) further states that permissible joint advertising, among other things, “identifies by name the advertising attorneys or law firms whom the consumer of legal services may select and initiate contact with.” Whether innovative online matching services constitute regulated lawyer referral activity or permissible joint advertising likely depends on the specific facts and circumstances of the service.

2. Aiding in the Unauthorized Practice of Law; Fee Splits with Nonlawyers

Rule 1-600 requires a lawyer to refrain from participating in an activity or program that recommends, pays for, or furnishes legal services, if that participation involves improper fee splits with nonlawyers or allows acts constituting the unauthorized practice of law. These issues of concern are the subject of other general rules not limited to the legal services context of rule 1-600. Rule 1-310 prohibits forming a partnership with a nonlawyer. Rule 1-320 prohibits, with certain exceptions, a lawyer from directly or indirectly sharing fees for legal services with a nonlawyer. Rule 1-300(A) prohibits a lawyer from aiding any person or entity in the unauthorized practice of law. Other California laws prohibit the unauthorized practice of law in California. Among these other laws are Business and Professions Code §§ 6125 et. seq. stating that perpetrators are guilty of a misdemeanor punishable by a fine, imprisonment, or both. Unauthorized practice of law may also be enforced under laws prohibiting unfair competition. (See *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599, applying the Unfair Competition Act, Business and Professions Code §§ 17200 – 17208. See also Opinion of the California Attorney General No. 93-303 (August 30, 1993).)

3. Corporations Practicing Law.

Rule 1-300(A) includes a prohibition against aiding an entity in the unauthorized practice of law. Certain entities are authorized to practice law in California. The State Bar registers Professional Law Corporations and Limited Liability Partnerships pursuant to code sections and State Bar rules. (See Business and Professions Code §§ 6160 et. seq. (re law corporations) and §§ 6174 and 6174.5 (re limited liability partnerships).)

Some nonprofit entities may also be authorized to practice law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221].)

4. Multi-Disciplinary Practice.

In 2001, a State Bar of California Task Force on Multidisciplinary Practice issued a Report and Findings overview of regulatory issues concerning concepts of possible reforms that could permit lawyers and other professionals to offer consumers “one-stop shopping” for professional services.⁵ The Office of Professional Competence staff observes that although this concept did not gain traction in California or with the ABA, it is possible that it might be revisited at some time in the future. The ABA also studied MDP. (See Section VIII.B, below.)

5. Passive Investment in Law Firms.

The State Bar MDP Task Force concluded that passive investment in law firms should not be permitted. (Report, at page 34.) There has been no further study of this issue in California.

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for Model Rule 5.4, whose paragraph (b) is the counterpart to rule 1-310, revised December 8, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_4.pdf [Last visited 2/6/17]
- Nine jurisdictions have adopted 5.4 verbatim.⁶ Thirty-eight jurisdictions have adopted something substantially similar to Model Rule 5.4⁷ and four jurisdictions have adopted something substantially different to Model Rule 5.4.⁸ The District of Columbia authorizes certain business combinations between lawyers and non-lawyers. Some legal commentators have critically examined the issue of lawyer / non-lawyer combinations with regard to expanding access to legal services for middle and lower income individuals.⁹

⁵ Posted online at: http://www.calbar.ca.gov/portals/0/documents/reports/2001_MDP-Report.pdf.

⁶ The nine jurisdictions are: Arizona, Arkansas, Delaware, Illinois, Montana, Nebraska, New Hampshire, Vermont, and Wisconsin.

⁷ The thirty-eight jurisdictions are: Alabama, Alaska, Colorado, Florida, Hawaii, Iowa, Idaho, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Maryland, Maine, Michigan, Minnesota, Montana, Mississippi, North Carolina, North Dakota, New Jersey, New Mexico, Nevada, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming.

⁸ The four jurisdictions are: California, Connecticut, District of Columbia, and Georgia.

⁹ See *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement* (2014) 82 Fordham L. Rev. 2587.

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of a single rule, derived from ABA Model Rule 5.4, that contains concepts intended to promote the independence of a lawyer's professional judgment.

- Pros: Proposed Rule 5.4 gathers together, in a single rule, concepts that are intended to promote the independence of a lawyer's professional judgment, but which are currently found in three separate California Rules of Professional Conduct: rules 1-310, 1-320, and 1-600.

Improves public protection by providing broader prohibitions on a lawyer's conduct and on relationships into which the lawyer might enter that could pose a threat to the lawyer's exercise of independent professional judgment.

A lawyer in a partnership or other organization that engages in law practice with a nonlawyer commits UPL whether the form of the business is a partnership, as stated in the current rule, or any other form of business association. Compromised legal judgment and impairment of the protections against revelation of confidential information could result.

Provides guidance on the exceptions to the prohibitions permitted under the Rule (many of which may be found in current rule 1-320) in an effort to articulate a clear and enforceable articulation of disciplinary standards.

Ensures California's existing laws permitting lawyers to participate with governmental entities, legal services programs and certain other organizations continues to be honored.

Responds to the Supreme Court's concern about possible conflicts between rules and comments.

- Cons: None identified.

2. Adopt paragraph (a), derived from current rule 1-320(A), which prohibits a lawyer or law firm from directly or indirectly sharing legal fees with a non-lawyer or organization not authorized to practice law. Paragraph (a) also contains five exceptions to the prohibition permitted under rule, derived from current rule 1-320(A).

- Pros: Maintains important public policy of prohibiting lawyers from sharing legal fees with non-lawyers in California. See discussion of *Emmons, Williams, Mires & Leech v. State Bar* in Section VIII.A.1, above.

- Cons: None identified.

3. Adopt paragraph (b), which prohibits a lawyer from forming a partnership or other organization with a nonlawyer if any of the activities consist of the practice of law.
 - Pros: The paragraph maintains the substance of current rule 1-310 but expands upon the current rule in order to provide greater public protection by not only prohibiting a lawyer from forming a partnership with a nonlawyer, but also any other organization comprised of nonlawyers if the activities of the organization consist of the practice of law.
 - Cons: None identified.
4. Adopt paragraph (c), which prohibits a lawyer from allowing a person who recommends, employs, or pays the lawyer to provide legal services for another to interfere with the lawyer's professional independent judgment or with the lawyer-client relationship in rendering legal services.
 - Pros: The paragraph maintains the substance of current rule 3-310(F)(1) which provides important client protection regarding the lawyer's duty of loyalty to his or her client.
 - Cons: None identified.
5. Adopt paragraph (d), which prohibits a lawyer from practicing law with or in the form of a professional corporation or other organization authorized to practice law for a profit if: (1) a nonlawyer owns any interest in it; (2) a nonlawyer is a director or officer of the corporation or holds a similar position of responsibility in any other form of organization; or (3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.
 - Pros: The paragraph maintains the longstanding principle of prohibiting nonlawyers from having a financial interest in a law firm in order to, among other things, protect the lawyer's independent professional judgment, avoid the unauthorized practice of law, and protect client confidences.

Paragraph (d)(1) contains a limited exception which provides: "except for allowing a fiduciary representative of a lawyer's estate to hold the lawyer's stock or interest for a reasonable time during administration." This is consistent with State Bar Rule 3.157(C) and Bus. & Prof. Code § 6171(a).
 - Cons: None identified.
6. Adopt paragraph (e), derived from current rule 1-600(B), which requires the State Bar Board of Trustees to formulate and adopt Minimum Standards for Lawyer Referral Services which are binding on lawyer in California. This paragraph also prohibits a lawyer from accepting a referral from, or otherwise participating in, a lawyer referral service unless it complies with the Minimum Standards adopted by the Board.
 - Pros: See Section VIII.A.1, above.

- Cons: None identified.

7. Adopt paragraph (f), derived from current rule 1-600(A), which prohibits a lawyer from practicing law with or in the form of a nonprofit legal aid, mutual benefit, or advocacy group if such organization allows any third person or organization to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or helps any person or organization to practice law in violation of the Rules of Professional Conduct or the State Bar Act.

- Pros: The paragraph maintains important policy of: (1) prohibiting third party interference with a lawyer's judgment or the attorney-client relationship; (2) aiding unlicensed persons to practice law; and (3) ensuring the legal services program does not otherwise violate the State Bar Act or the Rules of Professional Conduct.

- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

8. Retain the existing separate rules 1-310, 1-320, 1-600 language with no changes.

- Pros: Comports with and simply states CA's longstanding policy of preventing non-lawyers from practicing law with lawyers.

Extensive body of California law interpreting the existing Rules.

- Cons: Rule 1-320 does not expressly state the rationale that underlies the rule's prohibition on sharing legal fees with a non-lawyer, i.e., avoid interference with the lawyer's exercise of independent professional judgment.

Rule 1-320 does not expressly except from its prohibition the payment by a lawyer of court-awarded legal fees to a non-profit organization that employed, retained or recommended the lawyer. These fees are an important source of income for such non-profit organizations.

Rules 1-320 and 1-600 do not address the concerns the Supreme Court expressed in *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, about lawyers practicing with nonprofit organizations that might permit third parties to interfere with a lawyer's independence of judgment.

Arguably does not list all types of other organizations contained in the prohibition against lawyers practicing law with non-lawyers.

C. Changes in Duties/Substantive Changes to the Current Rule:

None.

D. Non-Substantive Changes to the Current Rule:

1. The proposed rule language is conformed to § 4.3A of the Guidelines for Drafting and Editing Court Rules.

E. Alternatives Considered:

1. Keep current rule without any changes.
2. Incorporate language allowing some form of organization in which a financial interest is held or managerial authority is exercised by an individual non-lawyer who performs professional services or provides a multidisciplinary practice combination.
3. The question of third-party case or matter funding was discussed but it was determined that the issue should be deferred. Lawyers routinely work with vendors and others. Participation with vendors and outsourcing has been the subject of much discussion.¹⁰ There would need to be significantly more study with specific data before determining if there is a need for modifications of the rule with regard to this topic, and whether any such change would be consistent with the statutory prohibition on the unauthorized practice of law.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 5.4 [1-320, 1-310, 1-600] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 5.4 [1-320, 1-310, 1-600] in the form attached to this Report and Recommendation.

¹⁰ See ABA Formal Opinion. No. 08-451; California State Bar Formal Opinion No. 2010-179; California State Bar Formal Opinion No. 1971-25; Los Angeles County Bar Assn. Formal Opinion No. 374 (1978)).

**Proposed Rule 5.4 [1-320, 1-310, 1-600] Financial and Similar Arrangements
with Nonlawyers
Synopsis of Public Comments**

TOTAL = 4	A = 1
	D = 1
	M = 2
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Public Hearing	Responsive Law (Gordon, Tom) (Provided oral public hearing testimony on July 26, 2016. See pages 43-46 of the public hearing transcript.)	Yes	D	5.4	<p>Nonlawyers should be permitted to invest in law firms as long as lawyer's professional judgment isn't compromised.</p> <p>Recounts examples under current rules where attorneys place their financial interests above those of their clients.</p> <p>Outside ownership will increase access to justice. Cites H&R Block as an example of a large company that has made tax work more available to the public.</p> <p>Outside ownership will allow lawyers to focus on what they are trained to do as opposed to the business of the law firm.</p> <p>Recent law grads can get training at these types of firms which is less likely at smaller firms.</p> <p>That the rule should just contain the language in paragraph (c) to protect the public while allowing outside ownership.</p>	<p>No change to the report is recommended. It is outside of the scope of the Commission to draft Rules that conflict with established California law. Ownership interests by non-lawyers in California law firms are prohibited. California Business and Professions Code Section 6125 states, "No person shall practice law in California unless the person is an active member of the State Bar." California law has long limited the practice of law to Lawyers. "(I)ndividuals may not, either singly or in association, engage in the practice of the law without having a special license so to do, and hence the individuals forming this corporation could not, under the section of the code relied upon, gain any other or further right by the act of incorporation than that lawfully possessed by them, either singly or in the aggregate, without incorporation." <i>People v. Merchants Protective Corp.</i>, 189 Cal. 531 (1922). The</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Proposed Rule 5.4 [1-320, 1-310, 1-600] Financial and Similar Arrangements
with Nonlawyers
Synopsis of Public Comments**

TOTAL = 4
A = 1
D = 1
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						Business and Professions Code Section specifically allows the establishment of law corporations. Law corporations are limited by California Business and Professions Code § 6165 which provides that "...each director, shareholder, and each officer of a law corporation shall be a licensed person as defined in the Professional Corporation Act, or a person licensed to render the same professional services in the jurisdiction or jurisdictions in which the person practices."
X-2016-76q	Los Angeles County Bar Association Professional Responsibility and Ethics Committee (PREC) (Schmid) (09-24-16)	Y	M		PREC finds the reference to "other organization" in paragraph (b) of Proposed Rule 5.4 to be overbroad and recommends that the language in this paragraph be clarified by adding "for a profit" to the end of the paragraph. Such a change would parallel the language used in the beginning portion of paragraph (d) of this Rule.	The Commission has not made the requested change. The provisions of paragraph (d) referred to by the commenter were discussed during drafting and were designed for lawyers practicing in for profit law firm organizations as differentiated from existing and legally permitted not for profit organizations that provide legal service. The provisions of paragraph (b) deal with all lawyers regarding the startup formation by lawyers of law

**Proposed Rule 5.4 [1-320, 1-310, 1-600] Financial and Similar Arrangements
with Nonlawyers
Synopsis of Public Comments**

TOTAL = 4	A = 1
	D = 1
	M = 2
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						partnerships and other law firm organizations and restates the long held prohibition against nonlawyers practicing law in California.
X-2016-104ba	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Y	A		OCTC supports this rule and its Comments.	No response required.
X-2016-115g	Lamport, Stanley (09-29-16)	N	M		<p>Current Rules 1-320 and 2-200 use different terms to describe the same concept, the division/sharing of fees. Proposed Rules 1.5.1 and 5.4 continue the use of the different terminology. Proposed Rule 1.5.1 refers to a division of fees for legal services. Proposed Rule 5.4 refers to sharing legal fees. In my view, the terminology in both rules should be the same.</p> <p>Accordingly, I recommend that proposed Rule 5.4 should be revised so that both proposed Rules 1.5.1 and proposed Rule 5.4 state that a lawyer or a firm shall not divide a fee for legal services. I have prepared redlined revision to proposed Rule 5.4 showing the requested changes.</p>	The Commission did not make the requested change. The current California rules, as well as those in all other jurisdictions, intentionally use different words for fee split arrangements among lawyers as opposed to fee arrangements between lawyers and nonlawyers. The former are permitted under certain circumstances, (proposed Rule 1.5.1 [2-200], while the latter are prohibited. The Commission is concerned about the problems a deviation in language could create. Consistent with the Commission's charter, the Commission does not believe a sufficiently good reason exists to deviate from this distinction in terminology established in the current rules.

PROPOSED RULE OF PROFESSIONAL CONDUCT 5.5
(Current Rule 1-300)
Unauthorized Practice of Law; Multijurisdictional Practice of Law

EXECUTIVE SUMMARY

The Commission evaluated current rule 1-300 (Unauthorized Practice of Law) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law).

Rule As Issued For 90-day Public Comment

Proposed rule 5.5 amends current rule 1-300. In substance, it continues the prohibitions in rule 1-300 against aiding any person or entity in the unauthorized practice of law and against a member of the California bar practicing law in another jurisdiction in violation of the regulations of that other jurisdiction. However, the Commission is recommending that the rule also include the Model Rule 5.5 prohibitions against a lawyer who is not admitted to practice in California from maintaining an office or systematic presence in California and falsely holding out that he or she is admitted to practice law in California.

The main issue considered by the Commission in studying this rule was whether to propose paragraph (b) that implements the Model Rule prohibitions against a lawyer who is not admitted to practice in California from: (i) maintaining an office or systematic presence in California; and (ii) from holding out that he or she is admitted to practice law in California. Although the Commission recognized that such conduct presently is governed by well-established State Bar Act prohibitions against the unlawful practice of law (see Business and Professions Code §6125 et seq.), the Commission nevertheless recommends this amendment to the current rule. Three of the Commission's reasons for this change are set forth below.

First, proposed rule 5.5 would serve as an entry point for out-of-state lawyers considering whether to practice in California and proposed paragraph (b) alerts such lawyers to limitations on their potential authorization to practice in California even if they believe that they would qualify to do so under one of the multijurisdictional practice of law ("MJP") provisions in the California Rules of Court (i.e., MJP Rule of Court 9.46 authorizing a registered in-house counsel to engage in a limited practice exclusively for that lawyer's employer).

Second, proposed paragraph (b) would prohibit all non-admitted lawyers, including those persons authorized to practice in California under the Rules of Court (i.e., under the MJP rules, the pro hac vice rule, and other rules) from holding himself or herself out to the public or otherwise representing that he or she is admitted to practice law in California as a member of the State Bar. For example, a non-admitted lawyer who is given narrow permission by a trial judge to appear as counsel pro hac vice in a single case should not thereafter hold himself or herself out as being admitted in California as that would be a misleading representation that the lawyer enjoys the same unlimited privilege of practicing law as an active member.

Third, proposed paragraph (b) would be a necessary predicate in the black letter of the rule for the important information provided in the proposed comment to the rule concerning California's regulatory structure for MJP which differs substantially from that in other jurisdictions where

regulation of MJP is found in the Rules of Professional Conduct. In California, MJP is “codified” in the Rules of Court. The comment identifies the categories of authorized practice of law available to qualified lawyers who are not admitted in California and includes citations to the applicable Rules of Court.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 5.5 [1-300]

Commission Drafting Team Information

Lead Drafter: Mark Tuft

Co-Drafters: Jeffrey Bleich, Hon. Karen Clopton

I. CURRENT CALIFORNIA RULE

Rule 1-300 Unauthorized Practice of Law

- (A) A member shall not aid any person or entity in the unauthorized practice of law.
- (B) A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 5.5 [1-300]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 5.5 [1-300]

Vote: 11 (yes) – 0 (no) – 1 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 5.5 [1-300] Unauthorized Practice of Law; Multijurisdictional Practice of Law

- (a) A lawyer admitted to practice law in California shall not:
 - (1) practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.
 - (2) knowingly* assist a person* or entity in the unauthorized practice of law.
- (b) A lawyer who is not admitted to practice law in California shall not:
 - (1) except as authorized by these Rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

Comment

Paragraph (b)(1) prohibits lawyers from practicing law in California unless otherwise entitled to practice law in this state by court rule or other law. See, e.g., California Business and Professions Code, §§ 6125 et seq. See also California Rules of Court, rules 9.40 (counsel pro hac vice), 9.41 (appearances by military counsel), 9.42 (certified law students), 9.43 (out-of-state attorney arbitration counsel program), 9.44 (registered foreign legal consultant); 9.45 (registered legal services attorneys), 9.46 (registered in-house counsel), 9.47 (attorneys practicing temporarily in California as part of litigation), and 9.48 (non-litigating attorneys temporarily in California to provide legal services).

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-300)

Rule 5.5 [1-300] Unauthorized Practice of Law; Multijurisdictional Practice of Law

~~(A) A member shall not aid any person or entity in the unauthorized practice of law.~~

(a) A lawyer admitted to practice law in California shall not:

(1) ~~(B) A member shall not~~ practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

(2) knowingly* assist a person* or entity in the unauthorized practice of law.

(b) A lawyer who is not admitted to practice law in California shall not:

(1) except as authorized by these Rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

Comment

Paragraph (b)(1) prohibits lawyers from practicing law in California unless otherwise entitled to practice law in this state by court rule or other law. See, e.g., California Business and Professions Code, §§ 6125 et seq. See also California Rules of Court, rules 9.40 (counsel pro hac vice), 9.41 (appearances by military counsel), 9.42 (certified law students), 9.43 (out-of-state attorney arbitration counsel program), 9.44 (registered foreign legal consultant); 9.45 (registered legal services attorneys), 9.46 (registered in-house counsel), 9.47 (attorneys practicing temporarily in California as part of litigation), and 9.48 (non-litigating attorneys temporarily in California to provide legal services).

V. RULE HISTORY

The current rule 1-300 originated in 1928 as a part of former rule 3. Pursuant to then section 29 of the State Bar Act, the rule became operative on July 24, 1928. (See *The State Bar Journal* (July 1928) Vol. III, No. 1, p. 17.) The pertinent part of rule 3 originally read: “A member of the State Bar shall not . . . directly or indirectly aid or abet an unlicensed person to practice law or to receive compensation therefrom.”

For the purposes of clarification, the State Bar of California amended rule 3 in September, 1942. The Supreme Court approved the amendments which became operative on December 1, 1944. The amendments included dividing rule 3 into two sentences and revising the pertinent part of the rule to read: “A member of the State Bar shall not . . . directly or indirectly aid or abet any person not so licensed, or any association or corporation, to practice law or to receive compensation therefrom.” (See *The State Bar Journal* (November-December 1944) Vol. XIX, No. 6, p. 416 & 418.)

In 1972, the State Bar of California’s Special Committee to Study the ABA Code of Professional Responsibility recommended implementing the numbering system and format of the ABA Code of Professional Responsibility as adopted by the American Bar Association on February 24, 1970. This recommendation included renumbering rule 3 as rule 3-101, and entitling it “Aiding Unauthorized Practice of Law”. Proposed rule 3-101 contained two subparts. Subpart (A) provided: “A member of the State Bar shall not aid any person, association, or corporation in the unauthorized practice of law.” Subpart (B) provided: “A member of the State Bar shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.” Proposed Rule 3-101 became operative on January 1, 1975.

In 1989, rule 3-101 was amended and renumbered as rule 1-300 as part of a comprehensive revision and renumbering of the entire California Rules of Professional Conduct. Rule 1-300 was titled “Unauthorized Practice of Law.” Under subpart (A), the words “association, or corporation” were replaced with “or entity.” The rule was further amended by deleting the phrase “of the State Bar” from both subpart (A) and (B). The amended rule became operative May 27, 1989. Rule 1-300 has not since been amended.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC is concerned that subparagraph (a)(2) of this proposed rule requires “knowingly” for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rule 3.3, 4.1, and the General Comments section of this letter. Requiring “knowingly” permits an attorney not to research whether the person they are aiding is an attorney in California, or currently permitted to practice law in California. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation]; *Vaughn*

v. State Bar (1972) 6 Cal.3d 847, 850 and 855-858; *Sanchez v. Bar* (1976) 18 Cal.3d 280, 283–285 [gross negligence amounting to moral turpitude where attorney who knew client's case was in danger of dismissal inaccurately reported case status to client without first checking client's file]; *In the Matter of Yee* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330; *In the Matter of Parish* (2015) 5 Cal. State Bar Ct. Rptr. 370; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 281; *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 155 [gross negligence amounting to moral turpitude where attorney filed verification that his clients were out of county, without first confirming that fact]; *In the Matter of Carver* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 427, 432-433.)

Commission Response: The Commission has not made a change to the Rule. As it has noted with respect to other rules, the definition of “knowingly” in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. A lawyer may not engage in willful blindness to avoid knowledge the lawyer being assisted was not permitted to practice law in California. With this definition, the Commission believes that the “knowingly” standard is appropriately used in this Rule.

2. OCTC supports the Comment.

Commission Response: No response required.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, four public comments were received. One comment agreed with the proposed rule and three comments agreed only if modified. A public comment synopsis table, with the Commission’s responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was in support of the proposed rule if modified. That testimony and the Commission’s response is also in the public comment synopsis table.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. Aiding in the unauthorized practice of law. Other California laws prohibit the unauthorized practice of law in California. Among these other laws are Business and Professions Code §§ 6125 et seq. stating that perpetrators are guilty of a misdemeanor punishable by a fine, imprisonment, or both. Unauthorized practice of law may also be enforced under laws prohibiting unfair competition. (See,

People v. Landlords Professional Services (1989) 215 Cal.App.3d 1599, applying the Unfair Competition Act, Business and Professions Code §§ 17200 – 17208. See also, Opinion of the California Attorney General No. 93-303 (August 30, 1993).) Similar to the approach taken in rule 1-300(A), rule 1-311 regulates an attorney's employment or professional association with a disbarred, suspended, resigned, or involuntarily inactive member. Underlying both rules is the policy of protecting the public from lawyers or nonlawyers deemed unqualified to provide legal services.

2. Corporations practicing law. Rule 1-300(A) includes a prohibition against aiding an *entity* in the unauthorized practice of law. Certain entities are authorized to practice law in California. The State Bar registers Professional Law Corporations and Limited Liability Partnerships pursuant to code sections and State Bar rules. (See Business and Professions Code §§ 6160 et. seq. (re law corporations) and §§ 6174 and 6174.5 (re limited liability partnerships).) Some nonprofit entities may also be authorized to practice law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221].)
3. Practicing law in violation of another jurisdiction's regulation of the profession in that jurisdiction. Other laws regulate a California lawyer's professional conduct in another jurisdiction. The statutory duties of an attorney include a duty to report to the State Bar the "imposition of discipline against the attorney by a professional. . . disciplinary agency, whether in California or elsewhere." (Business and Professions Code § 6068(o)(6).) A California lawyer may be subject to expedited disciplinary proceedings in California if it is determined that the California lawyer committed professional misconduct in another jurisdiction. A certified copy of a final order from that jurisdiction is conclusive evidence of the lawyer's culpability. (Business and Professions Code § 6049.1.)

B. ABA Model Rule Adoptions

Adoptions of Model Rule 5.5. As discussed below in the section on state adoptions of Model Rule 5.5, most jurisdictions have adopted some version of current Model Rule 5.5 that includes the model rule's multijurisdictional practice provisions.

- Illinois Rule 5.5 is representative of how Model Rule 5.5 has been adopted or revised in the various jurisdictions:

Illinois Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Jurisdictions that have not adopted Model Rule 5.5's MJP Provisions. As noted below under state adoptions of Model Rule 5.5, there are four jurisdictions, that have rules substantially similar to California Rule 1-300. They are:

- **Hawaii Rule 5.5**

A lawyer shall not:

- (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law; or
- (c) allow any person who has been suspended or disbarred and who maintains a presence in an office where the practice of law is conducted by the lawyer to have any contact with the clients of the lawyer either in person, by telephone, or in writing or to have any contact with persons who have legal dealings with the office either in person, by telephone, or in writing.

- **Mississippi Rule 5.5**

A lawyer shall not:

- (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

- **Montana Rule 5.5**

A lawyer shall not:

- (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

- **Texas Rule 5.05**

A lawyer shall not:

- (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

The ABA State Adoption Chart for Model Rule 5.5, which is analogous to rule 1-300, was last revised on October 18, 2016, and is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_5.authcheckdam.pdf (Last accessed on 2/7/17)

In addition, the ABA has issued an Adoption Chart regarding the various jurisdictions' adoption of the multijurisdictional practice (MJP) principles contained in Model Rule 5.5, last revised on April 28, 2014. It is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/quick_guide_5_5.authcheckdam.pdf (Last accessed on 2/7/17)
- Fourteen jurisdictions have adopted a rule of professional conduct identical to Model Rule 5.5.¹
- Thirty jurisdictions have adopted a rule of professional conduct substantially similar to Model Rule 5.5.²
- Two jurisdictions (California, District of Columbia³) have rules of court that address substantially the same issues as are addressed in Model Rule 5.5.
- Four jurisdictions have adopted a rule of professional conduct substantially different from Model Rule 5.5;⁴ these jurisdictions have retained their version of Model Rule 5.5 that pre-dates the 2002 Ethics 2000 revisions to Model Rule 5.5, as well as the 2003 ABA MJP Commission revisions to Model Rule 5.5, and are similar to current California Rule 1-300.
- One jurisdiction has a recommendation before its highest court to adopt a rule substantially similar to Model Rule 5.5 (New York).

¹ The fourteen jurisdictions are: Alaska, Arkansas, Illinois, Indiana, Iowa, Maryland, Massachusetts, Nebraska, New Hampshire, Rhode Island, Utah, Vermont, Washington, and West Virginia.

² The thirty jurisdictions are: Alabama, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, Wisconsin, and Wyoming.

³ See D.C. App. Rule 49, available at: <http://www.dccourts.gov/internet/documents/rule49.pdf> [Last visited 5/10/15]

⁴ The four jurisdictions are: Hawaii, Mississippi, Montana, and Texas.

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

A. Concepts Accepted (Pros and Cons):

1. Changing the title of the current rule by adding “Multijurisdictional Practice of Law”
 - Pros: Referring to multijurisdictional practice (“MJP”) more accurately describes the content of the proposed rule with the addition of paragraph (b). More important, because California addresses MJP in Rules of Court, (e.g., Rules 9.40 – 9.48) but the ABA Model Rules and most jurisdictions address MJP in their Rules of Professional Conduct, proposed Rule 1-300, which would apply to out-of-state lawyers authorized to practice in California. The change would provide such lawyers (who would naturally expect to find the MJP rules in the CRPC’s) with an important point of reference for locating the relevant California regulations concerning MJP.
 - Cons: None identified so long as paragraph (b) is included in the rule.
2. Substitute the term “lawyer” for the term “member”.
 - Pros: The rule’s use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term “lawyer.” More important, using “lawyer” is particularly apt in proposed Rule 1-300, which addresses in paragraph (b) the concept of MJP, i.e., the practice of law in California by lawyers who by definition are *not admitted* in California. It is more accurate to draw a distinction between a “lawyer admitted to practice law in California” (paragraph (a)) and a “lawyer who is not admitted to practice law in California” (paragraph (b)) than to have the distinction rest on a term, “member,” that is familiar only in California.
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
3. Add the phrase “admitted to practice law in California”
 - Pros: See Pros for substituting “lawyer” for “member,” above. Implied in the decision to substitute “lawyer” for member is the need to add the phrase “admitted to practice law in California” to demarcate that paragraph (a) applies to lawyers who are “admitted” to practice law in California, (i.e., members of the California bar.)
 - Cons: None identified if “lawyer” is substituted for “member.”

4. Reverse the order of current rule 1-300(A) and (B) in the proposed rule as proposed paragraphs (a)(2) and (a)(1), respectively.
- Pros: First, addressing the lawyer's own unauthorized practice logically should be addressed in the rule before the lawyer's assisting another person's unauthorized practice. Second, this logic was apparently recognized by the ABA in 1983 when the Kutak Commission similarly reversed the order of the concepts when it revised ABA Code of Professional Responsibility ("ABA Code"), DR 3-101, from which Rule 1-300 is derived, and renumbered it Model Rule 5.5. Third, the switch removes an unnecessary difference between California and the trend in nearly every other jurisdiction to first address the lawyer's own violation and then address the lawyer assisting in a violation. Fourth, a non-substantive change is to place current (A) and (B) as subparagraphs (2) and (1) of proposed paragraph (a), respectively. This latter change tracks the organization of Model Rule 5.5, with proposed paragraph (a) applying to lawyers "admitted" in California and proposed paragraph (b) applying to lawyers "not admitted" in California and would provide less confusion if the concept of MJP is included in the rule. Finally, setting out the provisions in proposed Rule 5.5(a) as subparagraphs provides for better clarity.
 - Cons: None identified if "lawyer" is substituted for "member."
5. In proposed Rule 5.5(a)(2) [current 1-300(B)], include the word "knowingly" to modify "assist."
- Pros: Including "knowingly" in the rule would apply a *mens rea* requirement for assisting a person in the unauthorized practice of law. The first Commission included "knowingly" in its version of the rule, which OCTC approved and the Board adopted. If the Model Rule definition of "know" or "knowing" were to be adopted, actual knowledge could be inferred from the surrounding circumstances. (Model Rule 1.0(f) provides: "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.")
 - Cons: Including the word "knowingly," which would require actual knowledge, would narrow the rule's application and make it less enforceable. Current rule 1-300(A) does not include such a limitation on liability. There is no evidence that the lack of such a limitation has unfairly led to lawyers being charged or disciplined under the rule. Also, the term "knowingly" is not used in the rule adopted by any other jurisdiction.
6. In proposed paragraph (a)(2) [current 1-300(A)], substitute the word "assist" for "aid" in current rule 1-300(A).
- Pros: No substantive change in meaning is intended or likely to result from changing "aid" to "assist." Current rule 1-300's wording is derived from the

ABA Code, DR 3-101(A), which used the word “aid.” The ABA substituted “assist” for “aid” in 1983 with no known adverse consequences. Moreover, a substantial majority of jurisdictions have followed suit and adopted the 1983 Model Rule word change. Further, conforming the language of proposed paragraph (a)(2) to that of the Model Rule and the substantial majority of jurisdictions is warranted for the same reasons outlined above, i.e., proposed Rule 5.5 (together with a rule similar to Model Rule 8.5 [current rule 1-100(D)] functions as an the entry point to the California Rule for out-of-state lawyers.

- Cons: There is a possibility that changing “aid” to “assist” would generate litigation over whether the change is substantive. This possibility might be remote given that “aid” and “assist” are considered as synonyms (see <http://www.thesaurus.com/browse/assist> and <http://www.thesaurus.com/browse/aid?s=t>.)

7. In proposed paragraph (a)(2) [current 1-300(A)], substitute the word “a” for “any.”

- Pros: No change in meaning is intended or likely. Substituting the article “a” for the adjective “any” is simply a modern, preferred convention for writing rules.
- Cons: None identified.

8. Add proposed paragraph (b) [based on Model Rule 5.5(b)], which applies concepts regarding UPL/MJP to out-of-state lawyers and parallels the prohibitions stated in Bus. & Prof. Code § 6126.

- Pros: First, as noted, proposed Rule 5.5, together with a rule similar Model Rule 8.5, functions as an entry point for out-of-state lawyers. The rule should alert such lawyers to limitations on their ability to practice even if they are authorized under one of the MJP rules of court. Derived from Model Rule 5.5(b), proposed paragraph (b) contains two prohibitions on lawyers not admitted in California who seek to practice in California: (1) it prohibits such lawyers from establishing or maintaining a resident office – or any other systematic or continuous presence in California unless the lawyer is authorized to do so, e.g., if the lawyer is a registered legal services lawyer (Rule of Court 9.45); registered in-house counsel (Rule of Court 9.46); or registered foreign legal consultant (Rule of Court 9.44); and (2) prohibits all non-admitted lawyers, including those authorized to practice in California under Rules of Court 9.40 – 9.48, from holding himself or herself out to the public or otherwise representing that he or she is admitted to practice law in California.

Second, proposed Rule 5.5(b)(2) responds to OCTC’s request that: “Rule 1-300(B) should be amended to prohibit not only the practice of law in a jurisdiction where to do so would be in violation in that jurisdiction, but also holding oneself out as entitled to practice law in a jurisdiction where one is not entitled to do so. This would clarify rule 1-300(B) and conform it to Business

and Professions Code, §§ 6125 and 6126.” (See 4/20/15 OCTC Memo [Kim] to Chair & Commission.) To the extent OCTC appears to have requested that the prohibition be applied to State Bar members (current paragraph (B) applies to “members” engaging in extra-jurisdictional practice), the request was confusing for two reasons: First, although OCTC stated such a provision would conform current 1-300(B) to §§ 6125 and 6126, § 6125 in fact only states that a “person shall not practice law in California unless the person is an active member of the State Bar.” By definition, a “member” to whom current 1-300(B) applies is not covered by § 6125. Further § 6126 prohibits lawyers not admitted or authorized to practice law in California from holding themselves out as “practicing or being entitled to practice” unless they are “an active member of the State Bar.” Again, by definition, a “member” to whom current 1-300(B) applies is not covered by § 6125. OCTC’s proposed amendment would not conform the rule to the statute sections. Second, the Commission is not aware of any jurisdiction that has such a prohibition, i.e., prohibits lawyers admitted in the regulatory authority’s jurisdiction from holding themselves out as being admitted in another jurisdiction. To the extent there is a prohibition on “holding out,” it is the host jurisdiction that would prohibit the conduct of “out-of-state” lawyers holding themselves out to be admitted in the host jurisdiction. Such a prohibition is the intent of proposed paragraph (b)(1). It is more aligned with the host jurisdictions interest in protecting its residents, i.e., the “public,” than is the proposed OCTC request.

Third, the construction of proposed paragraph (b) affords desired public protection. Proposed paragraph (b)(1) recognizes that in certain situations, (e.g., pursuant to Cal. Rules of Court, rules 9.44, 9.45, and 9.46) lawyers not admitted to practice in California nevertheless can establish or maintain an office, but prohibits lawyers not so authorized from doing so. Further, proposed paragraph (b)(2), by not containing a savings clause similar to the one in (b)(1) (“except as authorized”), prohibits even lawyers otherwise authorized to practice in California from holding themselves out as being “admitted to practice” in California.

Fourth, proposed paragraph (b) serves as a necessary predicate in the black letter of the rule for the proposed Comment, which provides important information about California’s regulatory structure for MJP which, as noted, differs substantially from that in other jurisdictions which regulate MJP through their Rules of Professional Conduct.

Fifth, proposed paragraph (b) tracks Model Rule 5.5(b), which a substantial majority of the states have adopted.

- Cons: First, regarding paragraph (b)(2), the difference between “admitted to practice law in California” and “entitled to practice law in this state by court rule” might not be readily understood and could cause confusion. For example, the rules of the State Bar governing a Registered In-House Counsel

state that a registrant “must” use the title “Registered In-House Counsel” in connection with activities performed as Registered In-House Counsel (See rule 3.372(C) of the Rules of the State Bar). Paragraph (b)(2) might be misinterpreted as being in conflict with this requirement.

Second, regarding the OCTC comment concerning State Bar members who improperly “hold out” their ability to practice law in another jurisdiction, existing discipline case law demonstrates that this is not an uncommon problem in the discipline system and declining to implement OCTC’s change could be a lost opportunity to facilitate greater compliance by members. (See *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 903; *In the Matter of Lenard* (Review Dept. 2013) 2013 WL 5676040; and *In the Matter of Ferko* (Review Dept. 2014) 2014 WL 3889184.

9. In proposed paragraph (b)(1), add the word “resident” as a modifier of “office,” add the phrase “or maintain,” and insert the conjunction “or” between the terms “systematic” and “continuous presence.”

- Pros: Although Model Rule 5.5(b) does not contain any of the modifications listed, the Commission made those revisions to Model Rule 5.5(b)(1) to conform proposed paragraph (b)(1) to the language used in Rules of Court 9.47 [Attorneys practicing law in California as part of litigation] and 9.48 [Non-litigating attorneys temporarily in California to provide legal services]. Although the Commission determined that the use of “or” is not only inconsistent with the Model Rule and rules in most jurisdictions and can cause mischief for out-of-state lawyers, the Commission concluded that the rule’s language should be conformed to the language of the Rules of Court.
- Cons: The aforementioned inconsistency of language between California and a substantial majority of other jurisdictions might operate to undermine the attainment of a national standard in this area and could be a source of confusion.

10. Change the name of the “Discussion” section to “Comment”.

- Pros: The Code of Judicial Ethics refers to its explanatory sections as “*Commentary* of the Advisory Committee.” (Emphasis added). The ABA Model Rules and every other jurisdiction that has adopted the Model Rule approach of including comments to their rules, refers to the explanatory comment sections of each rule as “Comment.”
- Cons: None identified.

11. Add a Comment concerning MJP to the proposed rule.

- Pros: As noted, proposed paragraph (b) applies to out-of-state lawyers who are authorized to practice in California, and the proposed Comment is intended to provide a useful entry point for out-of-state lawyers unfamiliar with

California law to the regulatory framework of MJP in California. Although the savings clause in subparagraph (b)(1) (“except as authorized”) of the black letter informs such lawyers that an MJP framework exists in California, there is no explanation of what that framework is or where it might be located. The proposed Comment provides that information by referring readers to specific Rules of Court that establish the framework. Alerting out-of-state lawyers to the California Rules of Court requirements enhances public protection. Further, by listing the relevant Rules of Court with their subject matter, the Comment clarifies what is meant by the phrase, “authorized by these Rules or other law.”

- Cons: Proposed paragraph (b)(1), if adopted, would merely inform a lawyer of the existence of an MJP regulatory framework in California. A set of minimum standard disciplinary rules arguably is not the place to provide guidance on where to find the relevant law that establishes that framework.

B. Concepts Rejected (Pros and Cons):

1. In proposed Rule 5.5(a)(2) [current 1-300(B)], substitute the clause, “in the performance of activity that constitutes the unauthorized practice of law” for the phrase “the unauthorized practice of law.”
 - Pros: The extra verbiage adds nothing to the rule’s scope or application. The substantial majority of jurisdictions do not use it.
 - Cons: This clause, which has been adopted by several jurisdictions,⁵ is a more precise description of the conduct that is prohibited under the rule.
2. Add new paragraph (a)(3) which would have provided that a lawyer *admitted in California* shall not “hold out to the public or otherwise represent that the lawyer is admitted or authorized to practice in another jurisdiction unless the lawyer is entitled to do so.” (See explanation for rejection in Section A.8, above.)
3. Add a Comment to the proposed rule intended to clarify the application of paragraph (a).⁶
 - Pros: The proposed Comment that was rejected did not clarify the rule so much as it restated the rule and thus was not appropriate for inclusion.

⁵ There are six jurisdictions that have adopted this language: Alabama, Colorado, Hawaii, Mississippi, New Jersey and Texas.

⁶ The proposed Comment would have provided:

“A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. Paragraph (a) prohibits the unauthorized practice of law by a lawyer admitted to practice law in California, whether through the lawyer’s own conduct or by the lawyer assisting another person in the performance of activities that constitute the unauthorized practice of law.”

- Cons: The proposed Comment was based on a Comment to the first Commission's proposed Rule 5.5. Although current rule 1-300 does not have any Comments, this Comment would have provided helpful orientation regarding the application of proposed paragraph (a) to lawyers who are *admitted* to practice in California. In tandem with the Comment that has been added to the rule, which expressly states it applies to lawyers who are *not admitted* in California, the two Comments would have helped clarify the regulatory scope of each proposed paragraph.
4. Add to the proposed Comment a reference to Business & Professions Code §§ 6450 – 6456 (regulation of paralegals). This issue was addressed in consideration of a public comment received as part of the Commission's outreach with a 45-day public comment period ending on June 16, 2015. Without determining the pros or cons of including such a reference, the Commission concluded that including such a reference in a set of *lawyer* disciplinary rules was beyond the scope of the Commission's charge.
 5. Add a Comment, similar to Discussion ¶. 1 in current rule 1-311, that would provide guidance on what constitutes the practice of law.
 - Pros: Defining the practice of law has proven to be an elusive endeavor, the ABA having abandoned a project to do so over a dozen years ago. See http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law.html

Moreover, the California Supreme Court in *Birbrower Montalbano, Condon & Frank, P.C. v. Superior Court* (1998) 17 Cal.4th 119, 129, held that the determination of what constitutes the practice of law "in" California must be decided on the facts of each case.

 - Cons: Such information provide guidance to lawyers on conduct that is viewed as the unauthorized practice of law.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Adding proposed paragraph (b) and its subparts is a substantive change to the extent that neither current rule 1-300 nor any other California rule of professional conduct addresses the conduct described in the paragraph. However, paragraph (b)(1) reflects the current state of the law regarding multijurisdictional practice as regulated by Rules of Court 9.40 – 9.41 and 9.43 – 9.48. In addition, paragraph (b)(2) conforms the rules of professional conduct to Business and Professions Code § 6126 and the rule in a substantial majority of the other states. Therefore,

it is arguable that there has been no change in lawyer duties by the inclusion of paragraph (b) in the rule.

2. Adding the word “knowingly” to modify the word “assist” in proposed paragraph (a)(2) is a substantive change to current rule 1-300(A) because it adds a *mens rea* requirement where none currently exists. (See Section IX.A.5, above.)

D. Non-Substantive Changes to the Current Rule:

1. Substituting the term “lawyer” for “member”.
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California under *pro hac vice* admission (see current rule 1-100(D)(1)) to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. In proposed paragraph (a)(2), substituting “assist” for “aid,” and “a” for “any” are also intended as non-substantive. See Concepts Adopted, above.
4. Changing the name of the “Discussion” section to “Comment” is a non-substantive change, recommended to remove unnecessary differences between

the California rules and the rules in other jurisdictions, as well as the Code of Judicial Conduct.

5. Adding the proposed Comment is not intended as a substantive change except to the extent that a Comment has been added to a rule that previously had no Comments. The Comment is explanatory and clarifies the rule's scope. (See Section IX.A.11, above.) It does not extend the scope of the rule or provide for an exception to the rule that is not in the black letter rule itself.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 5.5 [1-300] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 5.5 [1-300] in the form attached to this Report and Recommendation.

**Proposed Rule 5.5 [1-300] Unauthorized Practice of Law;
Multijurisdictional Practice of Law
Synopsis of Public Comments**

TOTAL = 4	A = 1
	D = 0
	M = 3
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Public Hearing	Responsive Law (Gordon, Tom) (Provided oral public hearing testimony on July 26v, 2016. See page 46-47 of the public hearing transcript.)	Yes	M		I believe the Multijurisdictional Practice Rule, under the new Rule 5.5 could use some clarification. A lawyer who's not a member of the California Bar may not have a "systemic or continuous presence in California". It's unclear from the rule and the comments whether, for example, a Denver-based lawyer with an online presence answering questions about Colorado law for a California resident would have a systemic or continuous presence in California. These types of services are becoming more common as lawyers expand their online practices, and it would be helpful if this rule could be made more clear so hopefully, services of this type are not in violation of the Rules of Professional Conduct. This will clear the way for more consumers to be able to receive legal services online and expand the options available therein resolving their legal matters.	No change is recommended. Paragraph (b)(1) follows the language in California Rules of Court, Rules 9.47(d)(2) and 9.48((d)(2), restricting the right of a non-admitted attorney to practice temporarily in California. The phrase "systematic or continuous" also tracks the language in ABA Model Rule 5.5(b)(1). Application of the rule in providing online legal services in California by a non-admitted lawyer would require an analysis of the particular facts and circumstances and would be better addressed in an ethics opinion or other form of guidance.
X-2016-43a1	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Yes	A		COPRAC supports the adoption of proposed Rule 5.5.	No response required.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Proposed Rule 5.5 [1-300] Unauthorized Practice of Law;
Multijurisdictional Practice of Law
Synopsis of Public Comments**

TOTAL = 4	A = 1
	D = 0
	M = 3
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-76r	Los Angeles County Bar Association (LACBA) – Professional Responsibility and Ethics Committee of Los Angeles (PREC) (Schmid) (9-24-16)	Yes	M	Paragraph (b)(1)	Paragraph (b)(1) of Proposed Rule 5.5 [Unauthorized Practice of Law; Multijurisdictional Practice of Law (current Rule 1-300)] includes the term “resident office,” which is undefined and uncertain. The word “resident” is unnecessary and should be deleted. In the event it is decided that the word “resident” should be retained, we recommend that the term “resident office” be defined or clarified.	The Commission did not make the suggested change. The language of paragraph (b)(1) is taken nearly verbatim from the Rules of Court, which regulate multijurisdictional practice in California. See Rules 9.47(c)(2), 9.48(c)(2). The Commission believes that the following clause, “or other systematic or continuous presence in California for the practice of law” provides sufficient guidance regarding the meaning of “resident office.”
X-2016-104bb	Office of Chief Trial Counsel (OCTC) (Dresser) (9-27-16)	Yes	M		<p>1. OCTC is concerned that subparagraph (a)(2) of this proposed rule requires “knowingly” for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rule 3.3, 4.1, and the General Comments section of this letter. Requiring “knowingly” permits an attorney not to research whether the person they are aiding is an attorney in California, or currently permitted to practice law in California.</p> <p>2. OCTC supports the Comment.</p>	<p>1. The Commission has not made a change to the Rule. As it has noted with respect to other rules, the definition of “knowingly” in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. A lawyer may not engage in willful blindness to avoid knowledge the lawyer being assisted was not permitted to practice law in California. With this definition, the Commission believes that the “knowingly” standard is appropriately used in this Rule.</p> <p>2. No response required.</p>

PROPOSED RULE OF PROFESSIONAL CONDUCT 5.6
(Current Rule 1-500)
Restrictions on a Lawyer's Right to Practice

EXECUTIVE SUMMARY

The Commission evaluated current rule 1-500 (Agreements Restricting a Member's Practice) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 5.6 (Restrictions On Right To Practice). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 5.6 (Restrictions on a Lawyer's Right to Practice).

Rule As Issued For 90-day Public Comment

The main issue considered was whether to add an express exception that would permit a restrictive partnership, or similar, agreement which is "authorized by law" in order to address the wide range of restrictive arrangements that a law firm might employ which do not constitute a violation of the current rule (see *Howard v. Babcock* (1993) 6 Cal.4th 409, 425). The Commission voted to recommend adoption of this exception. Furthermore, the Commission recommends adoption of the rule structure of Model Rule 5.6 to eliminate unnecessary differences with the national standard of Model Rule 5.6 and to facilitate compliance in the case of partnership agreements among multijurisdictional law firms.

Paragraph (a) restricts a lawyer from participating in offering or making: (1) a restrictive law firm partnership, or similar, agreement; and (2) a restrictive agreement as part of a settlement of a client's case or matter. Paragraph (a) continues the concept of the existing exception for agreements that concern benefits upon retirement (current rule 1-500(A)(1)). Paragraph also adds the exception described above that permits agreements authorized by law.

Paragraph (b) continues the existing prohibition against a lawyer participating in, offering or making an agreement which precludes the reporting of a violation of the rules. Although this concept is not in Model Rule 5.6, the Commission recommends that it be carried forward because it provides important public protection.

Paragraph (c) provides that the rule does not prohibit agreements that impose restrictions on practice as part of disciplinary proceedings. This continues paragraph (A)(3) of current rule 1-500.

Comment [1] cites to Business and Professions Code § 16602 and *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80] concerning the application of the wide range of restrictive arrangements that law firms might employ.

Comment [2] explains how paragraph (a)(2) is applied, emphasizing that the terms of a settlement agreement cannot require that a lawyer refrain from representing other clients. This continues the guidance in the first Discussion paragraph in rule 1-500.

Comment [3] clarifies that the rule does not prohibit restrictions of the sale of a law practice, where agreements to sell a law practice will likely include a clause that restricts the selling lawyer's ability to continue practice and compete with the practice after it is sold.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission did not revise the proposed rule.

Proposed Rule as Amended by the Board of Trustees on November 17, 2016

After public comment, the Commission's proposed rule was considered by the Board of Trustees at its meeting on November 17, 2016. To continue the broad scope of current rule 1-500, the Board revised the proposed rule to provide that a lawyer shall not participate in offering or making an agreement that imposes a restriction on a lawyer's right to practice even if that agreement is not a partnership, shareholders, operating, employment, or other similar type of agreement and even if the agreement is not connected with a settlement of a client controversy.

The Board also revised the rule to make the prohibition on restrictive agreements subject to a general "authorized by law" exception. With these changes, the Board voted to authorize an additional 45-day public comment period on the proposed rule.

The redline strikeout text below shows the changes made by the Board:

- (a) ~~A~~Unless authorized by law, a lawyer shall not participate in offering or making:
- (1) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that: ~~—(i) concerns benefits upon retirement, or (ii) is authorized by law; or~~
 - (2) an agreement that imposes a restriction on a lawyer's right to practice in connection with a settlement of a client controversy, or otherwise~~in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.~~

* * * * *

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 5.6 [1-500]

Commission Drafting Team Information

Lead Drafter: Mark Tuft

Co-Drafters: Jeffrey Bleich, James Ham, Lee Harris

I. CURRENT CALIFORNIA RULE

Rule 1-500 Agreements Restricting a Member's practice

- (A) A member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law, except that this rule shall not prohibit such an agreement which:
- (1) Is a part of an employment, shareholders', or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship; or
 - (2) Requires payments to a member upon the member's retirement from the practice of law; or
 - (3) Is authorized by Business and professions Code sections 6092.5 subdivision (i), or 6093.
- (B) A member shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these rules.

Discussion

Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.

Paragraph (A) permits a restrictive covenant in a law corporation, partnership, or employment agreement. The law corporation shareholder, partner, or associate may agree not to have a separate practice during the existence of the relationship; however, upon termination of the relationship (whether voluntary or involuntary), the member is free to practice law without any contractual restriction except in the case of retirement from the active practice of law.

I.A. CURRENT ABA MODEL RULE

Rule 5.6 Restrictions On Right To Practice

A lawyer shall not participate in offering or making:

- (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
- (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

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

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

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 5.6 [1-500]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 10, 2017

Action: Board Adoption of Proposed Rule 5.6 [1-500]

Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

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

- (a) Unless authorized by law, a lawyer shall not participate in offering or making:
 - (1) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of

the relationship, except an agreement that: concerns benefits upon retirement, or

- (2) an agreement that imposes a restriction on a lawyer's right to practice in connection with a settlement of a client controversy, or otherwise.
- (b) A lawyer shall not participate in offering or making an agreement which precludes the reporting of a violation of these rules.
- (c) This Rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

Comment

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

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

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

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-500)

Rule 1-500 ~~Agreements Restricting a Member's~~ [5.6] Restrictions on a Lawyer's Right to Practice

(a) Unless authorized by law, a lawyer shall not participate in offering or making:

- (A1) ~~A~~ member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a ~~member~~ lawyer to practice ~~law~~ after termination of the relationship, except ~~that this rule shall not prohibit such~~ an agreement ~~which~~ that concerns benefits upon retirement, or
- ~~(1) Is a part of an employment, shareholders', or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship; or~~
- ~~(2) Requires payments to a member upon the member's retirement from the practice of law; or~~ an agreement that imposes a restriction on the lawyer's right to practice is part of the settlement of a client controversy, or otherwise.

~~(3) Is authorized by Business and Professions Code sections 6092.5 subdivision (i), or 6093.~~

~~(Bb)~~ A ~~member~~lawyer shall not ~~be a party to or~~ participate in offering or making an agreement which precludes the reporting of a violation of these rules.

(c) This Rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

DiscussionComment

~~Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.~~

~~Paragraph (A) permits a restrictive covenant in a law corporation, partnership, or employment agreement. The law corporation shareholder, partner, or associate may agree not to have a separate practice during the existence of the relationship; however, upon termination of the relationship (whether voluntary or involuntary), the member is free to practice law without any contractual restriction except in the case of retirement from the active practice of law.~~

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

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

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

IV.A. COMMISSION'S PROPOSED RULE **(REDLINE TO CURRENT ABA MODEL RULE 5.6)**

Rule 5.6 [1-500] Restrictions on ~~Rights~~a Lawyer's Right to Practice

A(a) Unless authorized by law, a lawyer shall not participate in offering or making:

- (a1)** a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement ~~concerning~~that concerns benefits upon retirement~~;~~ or
- (b2)** an agreement ~~in which~~that imposes a restriction on ~~the~~a lawyer's right to practice ~~is part of the~~in connection with a settlement of a client controversy~~,~~ or otherwise.

- (b) A lawyer shall not participate in offering or making an agreement which precludes the reporting of a violation of these rules.
- (c) This Rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

Comment

[1] ~~An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.~~ Concerning the application of paragraph (a)(1), see Business and Professions Code § 16602; *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].

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

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

V. RULE HISTORY

Rule 2-109 was adopted in 1975 following the 1972 State Bar of California Special Committee's Study of the ABA Code of Professional Responsibility. Rule 2-109 largely followed the provisions of ABA Code DR 2-108. Rule 2-109 was intended to deter situations called to the Committee's attention in which lawyers had "agreed" to restrict their practice (i.e., geographically) upon termination of employment with a law firm. It was believed such agreements violated state antitrust laws. See Business and Professions Code § 16600, et. seq. In addition, rule 2-109 also prohibited a lawyer from agreeing, as part of a settlement, to restrict the lawyer's practice, for example, a lawyer who agrees not to represent another plaintiff in a lawsuit against a manufacturer that is based on the same defect in the manufacturer's product as was alleged in the settled matter.

In 1989, as part of a comprehensive revision and reordering of the Rules of Professional Conduct, rule 2-109 was renumbered rule 1-500. Proposed rule 1-500(A) carried forward the prohibition of agreements restricting the right of a lawyer to practice law in rule 2-109(A).

Rule 2-109(B), which provided exceptions to paragraph (A)'s general prohibition, was also carried forward. Paragraph (B)(1) was expanded to clarify that a restrictive employment agreement would not survive the termination of the relationship created or contemplated by the agreement, and that the rule was applicable to an agreement between shareholders of a law corporation.

Paragraph (C), similar to Business and Professions Code § 6090.5, was added to expressly prohibit a lawyer from requiring, as a condition of settling a civil action for

professional misconduct brought against the attorney, that the client agree not to file a complaint with the State Bar concerning the conduct. Paragraph (C) was intended to be broader than the statute because it was not limited to circumstances involving attorney malpractice.

In 1992, Paragraphs (A) and (B) were consolidated for greater clarity. No substantive change was intended. Proposed subparagraph (A)(3) was new. It added a new exception to rule 1-500 where a member enters into an agreement in connection with State Bar discipline that restricts the member's practice pursuant to Business & Professions Code §§ 6092(i) (agreements in lieu of discipline), and 6093 (conditions of probation).

A proposed amendment to the second paragraph of the Discussion section conformed it to the relettering of the paragraphs of the text. No substantive change was intended.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule and Comments [1] and [3].

Commission Response: No response required.

2. OCTC is concerned that Comment [2] is unnecessary and merely repeats the rule.

Commission Response: The Commission did not delete Comment [2] because it explains how paragraph (a)(2) is applied, emphasizing that the terms of a settlement agreement may not require that a lawyer refrain from representing other clients. This explanation is being carried forward from the first Discussion paragraph found in current rule 1-500 and deleting it might cause confusion as to whether this explanation remains true for the proposed rule.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, two public comments were received. Both comments agreed with the proposed Rule. During the 45-day public comment period, no comments were received. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. The California Supreme Court's Opinion in *Howard v. Babcock*

In *Howard v. Babcock* (1993) 6 Cal.4th 409 [25 Cal.Rptr.2d 80], the enforceability of a partnership agreement was challenged as inconsistent with the policy reflected in the prohibition of rule 1-500. In part, the challenged partnership agreement provided for forfeiture of all withdrawal benefits, other than the right to a return of capital, if a partner withdrew from the firm before the age of 65 and within one year thereafter engaged in the practice of law in the same defined geographic area in which the partnership conducted business.

In rejecting the challenge and finding that the agreement was enforceable, the Court observed that there is no reason to distinguish the legal profession from other professions, which may provide in a partnership agreement against competition by withdrawing partners in a limited geographical area. The court observed that a non-competition provision is essentially an agreement for liquidated damages. Specifically, the Court stated: "We hold that an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm in a limited geographical area is not inconsistent with rule 1-500 and is not void on its face as against public policy." (*Howard v. Babcock* at p. 425.)

Justice Kennard dissented, taking a different view of the legal profession:

"If the practice of law is to remain a profession and retain public confidence and respect, it must be guided by something better than the objective of accumulating wealth. Here, in refusing to enforce a rule of ethics that prohibits attorneys from entering into agreements that restrict their right to practice law after leaving a firm, the majority diminishes the rights of clients in favor of the financial interest of law firms based on its one-sided view of the realities and equities of the practice of law." (*Howard v. Babcock* at p. 433.)

2. Business & Professions Code §§ 16600, et seq.

Subject to certain exceptions, an agreement that prevents a person from engaging the person's profession, trade or business is considered void as against public policy. Business and Professions Code § 16600 provides: "Every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void." This statutory prohibition also is regarded as a well-settled public policy in California that promotes competition and mobility. In addition, an agreement that violates this law is likely to also constitute a unlawful business practice in violation of California's Unfair Practices Act (California Business and Professions §§ 17200 et seq.).

B. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 5.6: Restrictions on Right to Practice,” revised September 15, 2016, is available at::

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_6.authcheckdam.pdf [Last visited 2/7/17]
- Twenty-seven states have adopted Model Rule 5.6 verbatim.¹ Twenty-three jurisdictions have adopted a rule that is substantially similar to Model Rule 5.6.² California has adopted a rule substantially different in format and structure from Model Rule 5.6. However, the substance of rule 1-500 is substantially similar to the Model Rule.
- Eight states have adopted a rule that provides for an exception for practice restrictions in connection with a sale of a law firm.³

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

A. Concepts Accepted (Pros and Cons):

1. Recommend that the structure of current rule 1-500 be replaced with the rule structure used in jurisdictions that have adopted the Model Rule structure, i.e., state the general prohibitory language in the introductory clause (“shall not participate in offering or making”) of paragraph (a), add a clause stating an “authorized by law” proviso, and then state the two specific prohibited agreements: (1) partnership/shareholders/operating/employment agreements (“partnership agreements”) that restrict right to practice; and (2) agreements to restrict practice made as part of a settlement.⁴

¹ The twenty-seven jurisdictions are: Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wisconsin, and Wyoming.

² The twenty-three jurisdictions are: Alabama, Alaska, Arizona, Arkansas, District of Columbia, Georgia, Hawaii, Idaho, Kentucky, Massachusetts, Michigan, Mississippi, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Virginia, Washington, and West Virginia.

³ The eight jurisdictions are: Alaska, Arkansas, Hawaii, Idaho, Michigan, Mississippi, New York, and Pennsylvania.

⁴ Current rule 1-500 instead states in the introductory clause the two specific prohibitions on (i) a restriction on practice made as part of a settlement or (ii) any other restriction on practice, then states three exceptions to the prohibition.

- Pros: The Model Rule structure more accurately distinguishes the two kinds of prohibited agreement, recognizing that the former kind (partnership, etc.) is subject to exceptions, while the latter kind (agreement as part of settlement) is not. Current rule 1-500 is confusing because none of the three exceptions in paragraph (A) would apply to an agreement made as part of a settlement that restricts a lawyer's practice. In addition, all other 50 jurisdictions have adopted the Model Rule structure. Adopting the Model Rule structure should facilitate compliance with the Rule's limitations on partnership agreements by multijurisdictional law firms.
 - Cons: There is no evidence that the structure of current rule 1-500 has been confusing or misleading.
2. Include a proviso at the start of paragraph (a) that would permit a practice restriction that "is authorized by law."
- Pros: The exception would codify the general holding in *Howard v. Babcock* (1993) 6 Cal.4th 409 [25 Cal.Rptr.2d 80] that a partnership can impose reasonable costs on a departing lawyer in compliance with Bus. & Prof. Code § 16602. The Commission has recommended a general "authorized by law" exception because of the wide range of restrictive arrangements that law firms might employ under § 16606 and that any attempt to describe more specifically the holding in *Howard v. Babcock* would be inaccurate.⁵

⁵ In addition to general exception recommended, the Commission also considered the following variations for paragraph (a)(1):

(1) **[ALT1]** a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that: (i) concerns benefits upon retirement, or (ii) imposes reasonable costs on a departing partner or shareholder who competes with the law firm, provided that such costs are imposed for only a limited time in a limited geographical area;

(1) **[ALT2]** a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that: (i) concerns benefits upon retirement, or (ii) imposes reasonable costs as authorized by Business and Professions Code § 16602 on a departing partner or shareholder who competes with the law firm;

(1) **[ALT3]** a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that: (i) concerns benefits upon retirement, or (ii) is authorized by Business and Professions Code § 16602;

The Commission also considered not including a new exception for the *Howard v. Babcock* situation but instead address it in a comment.

- Cons: It is not certain that *Howard v. Babcock* created an exception to rule 1-500; rather, it is arguable that court viewed the law firm's agreement in compliance with Bus. & Prof. Code § 16602 as not having violated rule 1-500.
3. Recommend adoption of Model Rule 5.6(b) as proposed Rule 5.6(a)(2).
- Pros: Proposed paragraph (a)(2) adheres to the recommended structure of Model Rule 5.6. (See Section IX.A.1.) This would not be a substantive change from current rule 1-500, which includes the same prohibition in the introductory clause to paragraph (A).
 - Cons: None identified so long as the Model Rule structure is approved.
4. Recommend retaining current rule 1-500(B) (prohibiting agreements not to report violations of the Rules).
- Pros: The provision is an important public protection and should be retained in the Rules. Although this prohibition on agreements *not to report rule violations* arguably does not fit in a rule that is intended to prohibit restrictions on practice, by retaining the provision in this Rule.
 - Cons: None identified.
5. Recommend retention of current rule 1-500(A)(3), which provides an exception for agreements that impose restrictions on practice as part of disciplinary proceedings pursuant to Bus. & Prof. Code §§ 6092.5(i) and 6093. (See paragraph (c).)
- Pros: There is no evidence that there is a problem with this provision. Removing it could lead to unnecessary litigation as to whether the Bus. & Prof. Code sections trumped Rule 5.6's prohibitions on agreements restricting practice. Placing the provision in a separate paragraph is not intended as a substantive change but is recommended to conform to the recommended Model Rule structure. (See Section IX.A.1, above.)
 - Cons: None identified.
6. Recommend adoption of proposed Comment [1], which includes citations to Bus. & Prof. Code § 16602 and *Howard v. Babcock*.
- Pros: Provides importance guidance on how the "authorized by law" exception in paragraph (a)(1)(ii) might be applied. The Commission believes that rather than attempting to accurately characterize the holding in *Howard v. Babcock*, it is more helpful to provide citations to § 16602 and the case for the requisite interpretive guidance.
 - Cons: None identified.

7. Recommend adoption of proposed Comment [2], which is based on Model Rule 5.6, Cmt. [2], and explains how paragraph (a)(2) is applied.
 - Pros: The Comment does not merely restate the black letter, which expressly prohibits an agreement that restricts a lawyer's right to practice, which by its terms could include an agreement to cease all practice of law. The Comment clarifies that this prohibition is intended to apply to the specific situation where a lawyer agrees not to represent particular persons, e.g., plaintiffs who might bring a similar claim.
 - Cons: The Comment merely restates the substance of paragraph (a)(2).
8. Recommend adoption of proposed Comment [3], which excepts from the application of the Rule agreements for the sale of a law practice.
 - Pros: An agreement to sell a law practice will likely include a clause that restricts the selling lawyer's ability to continue practice and compete with the practice after it is sold. This rule should not frustrate the policy underlying proposed Rule 1.17 to permit a solo practitioner to receive compensation for the good will developed. Finally, this Comment has been adopted by nearly every jurisdiction, although eight jurisdictions include the exception in the black letter of their rule.⁶
 - Cons: The provision should not be included unless the Commission recommends adopting Model Rule 1.17, which permits the sale of an area (field) of practice and not just the entire practice. The policy underlying proposed Rule 1.17, which requires sale of the *entire* practice, is to permit a solo practitioner to receive compensation for the good will developed upon the selling lawyer's retirement from practice. Where the seller retires, there should be no need for a practice restriction clause in the sale agreement.

B. Concepts Rejected (Pros and Cons):

1. Retain current rule 1-500, Discussion ¶1, which concerns agreements restricting a lawyer's right to practice made as part of a settlement.
 - Pros: There is no evidence that Discussion ¶1. 1 has caused problems. It is an articulate statement of the practice that proposed paragraph (a)(2) is intended to prohibit.
 - Cons: Proposed Comment [2], which is derived from Model Rule 5.6, Cmt. [2], is a more succinct statement of the same subject matter.

⁶ See note 3, above.

2. Retain current rule 1-500, Discussion ¶. 2, which concerns practice restrictions in partnership agreements.
 - Pros: The Discussion paragraph elaborates on the prohibition against restrictions on practice in partnership agreements.
 - Cons: The Discussion paragraph merely restates the rule provision it is intended to explain. Moreover, it is an incomplete statement of the current law in light of *Howard v. Babcock*.
3. Recommend adoption of a provision that would prohibit confidential settlement agreements.
 - Pros: Confidential settlements undermine public safety to the extent evidence of dangerous products is concealed by preventing disclosure of the evidence in a case. Confidential settlements also potentially frustrate the objective of Rule 5.6 to prevent restrictions on practice as part of a settlement; with a confidential settlement, there is no evidence whether Rule 5.6 was violated.
 - Cons: If confidential settlements are to be prohibited, it should be accomplished by statute or rule of procedure, not a rule of professional conduct. There are many policy decisions that implementing such a rule would require that are beyond the scope of the Commission's Charter.
4. Recommend adoption of a provision that would prohibit institutional clients from requiring that a lawyer, as part of a retention agreement, not represent certain persons, e.g., a competitor of the client.⁷ (See 6/29/2015 Letter to Chair & Commission from Anthony Davis, on behalf of Law Firm General Counsel.)
 - Pros: According to the author, the provision would avoid frustrating a subsequent client from retaining counsel of choice because of the agreement. Provision would presumably apply to sophisticated clients who tend to seek such agreements.
 - Cons: As with a provision prohibiting confidential settlements, this provision would require policy decisions for implementation that are beyond the scope of the Commission's Charter.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together

⁷ The proposed provision would provide:

(c) A member shall not be a party to or participate in offering or making an agreement with a client containing a categorical restriction against: (i) the representation of parties that are mere competitors of the client not adverse to the client in a matter or (ii) the representation of parties in matters adverse to legal entities that lack a unity of interest with that client."

with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. See Section IX.A.1, above, re the adoption of Model Rule 5.6 structure and rejection of the current California structure. However, although the rule's appearance will be different, the substantive duties will largely remain the same. (See Section IX.C.2, below.)
2. The addition of the "authorized by other law" exception is a substantive change to current rule 1-500, but should not result in a change of duties as lawyers and firms are already subject to the holding in *Howard v. Babcock*. (See Section IX.A.2, above.)

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".
 - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

1. The alternatives considered were: (i) to retain the structure of current rule 1-500 (see, Sections IX.A.1); and (ii) to consider addressing the *Howard v. Babcock* exception with detailed blackletter rule language (see, IX.A.2 footnote 5, above.)

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 5.6 [1-500] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 5.6 [1-500] in the form attached to this Report and Recommendation.

PROPOSED RULE OF PROFESSIONAL CONDUCT 6.3
(No Current Rule)
Membership in Legal Services Organization

EXECUTIVE SUMMARY

The Commission reviewed and evaluated ABA Model Rule 6.3 (Membership in Legal Services Organization) for which there is no California counterpart. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The result of this evaluation is proposed rule 6.3 (Membership in Legal Services Organization).

Rule As Issued For 90-day Public Comment

Proposed rule 6.3 is derived from ABA Model Rule 6.3. The proposed rule addresses a lawyer serving as an officer or member in a legal services organization while continuing to practice law in another capacity. The proposed rule's aim is to provide assurance to lawyers that they will not disqualify themselves or their firm from participating as officers or members of a legal services organization. Such service is important and should be encouraged as long as it does not interfere with the lawyer's duties to his or her clients.

Proposed rule 6.3 provides that a lawyer may serve as an officer or member of a legal services organization even where the organization serves persons whose interests are adverse to the lawyer's clients. However, the lawyer is barred from participating in a decision or action of the legal services organization in the following situations.

First, paragraph (a) prohibits such participation if it would be incompatible with certain enumerated duties owed to the lawyer's clients, including the duty of confidentiality. While ABA Model Rule 6.3 does not include a reference to confidentiality, California has a tradition of heightened client protection in this area.

Second, paragraph (b) prohibits a lawyer from participating in a decision or action of a legal services organization where it would have an adverse effect on the organization's client whose interests are adverse to those of the lawyer's client.

The comment provides that a lawyer participating as an officer or member of a legal services organization does not have a lawyer-client relationship with the persons served by the organization. The comment explains the policy underlying the proposed rule, namely, that without such a rule, the profession's involvement in legal services organizations would be severely curtailed.

National Background – Adoption of Model Rule 6.3

As California does not presently have a direct counterpart to Model Rule 6.3, this section reports on the adoption of the Model Rule in United States' jurisdictions. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 6.3: Membership in Legal Services Organizations," revised May 4, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_6_3.pdf

Thirty-eight jurisdictions have adopted Model Rule 6.3 verbatim.¹ Seven states have adopted a slightly modified version of Model Rule 6.3.² Two states have adopted a version of the rule that is substantially different from Model Rule 6.3.³ Four states have not adopted any version of Model Rule 6.3.⁴

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made non-substantive stylistic edits and voted to recommend that the Board adopt the proposed rule.

¹ The thirty-eight jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

² The seven states are: Florida, Georgia, Illinois, Kansas, Maryland, New York, and Tennessee.

³ The two states are: Michigan and New Jersey.

⁴ The four states are: California, Kentucky, Ohio, and Texas.

COMMISSION REPORT AND RECOMMENDATION: RULE 6.3

Commission Drafting Team Information

Lead Drafter: Raul Martinez

Co-Drafters: Lee Harris, Toby Rothschild

I. CURRENT ABA MODEL RULE

**[There is no California Rule that corresponds to Model Rule 6.3,
from which proposed Rule 6.3 is derived.]**

Rule 6.3 Membership In Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 6.3

Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 6.3

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)**Rule 6.3 Membership In Legal Services Organization**

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm* in which the lawyer practices, notwithstanding that the organization serves persons* having interests adverse to a client of the lawyer. The lawyer shall not knowingly* participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Business and Professions Code § 6068(e)(1) or Rules 1.7 or 1.9; or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

Lawyers should support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons* served by the organization. However, there is potential conflict between the interests of such persons* and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 6.3)**Rule 6.3 Membership In Legal Services Organization**

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm* in which the lawyer practices, notwithstanding that the organization serves persons* having interests adverse to a client of the lawyer. The lawyer shall not knowingly* participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under ~~Rule~~[Business and Professions Code § 6068\(e\)\(1\) or Rules 1.7 or 1.9](#); or

- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

COMMENT Comment

~~[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons* served by the organization. However, there is potential conflict between the interests of such persons* and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.~~

~~[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.~~

V. RULE HISTORY

Although the origin and history of Model Rule 6.3 was not the primary factor in the Commission's consideration of proposed Rule 6.3, that information is published in *A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, Art Garwin, Editor, 2013 American Bar Association, at pages 719-722, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule, but the Comment is unnecessary. It is merely a philosophical discussion of the reasons for the Rule, which are evident.

Commission Response: The Commission disagrees. The comment explains the policy underlying the Rule that permits withdrawal from decision-making but does not require resignation in the event a conflict arises involving a client of a lawyer serving on the organization's board.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, five public comments were received. Four comments agreed with the proposed Rule and one comment agreed only if

modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- California Rule 1-600 (Legal Services Program)
- California Rule 3-300 (Avoiding Interests Adverse to Client)
- California Rule 3-310 (Avoiding the Representation Adverse to Client)
- California Business and Professions Code §§ 6210 et seq. (State Bar Act – Article 14 Funds for the Provision of Legal Services to Indigent Persons)
- 42 U.S.C. § 2996 et seq. (Legal Services Corporation Act)

B. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 6.3: Membership in Legal Services Organizations,” revised September 15, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_6_3.authcheckdam.pdf (last accessed 2/7/17)
- Thirty-eight jurisdictions have adopted Model Rule 6.3 verbatim.¹ Seven jurisdictions have adopted a slightly modified version of Model Rule 6.3.² Two jurisdictions have adopted a version of the rule that is substantially different from Model Rule 6.3.³ Four jurisdictions have not adopted any version of Model Rule 6.3.⁴

¹ The thirty-eight jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

² The seven jurisdictions are: Florida, Georgia, Illinois, Kansas, Maryland, New York, and Tennessee.

³ The two jurisdictions are: Michigan and New Jersey.

⁴ The four jurisdictions are: California, Kentucky, Ohio, and Texas.

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

A. Concepts Accepted (Pros and Cons):

1. Proposed Rule 6.3 – inclusion of reference to Business and Professions Code § 6068(e)(1).
 - Pros: The ABA does not include a reference to confidentiality but California has a tradition of heightened client protection in this area. Including a reference to § 6068(e)(1) is an appropriate companion to the reference to Rule 1.7 that codifies loyalty, Rule 1.9 that codifies duties to former clients and Rule 1.18 that codifies duties to prospective clients.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Recommend inclusion of Model Rule Comment [2]
 - Pros: Consistent with the rule adopted in most jurisdictions.
 - Cons: The Comment is aspirational and inconsistent with the Commission's Charter.

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. If proposed Rule 6.3 is adopted, it would be a new Rule establishing a new charging vehicle for misconduct. While certain concepts overlap with other existing law, such as the duty of loyalty, the statement of these duties in this new rule constitute substantive changes to the current rules.

D. Non-Substantive Changes to the Current Rule:

None.

E. Alternatives Considered:

1. The primary alternative policy was to reject the addition of these Model Rules for which there are no current California counterparts.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 6.3 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 6.3 in the form attached to this Report and Recommendation.

**Proposed Rule 6.3 Membership in Legal Services Organization
Synopsis of Public Comments**

TOTAL = 5 **A = 4**
D = 0
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43aj	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	A	6.3	Supports adoption of proposed Rule 6.3.	No response required.
X-2016-76s	Los Angeles County Bar Association (LACBA) (Schmid) (9-24-16)	Y	M	6.3, cmt.	<p>1. The term “legal services organization” should be defined or the language revised.</p> <p>2. Comment language not consistent with rule language.</p>	<p>1. The Commission disagrees that the term needs to be defined. It continues to believe there should be no confusion as to the term’s meaning. It is a well understood term in the legal profession. Further, the fact that the term “legal services organization” is included in the definition of “firm” or “law firm” in proposed Rule 1.0.1(c) should remove any confusion that the term is so broad as to encompass any organization that provides legal services, including for-profit law partnerships and corporations. Finally, no other jurisdiction has found it necessary to define the term.</p> <p>2. The Commission agrees and has made changes to conform the text and Comment language.</p>
X-2016-94c	Disability Rights California (Mudryk) (9-27-16)	Y	A		Supports rule because clarifies the lack of conflict of interest for those who serve on boards	No response required.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Proposed Rule 6.3 Membership in Legal Services Organization
Synopsis of Public Comments**

TOTAL = 5 **A = 4**
D = 0
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					except in certain circumstances. Legal services organizations rely on volunteers and would see a great decline in volunteers without the guidance in the rule.	
X-2016-104bd	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	A	Cmt.	Comment is unnecessary.	The Commission disagrees. The comment explains the policy underlying the rule that permits withdrawal from decision-making but does not require resignation in the event a conflict arises involving a client of a lawyer serving on the organization's board.
X-2016-121h	California Commission on Access to Justice (CCAJ) (Harston) (9-23-16)	Y	A		Supports rule because it clarifies that there is no conflict of interest for attorneys serving on legal service organization board unless they knowingly participate in decisions where they have an adverse interest. There would be a great decline in volunteers without this rule.	No response required.

PROPOSED RULE OF PROFESSIONAL CONDUCT 6.5
(Current Rule 1-650)
Limited Legal Services Programs

EXECUTIVE SUMMARY

The Commission evaluated current rule 1-650 (Limited Legal Services Programs) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 6.5 (Nonprofit And Court-Annexed Limited Legal Services Programs). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 6.5 (Limited Legal Services Programs).

Rule As Issued For 90-day Public Comment

Proposed rule 6.5 carries forward the substance of current rule 1-650, which was originally derived from Model Rule 6.5. The rule promotes legal services activities by lawyers and aids in addressing the current access to the justice crisis in California.

Paragraph (a) states that if a lawyer provides short-term limited legal services to a client through a program sponsored by a court, government agency, bar association, law school or nonprofit organization the lawyer is:

- (1) subject to rules 1.7 [Conflict of Interest: Current Clients] and 1.9 [Duties To Former Clients] if the lawyer knows that the representation of the client involves a conflict of interest;
- (2) subject to rule 1.10 [Imputation of Conflicts of Interest: General Rule] if the lawyer knows that an associated lawyer in a law firm is prohibited from representation by rules 1.7 [Conflict of Interest: Current Clients] and 1.9 [Duties To Former Clients].

Paragraph (b) clarifies that rule 1.10 [Imputation of Conflicts of Interest] is inapplicable to proposed rule 6.5 outside of the specific language of 6.5(a)(2).

Paragraph (c) states that personal disqualification of a lawyer in a legal services program will not be imputed to lawyers participating in the same program.

Comment [1] explains that there is no expectation that the lawyer's representation of a client will continue beyond the limited consultation through legal services programs, in which it is unfeasible for a lawyer to systematically screen for conflicts of interest.

Comment [2] requires the client's informed consent to the limited scope representation when a lawyer provides short-term limited legal services. Furthermore, a lawyer's duty of confidentiality to the client are applicable to the limited representation.

Comment [3] reaffirms that the lawyer must have actual knowledge that the representation presents a conflict of interest for the lawyer.

Comment [4] reaffirms that imputation of conflicts of interest is applicable only when the lawyer has actual knowledge that another lawyer in the lawyer's law firm would be disqualified. In addition, imputation will not preclude the disqualified lawyer's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the legal service program's auspices.

Comment [5] clarifies that 1.7 [Conflict of Interest: Current Clients], 1.9 [Duties To Former Clients] and 1.10 [Imputation of Conflicts of Interest] are applicable when the lawyer undertakes to represent the client in the matter on an ongoing basis.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made non-substantive stylistic edits and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 6.5 [1-650]

Commission Drafting Team Information

Lead Drafter: Raul Martinez

Co-Drafters: Lee Harris, Toby Rothschild

I. CURRENT CALIFORNIA RULE

Rule 1-650 Limited Legal Services Programs

- (A) A member who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the member or the client that the member will provide continuing representation in the matter:
- (1) is subject to rule 3-310 only if the member knows that the representation of the client involves a conflict of interest; and
 - (2) has an imputed conflict of interest only if the member knows that another lawyer associated with the member in a law firm would have a conflict of interest under rule 3-310 with respect to the matter.
- (B) Except as provided in paragraph (A)(2), a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm.
- (C) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

Discussion

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client's informed consent to the limited scope of the representation. If a short-term limited representation would not be reasonable under the circumstances, the

member may offer advice to the client but must also advise the client of the need for further assistance of counsel. See rule 3-110. Except as provided in this rule 1-650, the Rules of Professional Conduct and the State Bar Act, including the member's duty of confidentiality under Business and Professions Code § 6068(e)(1), are applicable to the limited representation.

[3] A member who is representing a client in the circumstances addressed by rule 1-650 ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (A)(1) requires compliance with rule 3-310 only if the member knows that the representation presents a conflict of interest for the member. In addition, paragraph (A)(2) imputes conflicts of interest to the member only if the member knows that another lawyer in the member's law firm would be disqualified under rule 3-310.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the member's law firm, paragraph (B) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (A)(2). Paragraph (A)(2) imputes conflicts of interest to the participating member when the member knows that any lawyer in the member's firm would be disqualified under rule 3-310. By virtue of paragraph (B), moreover, a member's participation in a short-term limited legal services program will not be imputed to the member's law firm or preclude the member's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with rule 1-650, a member undertakes to represent the client in the matter on an ongoing basis, rule 3-310 and all other rules become applicable.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 6.5 [1-650]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 6.5 [1-650]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 6.5 [1-650] Limited Legal Services Programs

- (a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
 - (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows* that the representation of the client involves a conflict of interest; and
 - (2) is subject to Rule 1.10 only if the lawyer knows* that another lawyer associated with the lawyer in a law firm* is prohibited from representation by Rule 1.7 or 1.9(a) with respect to the matter.
- (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.
- (c) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

Comment

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms that will assist persons* in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent* to the limited scope of the representation. See Rule 1.2(b). If a short-term limited representation would not be reasonable* under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, these Rules and the State Bar Act, including the lawyer's duty of confidentiality under Business and Professions Code § 6068(e)(1) and Rules 1.6 and 1.9, are applicable to the limited representation.

[3] A lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (a)(1) requires compliance with Rules 1.7 and 1.9(a) only if the lawyer

knows* that the representation presents a conflict of interest for the lawyer. In addition, paragraph (a)(2) imputes conflicts of interest to the lawyer only if the lawyer knows* that another lawyer in the lawyer's law firm* would be disqualified under Rules 1.7 or 1.9(a).

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's law firm,* paragraph (b) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (a)(2). Paragraph (a)(2) imputes conflicts of interest to the participating lawyer when the lawyer knows* that any lawyer in the lawyer's firm* would be disqualified under Rules 1.7 or 1.9(a). By virtue of paragraph (b), moreover, a lawyer's participation in a short-term limited legal services program will not be imputed to the lawyer's law firm* or preclude the lawyer's law firm* from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a), and 1.10 become applicable.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-650)

Rule 6.5 [1-650] Limited Legal Services Programs

- (Aa) A ~~member~~lawyer who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the ~~member~~lawyer or the client that the ~~member~~lawyer will provide continuing representation in the matter:
- (1) is subject to ~~rule 3-310~~Rules 1.7 and 1.9(a) only if the ~~member~~lawyer knows* that the representation of the client involves a conflict of interest; and
 - (2) ~~has an imputed conflict of interest~~is subject to Rule 1.10 only if the ~~member~~lawyer knows* that another lawyer associated with the ~~member~~lawyer in a law firm* ~~would have a conflict of interest under rule 3-310~~is prohibited from representation by Rule 1.7 or 1.9(a) with respect to the matter.
- (Bb) Except as provided in paragraph (Aa)(2), ~~a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm~~Rule 1.10 is inapplicable to a representation governed by this Rule.

- (Cc) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

DiscussionComment

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services - such as advice or the completion of legal forms —that will assist persons* in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the ~~lawyer's~~lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A ~~member~~lawyer who provides short-term limited legal services pursuant to ~~rule 1-650~~this Rule must secure the client's informed consent* to the limited scope of the representation. See Rule 1.2(b). If a short-term limited representation would not be reasonable* under the circumstances, the ~~member~~lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. ~~See rule 3-110.~~ Except as provided in this ~~rule 1-650, the~~Rule, these Rules ~~of Professional Conduct~~ and the State Bar Act, including the ~~member's~~lawyer's duty of confidentiality under Business and Professions Code § 6068(e)(1), and Rules 1.6 and Rule 1.9, are applicable to the limited representation.

[3] A ~~member~~lawyer who is representing a client in the circumstances addressed by ~~rule 1-650~~this Rule ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (Aa)(1) requires compliance with ~~rule 3-310~~Rules 1.7 and 1.9(a) only if the ~~member~~lawyer knows* that the representation presents a conflict of interest for the ~~member~~lawyer. In addition, paragraph (Aa)(2) imputes conflicts of interest to the ~~member~~lawyer only if the ~~member~~lawyer knows* that another lawyer in the ~~member's~~lawyer's law firm* would be disqualified under ~~rule 3-310~~Rules 1.7 or 1.9(a).

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the ~~member's~~lawyer's law firm*, paragraph (Bb) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (Aa)(2). Paragraph (Aa)(2) imputes conflicts of interest to the participating ~~member~~lawyer when the ~~member~~lawyer knows* that any lawyer in the ~~member's~~lawyer's firm* would be disqualified under ~~rule 3-310~~Rules 1.7 or 1.9(a). By virtue of paragraph (Bb), moreover, a ~~member's~~lawyer's participation in a short-term limited legal services program will not be imputed to the ~~member's~~lawyer's law firm* or preclude the ~~member's~~lawyer's law firm* from undertaking or continuing the representation of a client with interests adverse to a client being represented under the ~~program's~~program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with ~~rule 1-650, a member~~this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, ~~rule 3-310 and all other rules~~Rules 1.7, 1.9(a), and 1.10 become applicable.

V. RULE HISTORY

Current rule 1-650 is based on Model Rule 6.5. and became operative in 2009 to promote the provision of short-term limited legal services to persons requiring such services in the face of the severe economic downturn at the end of the last decade. In part, both rule 1-650 and Model Rule 6.5 function to increase access to justice through lawyers volunteering to deliver pro bono legal services.

Model Rule 6.5 is one of five rules in Chapter 6 of the Model Rules, which is entitled “Public Service.” The other four rules are:

- 6.1 Voluntary Pro Bono Publico Service
- 6.2 Accepting Appointments
- 6.3 Membership in Legal Services Organization
- 6.4 Law Reform Activities Affecting Client Interests

For the most part, these rules are permissive and not intended as a source of discipline. Rather, they are intended to provide guidance and assurance to lawyers who choose to provide volunteer legal services or engage in other volunteer legal activities.

In 2009, many Californians who confronted serious legal issues because of the severe economic downturn, appeared in the courts as self-represented litigants without the benefit of any legal advice or counsel.¹ The issues included foreclosure, eviction, mortgage loan refinance, domestic violence, unemployment, guardianship, bankruptcy, and other legal problems. To assist people who could not afford lawyers, local bar associations and legal aid providers offered limited, short-term legal assistance at pro bono clinics. Although law firm lawyers were interested in volunteering at such clinics, they were reluctant because of concerns about potential conflicts of interest that would result in the disqualification of the lawyer providing assistance and, by imputation, the lawyer’s firm. A conflict could arise if, after the lawyer provided advice to an individual at the clinic, it is subsequently discovered that the volunteer lawyer or the lawyer’s firm represents a client with interests adverse to the individual.

The concern existed because California, unlike most other jurisdictions, had not adopted a rule similar to Model Rule 6.5. Model Rule 6.5 recognizes that it is impractical to conduct a thorough conflict check in limited legal service situations and, in effect, provides an exception to the imputation of conflicts within a law firm. With the express encouragement of the Board of Governors, the first Commission developed a

¹ See Dhyana Levy, “As Foreclosures Rise, Pro Pers Clog the Courts,” San Francisco Daily Journal, May 20, 2009, p. 1, at Exhibit 4.

proposed rule 1-650² that was based on Model Rule 6.5 and was drafted to provide a narrow exception to the conflict of interest rules.

The proposed rule, modified for application in California,³ was adopted by the Board and approved by the Supreme Court, effective August 28, 2009.⁴

Rule 1-650 applies to short-term *and* limited legal services provided by a lawyer to a client under a program sponsored by a court, government agency, bar association, law school,⁵ or nonprofit organization, that is, where there is no expectation by the lawyer or client that the lawyer will provide continuing representation. In these circumstances, rule 1-650 provides that: 1) the lawyer is subject to Rule of Professional Conduct 3-310 [Avoiding the Representation of Adverse Interests] only if the lawyer knows that the representation of the client involves a conflict of interest with another client; and 2) the lawyer is subject to an imputed conflict of interest only if the lawyer knows that another attorney in the lawyer's law firm would be subject to a conflict of interest under rule 3-310 with respect to the matter. Except for the latter situation, a conflict of interest

² Number "1-650" was recommended for the rule number so that it followed current rule 1-600 [Legal Services Programs].

³ The modification to Model Rule 6.5 takes into account the difference in purpose between the California rules and ABA Model Rules. The California rules regulate the professional conduct of members of the State Bar through discipline. (See rule 1-100(A) "Purpose and Function" of the California RPCs, and the Discussion comments to rule 1-100 which further state "These rules are not intended to supersede existing law relating to members in non-disciplinary contexts.") The Model Rules, on the other hand, provide lawyer conduct standards that may have more than one purpose. Some Model Rules are imperatives intended to be enforced through discipline. Other Model Rules, however, provide guidance concerning a lawyer's professional role and general obligations, and may have non-disciplinary consequences in the event of a violation. (See ABA Model Rules, Scope, paragraph [14] (the ABA Model Rules are "partly obligatory and disciplinary" and "partly constitutive and descriptive"). The Model Rules are available at http://www.abanet.org/cpr/mrpc/mrpc_toc.html.

Model Rule 6.5 both limits a lawyer's disciplinary exposure and provides guidance to lawyers and courts in determining issues of disqualification in a non-disciplinary context (i.e., a court case). Model Rule 6.5 also refers to Model Rule 1.10, which concerns imputation of conflicts of interests that are prohibited by the Rules. California has no counterpart to Model Rule 1.10, addressing imputation of conflicts in case law. Rule 1-650 takes these differences into account.

⁴ The Supreme Court approved proposed rule 1-650 on July 29, 2009. (See Request That The Supreme Court Of California Approve New Rule Of Professional Conduct 1-650, And Memorandum And Supporting Documents In Explanation, May 29, 2009, Supreme Court Case No. S173373.)

⁵ The Model Rule is limited to programs sponsored by courts and nonprofit organizations. The first Commission recognized that limited legal services programs are also sponsored by bar associations, government agencies and law schools, some of which are proprietary. There appeared to be no sound reason to exclude limited legal services programs sponsored by these organizations from the protections against disqualification of volunteer lawyer and firm afforded by rule 1-650.

arising from the lawyer's participation in one of the sponsored programs is not to be imputed to the lawyer's law firm.

The Discussion section accompanying the rule describes the important public protection rationale underlying the rule and provides guidance to attorneys.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule.

Commission Response: No response required.

2. OCTC supports Comments [2] and [5].

Commission Response: No response required.

3. OCTC is concerned that Comments [1], [3], and [4] are more appropriate for treatises, law review articles, and ethics opinions.

Commission Response: The Commission has made no change. The referenced Comments provide interpretative guidance on the rule's application. Moreover, the Supreme Court recently approved the rule and the Commission is aware of no problems that warrant deleting these Comments because they might have been misleading.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, five public comments were received. Four comments agreed with the proposed Rule and one comment did not indicate a position. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony did not indicate a position. That testimony and the Commission's response is also in the public comment synopsis table.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Current rule 1-650 is not strictly a disciplinary rule. Instead, by its terms it creates an express exception to the application of other rules (rule 3-310 concerning conflicts of interest) and case law (concerning the imputation within a law firm of one lawyer's conflict to all other lawyers in the firm). The policy rationale for the rule is not to regulate lawyer conduct through discipline, (compare Bus. & Prof. Code § 6077; rule 1-100(A)), but to encourage lawyers to provide pro bono legal services to people in need of such services without fear of jeopardizing the ability of the lawyers' law firms representing their clients. Put another way, rule 1-650 serves primarily to foster the access to justice.

There are other California laws or pronouncements that serve a similar purpose: The State Bar of California's Pro Bono Resolution, adopted by the Board in 1989 and amended in 2002, and Business & Professions Code §§ 6072-6073.

Outside of California. The American Bar Association has included an aspirational pro bono "rule," Model Rule 6.1, that, while recognizing that lawyers have "a professional responsibility to provide legal services to those unable to pay," states only that "[a] lawyer should aspire to render at least (50) hours of *pro bono publico* legal services per year." Comment [12] to the rule unambiguously asserts the non-disciplinary nature of the rule: "[10] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process." Nearly every jurisdiction has adopted a counterpart to Model Rule 6.1. In none of the adopting jurisdictions is the rule disciplinary in nature.

1. State Bar of California Pro Bono Resolution (adopted in December 1989 and amended in June 2002):

RESOLVED that the Board hereby adopts the following resolution and urges local bar associations to adopt similar resolutions:

WHEREAS, there is an increasingly dire need for pro bono legal services for the needy and disadvantaged; and

WHEREAS, the federal, state and local governments are not providing sufficient funds for the delivery of legal services to the poor and disadvantaged; and

WHEREAS, lawyers should ensure that all members of the public have equal redress to the courts for resolution of their disputes and access to lawyers when legal services are necessary; and

WHEREAS, the Chief Justice of the California Supreme Court, the Judicial Council of California and Judicial Officers throughout California have consistently emphasized the pro bono responsibility of lawyers and its importance to the fair and efficient administration of justice; and

WHEREAS, California Business and Professions Code Section 6068(h) establishes that it is the duty of a lawyer “Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed”; now, therefore, it is

RESOLVED that the Board of Governors of the State Bar of California:

(1) Urges all attorneys to devote a reasonable amount of time, at least 50 hours per year, to provide or enable the direct delivery of legal services, without expectation of compensation other than reimbursement of expenses, to indigent individuals, or to not-for-profit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged, not-for-profit organizations with a purpose of improving the law and the legal system, or increasing access to justice;

(2) Urges all law firms and governmental and corporate employers to promote and support the involvement of associates and partners in pro bono and other public service activities by counting all or a reasonable portion of their time spent on these activities, at least 50 hours per year, toward their billable hour requirements, or by otherwise giving actual work credit for these activities;

(3) Urges all law schools to promote and encourage the participation of law students in pro bono activities, including requiring any law firm wishing to recruit on campus to provide a written statement of its policy, if any, concerning the involvement of its attorneys in public service and pro bono activities; and

(4) Urges all attorneys and law firms to contribute financial support to not-for-profit organizations that provide free legal services to the poor, especially those attorneys who are precluded from directly rendering pro bono services.

2. Business and Professions Code §§ 6072 – 6073

Business and Professions Code § 6072 provides that a firm having a contract with the state for legal services that exceeds fifty thousand dollars (\$50,000) shall include a certification that the firm agrees to make a good faith effort to provide a minimum number of hours of pro bono legal services, or an equivalent amount of financial contributions to qualified legal services projects and support centers.

“Pro bono legal services” is defined as legal services either (1) without fee or expectation of fee to either; or (2) at no fee or substantially reduced fee to groups or organizations seeking to secure or protect civil rights, civil liberties, or public rights.

The legislature made the following formal declaration:

(a) The provision of pro bono legal services is the professional responsibility of California attorneys as an integral part of the privilege of practicing law in this state.

(b) Each year, thousands of Californians, particularly those of limited means, must rely on pro bono legal services in order to exercise their fundamental right of access to justice in California. Without access to pro bono services, many Californians would be precluded from pursuing important legal rights and protections.

(c) In recent years, many law firms in California have been fortunate to experience a robust increase in average attorney income. However, during the same time period, there has regrettably been a decline in the average number of pro bono services being rendered by attorneys in this state.

(d) Without legislative action to bolster pro bono activities, there is a serious risk that the provision of critical pro bono legal services will continue to substantially decrease.

The intent of the legislature was the following:

(a) To reaffirm the importance and integral public function of California attorneys and law firms striving to provide reasonable levels of pro bono legal services to Californians who need those services.

(b) To strengthen the state's resolve to ensure that all Californians, especially those of limited means, have an effective means to exercise their fundamental right of access to the courts.

Business and Professions Code § 6073 also address the legal profession's tradition of voluntary pro bono legal services by stating the following:

It has been the tradition of those learned in the law and licensed to practice law in this state to provide voluntary pro bono legal services to those who cannot afford the help of a lawyer. Every lawyer authorized and privileged to practice law in California is expected to make a contribution. In some circumstances, it may not be feasible for a lawyer to directly provide pro bono services. In those circumstances, a lawyer may instead fulfill his or her individual pro bono ethical commitment, in part, by providing financial support to organizations providing free legal services to persons of limited means. In deciding to provide that financial support, the lawyer should, at minimum, approximate the value of the hours of pro bono legal service that he or she would otherwise have provided. In some circumstances, pro bono contributions may be measured collectively, as by a firm's aggregate pro bono activities or financial contributions.

Lawyers also make invaluable contributions through their other voluntary public service activities that increase access to justice or improve the law and the legal system. In view of their expertise in areas that critically affect the lives and well-being of members of the public, lawyers are uniquely situated to provide invaluable assistance in order to benefit those who might otherwise be unable to assert or protect their interests, and to support those legal organizations that advance these goals.

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for the ABA Model Rule 6.5, which is the counterpart to current rule 1-650, revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_6_5.authcheckdam.pdf [Last visited 2/7/17]
- Forty-nine jurisdictions have adopted a rule counterpart to Model Rule 6.5. Thirty-four jurisdictions have adopted Model Rule 6.5 verbatim.⁶ Fifteen jurisdictions have adopted a modified version of Model Rule 6.5.⁷ Only two jurisdictions have not adopted any version of Model Rule 6.5.⁸

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

A. Concepts Accepted (Pros and Cons):

1. Recommend that the current rule be continued without changes in duties.
 - Pros: The current rule is of relatively recent vintage, having been approved by the Supreme Court in 2009. The Commission is not aware of any problems with the current rule and did not identify any issues. The rule promotes legal services activities by lawyers and aids in addressing the current access to justice crisis in California.
 - Cons: None identified.

⁶ The thirty-four jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and West Virginia.

⁷ The fifteen jurisdictions are: California, District of Columbia, Georgia, Massachusetts, Minnesota, Mississippi, New Hampshire, New Mexico, New York, North Dakota, Ohio, Washington, Wisconsin, and Wyoming.

⁸ The two jurisdictions are: Florida and Texas.

2. Recommend substituting references to possible new rules that would be numbered using the Model Rules numbering system, including rules on conflicts and imputation of conflicts.
 - Pros: This is not intended to be a substantive change. It anticipates necessary conforming changes that would follow the Model Rule numbering system. However, Commission's consideration of the conflicts rules (including a potential new rule on conflicts imputation) is pending.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Substitute the term "lawyer" for "member".
 - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.
2. The Commission considered but rejected a requirement ("shall" or "must") or best practice guidance ("should") that the lawyer participating in a limited legal services program be screened if a conflict subsequently is discovered between a person served in the program and a client of the participating lawyer's firm.
 - Pros: A requirement for, or guidance on, screening would promote confidence in the legal profession and administration of justice by assuring a person who makes use of short-term legal services that the lawyer providing the service will not disclose the person's confidential information to a law firm representing the person's adversary.
 - Cons: Forcing the law firm to implement a screen would add an unnecessary layer of process to the operation of the law firm, which would more likely than not discourage participation in the programs. The point of the rule is to encourage participation, so requiring or even recommending a screen should not be included in the rule. Further, screening is unnecessary because the participating lawyer still owes a duty of confidentiality (and arguably loyalty) to the short-term legal services client.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. There are no substantive changes in duty. (See IX.A.1 above.)

D. Non-Substantive Changes to the Current Rule:

1. Using “lawyer” rather than “member” in each proposed new rule. (See IX.A.1, above.)
2. Adopting the Model Rule numbering for each proposed rule.

E. Alternatives Considered:

1. There were no alternatives considered in regards to Rule 6.5.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 6.5 [1-650] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board adopts proposed Rule 6.5 [1-650] in the form attached to this Report and Recommendation.

**Proposed Rule 6.5 [1-650] Limited Legal Services Programs
Synopsis of Public Comments**

TOTAL = 5
A = 4
D = 0
M = 0
NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43ak	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-18-16)	Yes	A	6.5	COPRAC supports the adoption of proposed Rule 3.1.	No response required.
X-2016-94d	Disability Rights California (Mudryk) (09-27-16)	Yes	A	6.5	Agree with this proposed rule.	No response required.
X-2016-104be	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A	6.5	OCTC is concerned that Comments 1, 3, and 4 are more appropriate for treatises, law review articles, and ethics opinions.	The Commission has made no change. The referenced comments provide interpretative guidance on the rule's application. Moreover, the Supreme Court recently approved the rule and the Commission is aware of no problems that warrant deleting these comments because they might have been misleading.
X-2016-121i	California Commission on Access to Justice (CAAJ) (Hartston) (10-03-16)	Yes	A	6.5	CAAJ supports proposed Rule 6.5 because it balances the need to check for conflicts at clinics with an understanding of the limited nature of assistance provided at clinics.	No response required.
Public Hearing	Responsive Law (Gordon, Tom) (Provided oral public hearing testimony on July 26, 2016. See pages 41-42 of the public hearing	Yes	NI		This rule essentially exempts lawyers in walk-in or phone-in clinics from performing a conflicts check for quick, one time answers. We would suggest that this exception be expanded to include any legal consultation of	The commenter appears to misunderstand the scope of the rule. It is intended to apply only in a narrow set of circumstances – a one-time access to legal services under specific conditions – where a

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Proposed Rule 6.5 [1-650] Limited Legal Services Programs
Synopsis of Public Comments**

TOTAL = 5	A = 4
	D = 0
	M = 0
	NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
	transcript.)				a brief nature where the relationship with the client is not ongoing.	lawyer is volunteering time to assist the delivery of legal services to those people unable to afford lawyers. By temporarily suspending the application of conflicts rules, the rule is designed to encourage such volunteer activity by lawyers who otherwise would avoid such service because of the risk that engaging in these activities will result in a conflict with the lawyer's or the lawyer's firm's clients.

PROPOSED RULES OF PROFESSIONAL CONDUCT 7.1, 7.2, 7.3, 7.4 & 7.5
(Current Rule 1-400)
Advertising and Solicitation

EXECUTIVE SUMMARY

The Commission evaluated current rule 1-400 (Advertising and Solicitation) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA counterparts to rule 1-400, which comprise a series of rules that are intended to regulate the commercial speech of lawyers: Model Rules 7.1 (Communication Concerning A Lawyer's Services), 7.2 (Advertising), 7.3 (Solicitation of Clients), 7.4 (Communication of Fields of Practice and Specialization), and 7.5 (Firm Names and Letterheads).

Rule As Issued For 90-day Public Comment

The result of the Commission's evaluation is a three-fold recommendation for implementing:

- (1) The Model Rules' framework of having separate rules that regulate different aspects of lawyers' commercial speech:

Proposed Rule **7.1** sets out the general prohibition against a lawyer making false and misleading communications concerning the availability of legal services.

Proposed Rule **7.2** will specifically address advertising, a subset of communication.

Proposed Rule **7.3** will regulate marketing of legal services through direct contact with a potential client either by real-time communication such as delivered in-person or by telephone, or by directly targeting a person known to be in need of specific legal services.

Proposed Rule **7.4** will regulate the communication of a lawyer's fields of practice and claims to specialization.

Proposed Rule **7.5** will regulate the use of firm names and trade names.
- (2) The retention of the Board's authority to adopt advertising standards provided for in current rule 1-400(E). Amendments to the Board's standards, including the repeal of a standard, require only Board action; however, many of the Commission's changes to the advertising rules themselves are integral to what is being recommended for the Board adopted standards. Although the Commission is recommending the repeal of all of the existing standards, many of the concepts addressed in the standards are retained and relocated to either the black letter or the comments of the proposed rules.
- (3) The elimination of the requirement that a lawyer retain for two years a copy of any advertisement or other communication regarding legal services.

The five proposed rules were adopted by the Commission during its March 31-April 1, 2016 meeting for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process. Following consideration of public comment, a change was made to proposed Rule 7.1, therefore, we are requesting circulation for a second public comment period. There were no substantive changes made to proposed Rules

7.2, 7.3, 7.4, and 7.5. See the Executive Summary for proposed Rule 7.2, 7.3, 7.4, and 7.5 provided with the Commission's request for adoption of the proposed rules.

1. Recommendation of the ABA Model Rule Advertising & Solicitation Framework.

The partitioning of current rule 1-400 into several rules corresponding to Model Rule counterparts is recommended because advertising of legal services and the solicitation of potential clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts. The current widespread use of the Internet by lawyers and law firms to market their services and the trend in most jurisdictions, including California, toward permitting some form of multijurisdictional practice, warrants such national uniformity. In addition, a degree of uniformity should follow from the fact that all jurisdictions are bound by the constitutional commercial speech doctrine when seeking to regulate lawyer advertising and solicitation.

2. Recommendation to repeal or relocate the current Standards into the black letter or comments of the relevant proposed rule but to retain current rule 1-400(E), which authorizes the Board to promulgate Standards.

The standards are not necessary to regulate inherently false and deceptive advertising. The Commission reviewed each of the standards and determined that most fell into that category. Further, as presently framed, the presumptions force lawyers to prove a negative. They thus create a lack of predictability with respect to how a particular bar regulator might view a given advertisement. The standards also create a risk of inconsistent enforcement and an unchecked opportunity to improperly regulate "taste" and "professionalism" in the name of "misleading" advertisements. In the absence of deception or illegal activities, regulations concerning the content of advertisements are constitutionally permitted only if they are narrowly drawn to advance a substantial governmental interest. *Central Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010) (state's ban on "advertising techniques" that are no more than potentially misleading are unconstitutionally broad).

Nevertheless, although the Commission's review led it to conclude that none of the current standards should be retained as standards, it determined that proposed rule 7.1 should carry forward current rule 1-400(E), the standard enabling provision, in the event future developments in communications or law practice might warrant the promulgation of standard to regulate lawyer conduct.

A description of each of the proposed rules follows.

Rules 7.1 (Communication Concerning A Lawyer's Services)

As noted, proposed Rule 7.1 sets out the general prohibition against a lawyer making false and misleading communications concerning a lawyer's availability for legal services.

Paragraph (a) carries forward the basic concept in current rule 1-400(D) by prohibiting false or misleading communications and providing an explanation of when a communication is false or misleading. (Compare rule 1-400(D)(1) – (4).)

Paragraph (b) carries forward the enabling provision in current rule 1-400(E) authorizing the Board to formulate and adopt advertising standards. (See discussion at recommendation 2, above.) The current rule provides that the Board "shall" adopt standards but given the comprehensive revisions recommended for the advertising rules, the Commission is

recommending that the enabling provision be revised to be a permissive as opposed to mandatory provision (e.g., that the Board “may” formulate and adopt standards).

There are six comments. Comment [1] explains the breadth of the concept of lawyer “communication” about a lawyer’s services and is consistent with the similar concept in current rule 1-400(A). Comment [2] carries forward the concept found in current rule 1-400(E), Standard No. 1, which explains that guarantees and warranties are false or misleading under the Rule. Comment [3] provides specific examples of how certain communications are misleading although true, thus providing insight into how the rule should be applied. Comment [4] provides similar guidance by focusing lawyers on the concept of reasonable, as opposed to unjustified, client expectations in evaluating whether a communication violates the rule. Comment [5] carries forward the concept in current Standard No. 15 regarding communications that promote a lawyer’s or firm’s facility with a foreign language. A lawyer’s communication of a foreign language ability is helpful information to a consumer in choosing a lawyer, but it can also mislead a potential client who has expectations that a lawyer, as opposed to a non-lawyer, possesses the foreign language ability. Comment [6] provides cross-references to other law, including Bus. & Prof. §§ 6157 to 6159.2 and 17000 et seq., that regulate lawyer commercial speech. As can be seen, all of the comments provide interpretative guidance or clarify how the rule should be applied.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission only deleted “an untrue statement” from paragraph (a). After consideration of public comment, the Commission has deleted the term “untrue statement” as redundant because the concept described comes within the term “material misrepresentation of fact or law.”

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 7.1 [1-400]

Commission Drafting Team Information

Lead Drafter: Carol Langford

Co-Drafters: Tobi Inlender, Howard Kornberg, Mark Tuft

I. CURRENT CALIFORNIA RULE

Rule 1-400 Advertising and Solicitation

- (A) For purposes of this rule, “communication” means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:
- (1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or
 - (2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or
 - (3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or
 - (4) Any unsolicited correspondence from a member or law firm directed to any person or entity.
- (B) For purposes of this rule, a “solicitation” means any communication:
- (1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and
 - (2) Which is:
 - (a) delivered in person or by telephone, or
 - (b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.
- (C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of

California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.

- (D) A communication or a solicitation (as defined herein) shall not:
- (1) Contain any untrue statement; or
 - (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
 - (3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or
 - (4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or
 - (5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.
 - (6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.
- (E) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.
- (F) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.

Standards:

Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:

(1) A “communication” which contains guarantees, warranties, or predictions regarding the result of the representation.

(2) A “communication” which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as “this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter.”

(3) A “communication” which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.

(4) A “communication” which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.

(5) A “communication,” except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word “Advertisement,” “Newsletter” or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word “Advertisement,” “Newsletter” or words of similar import on the outside thereof.

(6) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.

(7) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.

(8) A “communication” which states or implies that a member or law firm is “of counsel” to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.

(9) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.

(10) A “communication” which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as

having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.

(11) (Repealed. See rule 1-400(D)(6) for the operative language on this subject.)

(12) A “communication,” except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.

(13) A “communication” which contains a dramatization unless such communication contains a disclaimer which states “this is a dramatization” or words of similar import.

(14) A “communication” which states or implies “no fee without recovery” unless such communication also expressly discloses whether or not the client will be liable for costs.

(15) A “communication” which states or implies that a member is able to provide legal services in a language other than English unless the member can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.

(16) An unsolicited “communication” transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or “yellow pages” section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 7.1 [1-400]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 7.1 [1-400]

Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 7.1 [1-400] Communications Concerning A Lawyer's Services

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

Comment

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

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

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

[4] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer, may be misleading if presented so as to lead a reasonable* person* to form an unjustified

expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable* person* to conclude that the comparison can be substantiated. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations.

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

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

IV. COMMISSIN'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-400)

Rule 7.1 [1-400] ~~Advertising and Solicitation~~ Communications Concerning A Lawyer's Services

(A) ~~For purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:~~

- ~~(1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or~~
- ~~(2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or~~
- ~~(3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or~~
- ~~(4) Any unsolicited correspondence from a member or law firm directed to any person or entity.~~

(B) ~~For purposes of this rule, a "solicitation" means any communication:~~

- ~~(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and~~
- ~~(2) Which is:~~

- ~~(a) delivered in person or by telephone, or~~
 - ~~(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.~~
- ~~(Ga)~~ A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited. lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.
- ~~(D)~~ A communication or a solicitation (as defined herein) shall not:
 - ~~(1) Contain any untrue statement; or~~
 - ~~(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or~~
 - ~~(3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or~~
 - ~~(4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or~~
 - ~~(5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.~~
 - ~~(6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.~~
- ~~(Eb)~~ The Board of GovernorsTrustees of the State Bar ~~shall~~may formulate and adopt standards as to communications ~~which~~that will be presumed to violate ~~this rule 1-400~~Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these ~~rules~~Rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code ~~sections~~§§ 605 and

606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all ~~members~~lawyers.

- ~~(F) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.~~

Comment~~Standards:~~

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

~~Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:~~

~~(1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation.~~

~~(2) A "communication" which contains testimonials about or endorsements of a member unless such communication also that contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."~~guarantee or warranty of the result of a particular representation is a false or misleading communication under this Rule. See also, Business and Professions Code § 6157.2(a).

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

~~(3) A "communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.~~

~~(4) A "communication" which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.~~

~~(5) A “communication,” except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word “Advertisement,” “Newsletter” or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word “Advertisement,” “Newsletter” or words of similar import on the outside thereof.~~

~~(6) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.~~

~~(7)~~^[4] A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists. that truthfully reports a lawyer’s achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer, may be misleading if presented so as to lead a reasonable* person* to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client’s case. Similarly, an unsubstantiated comparison of the lawyer’s services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable* person* to conclude that the comparison can be substantiated. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations.

~~(8) A “communication” which states or implies that a member or law firm is “of counsel” to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.~~

~~(9) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.~~

~~(10) A “communication” which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.~~

~~(11) (Repealed. See rule 1-400(D)(6) for the operative language on this subject.)~~

~~(12) A “communication,” except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.~~

~~(13) A “communication” which contains a dramatization unless such communication contains a disclaimer which states “this is a dramatization” or words of similar import.~~

~~(14) A “communication” which states or implies “no fee without recovery” unless such communication also expressly discloses whether or not the client will be liable for costs.~~

~~(15) A “[5] This Rule prohibits a lawyer from making a communication” which that states or implies that a memberthe lawyer is able to provide legal services in a language other than English unless the memberlawyer can actually provide legal services in suchthat language or the communication also states in the language of the communication (a) the employment title of the person* who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.~~

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

~~(16) An unsolicited “communication” transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or “yellow pages” section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.~~

V. COMMISSION’S PROPOSED RULE (REDLINE TO ABA MODEL RULE 7.1)

Rule 7.1 ~~Communication~~[1-400] Communications Concerning aA Lawyer’s Services

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the ~~statement~~communication considered as a whole not materially misleading.

- (b) The Board of Trustees of the State Bar may formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these Rules. “Presumption affecting the burden of proof” means that presumption defined in Evidence Code §§ 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Comment

[1] This Rule governs all communications of any type whatsoever about ~~the lawyer or the~~ lawyer’s services, including advertising permitted by Rule 7.2. ~~Whatever means are used to make known a lawyer’s services, statements about them must be truthful.~~ A communication includes any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer’s law firm* directed to any person.*

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

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

[34] ~~An advertisement~~ A communication that truthfully reports a lawyer’s achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer, may be misleading if presented so as to lead a reasonable* person* to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client’s case. Similarly, an unsubstantiated comparison of the lawyer’s services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable* person* to conclude that the comparison can be substantiated. ~~The inclusion of an An appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create often avoids creating~~ unjustified expectations ~~or otherwise mislead the public.~~

[5] This Rule prohibits a lawyer from making a communication that states or implies that the lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in that language or the communication

also states in the language of the communication the employment title of the person* who speaks such language.

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

~~[4]– See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.~~

VI. RULE HISTORY

A. 1979 Rule¹

In 1977, the United States Supreme Court handed down its decision in *Bates v. State Bar of Arizona* (1977) 433 U.S. 350 [97 S.Ct. 2691]. This decision held that publication of advertisements by attorneys containing objective information about attorneys (e.g., names, addresses, hours, prices of routine services, and factual information about fees presented in a non-misleading manner) could not be constitutionally prohibited. The Court noted, however, that some regulation as to time, place, manner, quality claims, in person solicitation, and similar matters was proper, and that false, deceptive or misleading advertising could be prohibited.

In response to the *Bates* decision and following consideration of a report of a Special Committee on Lawyer Advertising and Solicitation, the Board adopted and filed a proposal with the California Supreme Court on November 28, 1978. This filing included a request to repeal the then current rule 2-101 and to adopt a new substantially revised rule 2-101. Proposed rule 2-101 was amended by the Court and was adopted by order of the Supreme Court, effective April 1, 1979.

Rule 2-101 Professional Employment

This rule is adopted to foster and encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices of legal counsel.

Accordingly, a member of the State Bar may seek professional employment from a former, present or potential client by any means consistent with these rules.

(A) A “communication” is a message concerning the availability for professional employment of a member or a member’s firm. A “communication” made by or on behalf of a member shall not:

(1) Contain any untrue statement; or

¹ See “Final Report and Recommendation of the Special Committee on Lawyer Advertising and Solicitation,” November 1978.

- (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive or mislead the public; or
 - (3) Omit to state any fact necessary to make the statements made, in the light of the circumstances under which they are made, not misleading to the public; or
 - (4) Fail to indicate clearly, expressly or by context, that it is a “communication”; or
 - (5) State that a member is a certified specialist unless the member holds a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Supreme Court; or
 - (6) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct.
- (B) No solicitation or “communication” seeking professional employment from a potential client for pecuniary gain shall be delivered by a member or a member’s agent in person or by telephone to the potential client, nor shall a solicitation or “communication” specifically directed to a particular potential client regarding that potential client’s particular case or matter and seeking professional employment for pecuniary gain be delivered by any other means, unless the solicitation or “communication” is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A potential client includes a former or present client.

Notwithstanding the foregoing, nothing in this subdivision (B) shall limit or negate the continuing professional duties of a member or a member’s firm to former or present clients, or a member’s right to respond to inquiries from potential clients.

- (C) A member or member’s firm shall not solicit or accept professional employment offered or obtained through the acts of an agent, runner or capper, which acts would be in violation of law, or which, if performed by a member of the State Bar, would be in violation of subdivisions (A) or (B) of this rule 2-101.
- (D) The Board of Governors of the State Bar shall formulate and adopt standards as to what “communications” will be presumed to violate subdivisions (A) or (B) of this rule 2-101. The standards shall have effect exclusively in disciplinary proceedings involving alleged violations of these rules as presumptions affecting the burden of proof. “Presumption affecting the burden of proof” means that presumption defined in Evidence Code sections 605 and 606. The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on members of the State Bar.

- (E) The member shall retain for one year a true and correct copy or recording of any “communication” made by written or electronic media pertaining to the member or the member’s firm. Upon written request, the member or the member’s firm shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar the evidence of the facts upon which any factual or objective claims contained in the “communication” are based.

In addition, the Board unanimously recommended the adoption of four initial standards governing lawyer advertising and solicitation, as authorized by proposed rule 2-101(D), two of which identify prohibited solicitations (whether or not they are made for an attorney’s pecuniary gain). The initial standards were:

A “communication” is presumed to violate rule 2-101, Rules of Professional Conduct if it:

- (1) Contains guarantees, warranties or predictions regarding the result of legal action; or
- (2) Contains testimonials about or endorsements of a member; or
- (3) Is delivered in person or by telephone to a potential client who is in such a physical, emotional or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel; or
- (4) Is transmitted at the scene of an accident or at or en route to a hospital, emergency care center or other health care facility.

The preamble to rule 2-101 is the embodiment of the Committee’s intent to foster and encourage responsible information to assist the public in making informed choices of legal counsel. It recognized that attorney advertising legitimately serves in assisting the profession in its obligation to make legal services fully available and in teaching the public to recognize legal problems and the help which attorneys can provide. All types of media were permitted for attorney advertising communications except as specifically prohibited in paragraph (B).

Subdivision (A) included a broad definition of “communication” which included all advertisements and other information released which notified the public about an attorney’s availability for professional employment.

Even though the Supreme Court has extended First Amendment protection to commercial speech, this protection does not encompass false, deceptive or misleading advertising, since the benefits of commercial speech in facilitating informed choices by consumers accrue only if the advertisements are truthful. This includes attorney advertising. (See *Bates v. State Bar of Arizona*, *supra*, 433 U.S. at 350, 383.)

The language of rule 2-101(B)(1)-(4) was similar to language found in other statutory requirements for fair and full disclosure, and prohibitions on false, deceptive or misleading advertising. (See Bus. & Prof. Code § 17500.)

Subdivision (A)(5) was added to prohibit an attorney from using the designation “certified specialist” or “recognized specialist” unless he or she is in fact certified as a specialist by the California Board of Legal Specialization. The use of the term “specialist” with respect to a field of law in which the Board of Legal Specialization conducts a specialization program may be misleading if an attorney is not Board certified.

Subdivision (B), which prohibited all in person and telephoned solicitations of potential clients by attorneys seeking employment, specifically addressed situations in which the public could be subject to risks of invasions of privacy, high-pressure salesmanship, undue influence, overreaching, misleading and deceptive practices, divided loyalties, inadequate representation and other breaches of fiduciary duties. Only communications seeking employment that are transmitted orally were prohibited. Thus, mass mailings and posters were permissible, as well as written solicitations addressed to a particular client seeking employment for a specific matter. The purpose of this proposal was to protect the potential client, who can choose to contact the attorney or not, without the immediate pressure to act which is inherent in personal encounters.

Subdivision (C) also stated that the broad permission provided to attorneys to advertise (and to pay for legitimate support service such as advertising) does not extend to solicitation activities of agents, runners or cappers, which are prohibited by law. (Bus. & Prof. Code §§ 6150 et. seq.; *Hutchins v. Superior Court* (1976) 61 Cal.App.3d 77.)

Subdivision (D) and the standards operate together to further the state’s legitimate interest in regulating attorney conduct and assuring that a free flow of truthful, nondeceptive information flows from attorneys to the members of the public. The standards supply a test which can be used by consumers as well as by attorneys to judge the honesty of attorney advertising, and which can be promptly altered and amended to meet the demonstrated needs of the public and the Bar.

The Standards were drawn from statutory and decisional law, previous Rules of Professional Conduct, disciplinary cases, actual attorney advertisements, rules adopted in other jurisdictions, and regulation of other advertising subject matters. Standard (1) prohibits a communication that contains guarantees, warranties or predictions because such claims are inherently deceptive and misleading because past performance of an attorney is no indication of future performance and because no lawyer can guarantee the results of any legal action. Standard (2) prohibits testimonials or endorsements, as recognized and condemned by the California Supreme Court. (See, *Jacoby v. State Bar* (1977) 19 Cal.3d 359, 373, and *Belli v. State Bar* (1974) 10 Cal.3d 824, 837-838.) Standard (3) and Standard (4) protects the public from overreaching when they are particularly vulnerable. Standard (4) in particular is aimed at “ambulance chasers” and will aid in the enforcement of the prohibition on in person solicitation.

The requirement to maintain a copy of any advertisement under subdivision (E) assures that there is a record of all representations made by an attorney to which both the consumer and the State Bar can refer to if the truthfulness of an advertisement is ever questioned. Subdivision (E) also requires the attorney to provide the State Bar, upon request, proof of the facts upon which claims contained in the advertisements are based. The purpose of this requirement was to simplify enforcement of the rules regulating attorney commercial speech.

B. 1989 Rule²

In 1989, rule 2-101 was renumbered as rule 1-400 and renamed “Advertising and Solicitation.” The preamble was deleted and former 2-101(A) became 1-400(D). The new paragraph (A) was intended to define the specific types of “communications” to be regulated by the rule. In addition to a generic definition very similar to that found in the former rule 2-101(A), paragraph (A) contained four specific categories of communication sought to be regulated.

(A) For purposes of this rule, “communication” means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

- (1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or
- (2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or
- (3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or
- (4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

The new paragraph (B) defined solicitation as a communication concerning professional employment for pecuniary gain, made in person or by telephone, which is initiated by or on behalf of the lawyer or law firm. Paragraph (B) also included in the definition of solicitation communications initiated by the member directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication. This express prohibition was new and was intended to prevent interference with an already existing attorney-client relationship. A client would not be prevented from seeking a “second-opinion” on their matter because the proposed rule only prohibited contacts initiated by the attorney.

² See “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” Bar Misc. No. 5626, December 1987.

(B) For purposes of this rule, a “solicitation” means any communication:

(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and

(2) Which is;

(a) delivered in person or by telephone, or

(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

The new paragraph (C) prohibited such communications unless the lawyer has a family or prior professional relationship with the potential client. The former rule 2-101(B) also prohibited in person or telephone contacts with potential clients, but had no exception for those prospective clients who have a family or prior professional relationship with the attorney. The exception to the ban on in person and telephone contacts was proposed because the potential for overreaching feared with in person or telephone contacts was perceived to be greatly reduced when a family member or former client is involved. Paragraph (C) included a new provision intended to clarify the inapplicability of the rule to contacts with present or former clients where such solicitations are in discharge of a member's continuing professional duties (e.g., alerting an estate planning client of a change in tax laws and offering to rewrite his or her will).

(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.

The restriction found in former rule 2-101(C) on situations in which someone other than the attorney does the soliciting for the attorney was not expressly included in the proposal because Business and Professions Code §§ 6150 et seq. already addressed the runner or capper aspect and proposed subdivisions (B) and (C) referred to communications initiated or made “by or on behalf of” the member or firm.

The regulation of solicitation of clients by mail found in former rule 2-101(B) was not included in the proposed rule 1-400. Mailed communications would be regulated by proposed “Standard” (5), in addition to the regulations in paragraph (D) on the content of communications, which made such mailings presumptively violative of rule 1-400 unless the envelope bears an “advertising” notation to enable the recipient to distinguish such advertising from actual legal correspondence. The regulation of mailings found in former rule 2-101(B) was not included because any risk of intrusion and overreaching with mailings could be greatly reduced by requiring an advertising notation on the envelope and because the constitutionality of regulation of mailings such as that found in former rule 2-101 was in doubt.

As mentioned previously, paragraph (D) carried forward the regulations on the content of “communications” found in former rule 2-101(A).

(D) A communication or a solicitation (as defined herein) shall not:

- (1) Contain any untrue statement; or
- (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
- (3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or
- (4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or
- (5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct; or
- (6) State that a member is a “certified specialist” unless the member holds a current certificate as a specialist issued by the California Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.

Paragraph (E) carried forward the concept of rule 2-101(D) in which the Board of Governors may formulate and adopt standards as to what “communications” will be presumed to violate the rule.

(E) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. “Presumption affecting the burden of proof” means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

Paragraph (F) carried forward the requirement of retaining a copy of any “communication” or recording made pertaining to the attorney from former rule 2-101(E), but the time for retention of such copies was extended from one to two years. This is consistent with the policy advocated by the American Bar Association in its Model Rule 7.2(b) and is better suited to serve the interest of the public and the State Bar in having a documentary basis for reviewing attorney conduct under this rule.

(F) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.

Standard (1) was amended slightly to encompass any guarantee etc., about any representation of a client rather than limiting the presumption to guarantees etc., concerning legal action.

Standard (2) continued the protection afforded by the former rule's Standard (2), which provided that communications which contain testimonials or endorsements violate the rule. However, this standard was amended to provide that such a communication would not be presumed to violate the rule if a disclaimer such as that quoted in the standard were included in the communication. Of course, such a communication could violate the rule even if a disclaimer is included (e.g. a communication containing a testimonial which included false statements).

The former rule's Standard (3) provided that communications delivered in person or by telephone to a potential client in such a physical, emotional or mental state that he or she would not be expected to exercise reasonable judgment are presumed to violate the rule. The proposed Standard (3) continued the presumption in the former Standard (3) and expanded it to protect the particularly vulnerable client irrespective of the method of communication and to provide a nexus between the standard and the knowledge of the member.

Standard (4) is identical to the former rule's Standard (4), which provided that communications transmitted at the scene of an accident or at or en route to a hospital is presumed to violate the rule.

Standard (5) provided that certain mailed communications are presumed to violate the rule if not identified as advertisements on the envelope. (See *Leoni v. State Bar* (1985) 39 Cal.3d 609, 627.) This is because an envelope bearing only the return address of a member or law firm without the advertisement disclaimer may cause the recipient to fear legal action. Mailings with the disclaimer protect the recipient from having to discern the commercial intent through content alone.

Standards (6) through (8) were included to clarify areas of concern which are frequently raised with respect to firm or trade names, and the use of the term "of counsel."

Standard (9) was added because multiple trade names may be misleading because each trade name used may imply to the public the existence of a separate and distinct entity.

Standard (10) was added after a great deal of comment regarding the problems created by members advertising as lawyer referral services when in fact there is only one member taking all the cases.

C. 1992 Rule³

In 1992, the only revisions made were to the Standards. Proposed amendments to Standard (5), which defines conduct presumptively in violation of rule 1-400, were intended to: 1) clarify the types of “communication” considered to be within the scope of the standard; and 2) to provide suggested examples of express identifying language to be placed on the outside of the envelope. Proposed amendments to Standards (7) and (8) clarified that both standards apply to a relationship with another “lawyer,” as that term is defined in proposed rule 1-100(B)(3). The proposed amendments expanded the scope of these standards to encompass relationships with out-of-state and foreign-licensed attorneys. The proposed amendment to Standard (10) was for clarity only. No substantive change was intended.

D. 1993 Repeal of (D)(6)⁴

In June, 1990, the United States Supreme Court decided *Peel v. Attorney Reg. & Discipline Commission of Illinois* (1990) 496 U.S. 91 [110 L.Ed.2d 83, 110 S.Ct. 2281]. As stated by the Supreme Court, the issue presented by *Peel* was “whether a lawyer has a constitutional right, under the standards applicable to commercial speech, to advertise his or her certification as a trial specialist by NBTA.” (*Peel v. Attorney Reg. & Discipline Commission of Illinois, supra*, 496 U.S. 91, 100.)

The Supreme Court reversed Mr. Peel’s public censure on First Amendment grounds, stating:

A State may not, however, completely ban statements that are not actually or inherently misleading, such a certification as a specialist by a bone fide organization such as NBTA.

(*Peel v. Attorney Reg. & Discipline Commission of Illinois, supra*, 496 U.S. 91, 110.)

If Mr. Peel were a California lawyer, rule 1-400(D)(6) would prohibit him from noting on his letterhead the fact of his certification as a civil trial specialist by the NBTA. The then Board of Governors had serious concerns about this result and constitutionality of rule 1-400(D)(6) in light of the holding in *Peel*, and recommended repeal of the rule. In light of *Peel* and based on the recommendation of the Board of Governors of the State Bar, the Supreme Court repealed rule 1-400(D)(6), effective November 30, 1992. The general prohibitions on false, deceptive, or misleading advertising in rule

³ See “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” Supreme Court File No. 24408, December 1991.

⁴ See “Request That The Supreme Court Of California Approve The Repeal of Rule 1-400(D)(6) and Approve Conforming Amendments to Rule 1-400(D)(5), Rules Of Professional Conduct Of The State Bar Of California And Memorandum And Supporting Documents In Explanation,” Supreme Court File No. 26778, May 1992.

1-400(D)(1)-(5) would regulate the use of the phrase “certified specialist” in attorney advertising.

E. 1994 Amendment to Standard (5) and Addition of Standards (12)-(16)

In September 1992, State Bar of California President Harvey Saferstein created the Lawyer Advertising Task Force and directed it to study the issue of lawyer advertising in California. The Task Force was directed to review current lawyer advertising regulations and practices and, based upon its study, to recommend guidelines for ethical lawyer advertising that it deemed appropriate. The State Bar of California Lawyer Advertising Task Force recommended that, pursuant to rule 1-400, the State Bar amend Standard (5) and adopt five new advertising standards.

After consideration of the Task Force’s report, the Board voted to adopt four of the five new advertising standards and amend Standard (5), effective May 11, 1994.

1. Amendment of Standard (5)

The proposed amended standard amended the first sentence of former Standard (5). It created a presumption of violation of rule 1-400 by a State Bar member whose communication (that seeks professional employment for pecuniary gain and which is transmitted by mail or equivalent means) does not bear the word “Advertisement” or “Newsletter” in 12 point print on the first page of the communication. The second sentence of the standard remained unchanged from current Standard (5).

Based on its study, the Task Force concluded that the public could be misled by mailed attorney communications, even where the envelope containing the communication bears the word “Advertisement” or “Newsletter” on the outside. A recipient of such communication may not notice such disclaimer on the outside of the envelope before withdrawing the communication and reading it. Particularly in the case of targeted mailings, a recipient could be misled into wrongly believing that he or she has a legal problem requiring immediate attention when, in fact, the legal cause of action and/or timing issue is questionable and the mailing is simply a solicitation for legal employment.

The Task Force concluded that the proposed amended standard’s additional minimal disclosure requirement would protect the public from being misled by requiring the placement of the word “Advertisement” or “Newsletter” in 12 point print on the first page of an attorney communication. The amended standard helped clarify to the recipient of such a communication that the communication is, in fact, a solicitation for legal employment. The proposed new standard reads as follows:

(5) A “communication,” except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word “Advertisement,” “Newsletter” or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and

similar materials, is transmitted in an envelope, the envelope shall bear the word “Advertisement,” “Newsletter” or words of similar import on the outside thereof.

2. Adoption of New Standard (12)

The proposed new standard would create a presumption of violation of rule 1-400 by a State Bar member who does not state his or her name and State Bar membership number in his or her communication. Where the communication is made on behalf of a law firm, the proposed standard would create a presumption of violation of rule 1-400 by each State Bar member of such law firm where the communication does not expressly include the name and State Bar membership number of at least one State Bar member responsible for the communication.

The Task Force rationale for this proposed standard is the same as that set forth in the proposed trade name standard above. This proposed standard would promote the availability of information to consumers and assist the State Bar in protecting the public from misleading attorney communications. The proposed new standard reads as follows:

(12) A “communication,” except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.

3. Adoption of New Standard (13)

The proposed new standard would create a presumption of violation of rule 1-400 by a State Bar member who does not expressly disclose that his or her communication is a dramatization if, in fact, that is the case.

Based on its study, the Task Force concluded that advertisements containing dramatizations can be misleading to consumers of legal services. The proposed standard’s minimal disclosure requirement would protect the public from wrongly believing that the characters or situations portrayed in an attorney’s communication are real where, in fact, such characters are being played by actors or the situation portrayed is either fictitious, a reenactment or otherwise staged. The proposed new standard reads as follows:

(13) A “communication” which contains a dramatization unless such communication contains a disclaimer which states “this is a dramatization” or words of similar import.

4. Adoption of New Standard (14)

The proposed new standard would create a presumption of violation of rule 1-400 by a State Bar member whose communication states or implies “no fee without recovery” and who does not expressly disclose in such communication whether the client will be liable for the costs of the representation.

Although rule 4-210 of the California Rules of Professional Conduct (Payment of Personal or Business Expenses Incurred by or for a Client) allows State Bar members to advance and to accept ultimate responsibility for the legal costs of a client’s representation, many attorneys will still hold the client ultimately responsible for such costs. Where an attorney’s communication states or implies “no fee without recovery” in order to attract business, clients can be misled into believing that they will owe no money to the attorney if they are not successful in their underlying claim when, in fact, the attorney will charge them for reimbursement of legal costs advanced by the attorney.

Based on its study, the Task Force concluded that attorney communications including “no fee without recovery” claims are commonplace in California. The Task Force’s study revealed that some attorneys will charge costs to clients in spite of such claims. The proposed standard’s minimal disclosure requirement would protect the public from being misled by “no fee without recovery” communications by requiring that additional information be disclosed regarding client responsibility for legal costs. The proposed new standard reads as follows:

(14) A “communication” which states or implies “no fee without recovery” unless such communication also expressly discloses whether or not the client will be liable for costs.

5. Adoption of New Standard (15)

The proposed new standard would create a presumption of violation of rule 1-400 by a State Bar member whose communication states or implies that legal services are available in a language other than English and whose communication does not also state the name and employment title of the person who speaks such language other than English and expressly discloses in such language other than English that such person is the individual who speaks such language other than English.

Based on its study, the Task Force concluded that attorney communications including claims of non-English language representation (e.g., “Se Habla Espanol”) are commonplace in California. Frequently, however, no attorney actually speaks the non-English language advertised, but instead relies on non-attorney employees to communicate directly with non-English speaking clients. Such clients can be misled into wrongly believing that they are or will be communicating with and/or represented by an attorney conversant in their non-English language.

The proposed standard's minimal disclosure requirement would protect the public from being misled by claims of non-English language representation where, in fact, no attorney in the law office actually speaks such non-English language. The proposed new standard reads as follows:

(15) A "communication" which states or implies that a member is able to provide legal services in a language other than English unless the member can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.

6. 1997 Repeal and Adoption of a New Rule 1-400(D)(6)

In April 1993, the Board Committee on Admissions and Competence concurred with the Board of Legal Specialization's recommendation to adopt a new rule 1-400(D)(6) and repeal Standard (11) but delayed the submission to the Board of Governors pending development of a plan for implementation of a program to approve certifying entities.

In August 1995, having developed an implementation plan, the Board of Legal Specialization requested the Board Committee on Admissions and Competence to publish proposed rule 1-400(D)(6) again for public comment and also the repeal of rule 1-400(E), Standard (11). The reason for this request was twofold: (1) more than two years had elapsed since the end of the first comment period on the proposed rule; and (2) the language of the proposed rule had been revised to read "accredited" by the State Bar instead of "approved" to conform the rule to the language in the proposed accreditation standards. In addition, because existing rule 1-400(E), Standard (11), would need to be repealed in the event rule 1-400(D)(6) were approved, the concept contained in Standard (11) was incorporated by requiring a statement of the complete name of the entity which granted certification. The following was added by order of the Supreme Court, effective June 1, 1997:

(D) A communication or a solicitation (as defined herein) shall not:

(6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.

VII. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

• **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC believes that the current rule is working fine and does not need changes. OCTC is concerned with making the current rule into several separate rules for communications, advertising, and solicitation. The line between those concepts

is blurry, overlaps, and it is often difficult for attorneys and OCTC to determine whether a communication is a communication, an advertisement, or a solicitation. In fact, proposed Rule 7.2 requires that the advertising also be subject to the requirements of 7.1 and 7.3. OCTC believes a unitary rule is clearer, more understandable, and more enforceable. Further, by dividing the current rule into three rules, OCTC will have to unnecessarily charge violations of more rules.

Commission Response: The Commission continues to believe it is crucial, in light of multijurisdictional practice of law and communications over the Internet, that California move with other jurisdictions toward a national standard for the rules governing advertising and solicitation. Adopting the national approach will afford great public protection.

2. OCTC is concerned with the elimination of all the presumptions in the current rule, including those that are also in the State Bar Act. (See Business and Professions Code §§ 6158.1 and 6158.2.) Those presumptions, which are rebuttable, give great guidance and assistance to attorneys, OCTC, and the courts. (See e.g. *In the Matter of Liberty* (2016) Case No. 11-O-18778, Hearing Department Decision.) There is no reason to eliminate all of the presumptions. Further, eliminating them in the rule, while they are required in the State Bar Act, will create great confusion and issues for enforceability.

Commission Response: The Commission continues to take the position that the standards are not necessary to regulate inherently false and deceptive advertising. As presently framed, the presumptions force lawyers to prove a negative. They create a lack of predictability with respect to how a particular bar regulator will view a given advertisement. The standards also create a risk of inconsistent enforcement and an unchecked opportunity to regulate “taste” in the name of “misleading” advertisements. In the absence of deception or illegal activities, regulations concerning the content of advertisements are constitutionally permitted only if they are narrowly drawn to advance a substantial governmental interest. (*Central Hudson Gas & Elec. v. Pub. Serv. Comm’n* (1980) 447 U.S. 557; *Alexander v. Cahill* (2d Cir. 2010) 598 F.3d. 79 [state’s ban on “advertising techniques” that are no more than potentially misleading are unconstitutionally broad].)

Nevertheless, the Commission believes it essential that the Board’s authority to promulgate standards be maintained in the event new technology or changes in the delivery of legal services warrant a new standard. Consequently, Rule 7.1(b) has been retained in the rule.

3. If adopted, OCTC supports the Comments to this rule.

Commission Response: No response required.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the Rule and the Commission's responses to OCTC remained the same.

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

VIII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, six public comments were received. Five comments agreed with the proposed Rule and one comment agreed only if modified. During the 45-day public comment period, one public comment was received. One comment disagreed with the proposed Rule. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was in support of the proposed rule if modified. That testimony and the Commission's response is also in the public comment synopsis table.

IX. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

See Section VI on the history of the current rule. In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- Laws that apply generally to advertising and fair business practices also govern lawyer advertising (see Business and Professions Code §§ 17529-17529.9, 17538.41, 17538.43, 17538.45).
- Article 9.5 of the State Bar Act (entitled: "Legal Advertising") sets forth extensive statutory regulation of lawyer advertising, including provisions that expressly apply to electronic media advertisements. Also included in the statutory scheme is a special enforcement mechanism that affords the alleged violator a nine-day opportunity to withdraw an advertisement.
- Rules 9.47(b)(3) and 9.48(b)(3) of the California Rules of Court include provisions that impose website requirements on out-of-state lawyers practicing in California under multi-jurisdictional practice of law (MJP) standards.
- Compensation for client referrals are found in current rules 1-320(B) and 2-200(B). In addition, the State Bar Act prohibits "running and capping" in Business and Professions Code §§ 6150 through 6154.

- State Bar Act provisions regulating a lawyer referral service in California are not to be construed as prohibiting attorneys from “jointly advertising their services.” (Bus. & Prof. Code § 6155(h).)
- The Labor Code includes special provisions governing advertisements for workers’ compensation claims (see Labor Code §§ 139.45, and 5432 through 5434). In particular, Labor Code § 139.45 adapts the language of rule 1-400(D) to describe advertisements that are “false or misleading.”
- Business and Professions Code § 6132 requires the removal from all law firm advertisements, letterhead, signs and other materials of the name of an attorney who is disbarred, or who resigned with charges pending within 60 days of the disbarment or resignation.

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for the ABA Model Rule 7.1, which is a direct counterpart to rule 1-400 revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_1.authcheckdam.pdf [Last visited 2/7/17]
- Nineteen jurisdictions have adopted Model Rule 7.1 verbatim.⁵ Thirty-two jurisdictions have adopted a version of the rule that is substantially different from Model Rule 7.1.”⁶

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of Model Rule 7.1, as modified.

- Pros: Model Rule 7.1 is part of the Commission’s decision to adhere to the ABA Model Rule general framework for regulating lawyer advertising and solicitations for business by several separate rules, each of which addresses a general topic.

⁵ The nineteen jurisdictions are: Arizona, Connecticut, Delaware, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Oklahoma, Oregon, Pennsylvania, Tennessee, Vermont, Washington, West Virginia, and Wyoming.

⁶ The thirty-two jurisdictions are: Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin.

The partitioning of current rule 1-400 into several rules corresponding to Model Rule counterparts is preferable because advertising of legal services and the solicitation of potential clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts. The current widespread use of the Internet by lawyers and law firms to market their services and the trend in most jurisdictions, including California, toward permitting some form of multijurisdictional practice, warrants such national uniformity.

Proposed Rule 7.1 sets out the general prohibition against a lawyer making false and misleading communications concerning the availability of legal services.

Proposed Rule 7.2 will specifically address advertising, a subset of communication.

Proposed Rule 7.3 will regulate marketing of legal services through direct contact with a potential client either by real-time communication such as delivered in-person or by telephone, or by directly targeting a person known to be in need of specific legal services.

Proposed Rule 7.4 will regulate the communication of a lawyer's fields of practice and claims to specialization.

Proposed Rule 7.5 will regulate the use of firm names and letterheads.

- Cons: There is no evidence that current rule 1-400, when applied in conjunction with Business & Professions Code §§ 6157 et seq., does not provide an adequate basis for regulating the field of lawyer advertising.

2. Recommend adoption of Model Rule 7.1(a), as modified that serves as a general prohibition against false or misleading communications.

- Pros: A general prohibition coextensive with the commercial speech doctrine provides public protection by setting an enforceable standard for evaluating lawyer communications. Like current rule 1-400, the concept of a "communication" encompasses advertising as well as firm names and letterheads as subsets of communications and other rules address these subsets and refer back to Rule 7.1.
- Cons: There is no evidence that current rule 1-400 does not effectively regulate lawyer advertising in California. Together with Business & Professions Code §§ 6157 et seq., the existing regulatory scheme provides the State Bar with an array of useful tools for both guiding lawyer compliance and disciplining lawyers when necessary to protect the public.

3. Recommend adoption of Model Rule 7.1(b) to continue the authority granted to the State Bar Board of Trustees by the California Supreme Court that permits, but does not require, the Board to adopt standards as to communications that are presumed to violate the advertising rules.
 - Pros: The standards address longstanding problem areas that have been identified by the State Bar. They give guidance to lawyers and they are used by State Bar enforcement staff in minor misconduct matters involving, for example, warning letters and resource letters where complaints are closed following contact with a respondent lawyer. The standards have been cited by the State Bar Court Review Department (see *In the Matter of Respondent V* (1995) 3 Cal. State Bar Ct. Rptr. 442, 457.) The use of advertising standards as presumptions is also found in the State Bar Act (see Bus. & Prof. Code §§ 6158.1 and 6158.2). Although the Commission is recommending changes to the existing standards (deleting some, moving others to the black letter or Comments of the rules in the 7 series), the authority granted by the Supreme Court should be retained. (See the Standards Cross-Reference Table, that identifies the disposition of each of the current standards. It is a separate attachment to this Report.)
 - Cons: The standards are not necessary to regulate inherently false and deceptive advertising. As presently framed, the presumptions force lawyers to have to prove a negative. They create a lack of predictability with respect to how a particular bar regulator will view a given advertisement. The standards also create a risk of inconsistent enforcement and an unchecked opportunity to regulate “taste” and “professionalism” in the name of “misleading” advertisements. In the absence of deception or illegal activities, regulations concerning the content of advertisements are constitutionally permitted only if they are narrowly drawn to advance a substantial governmental interest. (*Central Hudson Gas & Elec. v. Pub. Serv. Comm’n* (1980) 447 U.S. 557; *Alexander v. Cahill* (2d Cir. 2010) 598 F.3d. 79 [state’s ban on “advertising techniques” that are no more than potentially misleading are unconstitutionally broad].) The standards are not “guidelines.” The “standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules” rule 1-400(E). They are intended to serve no other purpose.
4. Recommend adoption of Comment [1], as a modified version of Model Rule 7.1, Cmt. [1].
 - Pros: The Comment explains the breadth of the concept of lawyer “communication” about a lawyer or the lawyer’s services and is consistent with the similar concept in current rule 1-400(A). In addition, it makes clear that communications include messages made by or on behalf of a lawyer.
 - Cons: If the goal is to simplify the advertising rules, then a black letter statement of a general prohibition coextensive with the commercial speech

standard is sufficient and Comments are unnecessary and may pose a risk of diluting or expanding the general prohibition.

5. Recommend adoption of Comment [2] as a Comment that has no counterpart in Model Rule 7.1 but carries forward a specific restriction found in current rule 1-400(E), Standard No. 1.
 - Pros: This change retains the longstanding prohibition of guarantees, warranties, or predictions concerning the result of a representation. It also eliminates the potentially risky suggestion in the current standard that a lawyer might be able to rebut the misleading character of such communications. In fact, the State Bar Act states an absolute prohibition on a guarantee or warranty (see Bus. & Prof. Code §§ 6157.2(a).)
 - Cons: This Comment is merely an example, albeit a clear example, of a communication that violates the rule. It is unnecessary given the Commission's charter indicating that Comments be used sparingly.
6. Recommend adoption of Comment [3], a modified version of Model Rule 7.1, Cmt. [2]. The Commission recommends including this Comment to: (i) clarify that a truthful statement might nevertheless be presented in manner that is misleading, such as through a material omission; and (ii) move to the Comments the guidance provided by existing Standard No. 14 regarding prohibited communications that state or imply "no fee without recovery."
 - Pros: This Comment promotes compliance with the Rule by explaining an important point found in lawyer advertising case law regarding the misleading presentation of truthful information. This Comment also carries forward as a Comment, the concept of existing Standard No. 14 that when a lawyer communicates that a client might not incur any legal fees, that communication must also address the issue of costs to avoid a misleading omission. (See Bus. & Prof. Code §§ 6157.2(d).) (See also *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio* (1985) 471 U.S. 626, 652-653 and current rule 1-400(D)(3).) In addition, OCTC has commented in support of retaining Standard No. 14.
 - Cons: The general prohibition in paragraph (a) adequately addresses misleading statements and omission of material facts.
7. Recommend adoption of Comment [4], a modified version of Model Rule 7.1, Cmt. [3]. This Comment highlights the concept of reasonable v. unjustified client expectations in evaluating whether a communication violates the rule.
 - Pros: This Comment emphasizes that a lawyer should consider a proposed communication from the perspective of a consumer of legal services in order to evaluate the communication under the false, deceptive or misleading test.

- Cons: This information, including an example, seems more appropriate for an ethics opinion.
8. Recommend adoption of Comment [5] which carries forward a specific restriction found in current rule 1-400(E), Standard No. 15. Current Standard No. 15 addresses lawyer communications that hold out to the public an ability to provide legal services in a language other than English.
- Pros: A lawyer's communication of a foreign language ability is helpful information to a consumer in choosing an attorney, but it can also mislead a potential client who has expectations that a lawyer, as opposed to a non-lawyer, possesses the foreign language ability. Whether as a Comment or as a standard, the concept should be specifically addressed in the rule. (Compare Bus. & Prof. Code § 6158.2(o) [stating that information concerning foreign language ability is permissible in electronic media advertising provided the message as a whole is not false, misleading or deceptive].)
 - Cons: None identified.
9. Recommend adoption of Comment [6] as a Comment that has no counterpart in Model Rule 7.1 but provides information about other applicable law. This Comment clarifies that the rules are not the only authorities regulating lawyer advertising, citing the State Bar Act and noting that federal laws might also apply.
- Pros: As a disciplinary rule, this Comment alerts a lawyer to other applicable law. It promotes compliance because certain issues that do not appear in the rules are present in the State Bar Act, such as special regulations on advertisements for immigration services (see, e.g., Bus. & Prof. Code § 6157.5.)
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Retain Model Rule 7.1, Comment [4] in some form. Model Rule 7.1 Comment [4] provides a cross reference to Model Rule 8.4(e) that prohibits a lawyer from stating or implying an ability to exert improper influence on an official or government agency.
- Pros: The Commission is recommending adoption of a direct counterpart to Model Rule 8.4(e).
 - Cons: Although the Commission is recommending adoption of a direct counterpart to Model Rule 8.4(e), the Commission must take account of the Commission's charter indicating that Comments be used sparingly.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. The Commission believes that current rule 1-400 must be applied consistent with the commercial speech doctrine. Although rule 1-400 includes certain provisions that are more detailed statements of what constitutes a false, deceptive or misleading communication (see, e.g., rule 1-400(D)(4) regarding a communication that fails to indicate expressly or by context that it is a promotional message concerning legal services), the general prohibition is substantively the same as the proposed rule.

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term “lawyer” for “member”.
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model rules numbering and formatting (e.g., lower case letters).
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

The Commission considered retaining the California approach to the regulation of lawyer advertising and solicitation.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 7.1 [1-400] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 7.1 [1-400] in the form attached to this Report and Recommendation.

Current CA Rule 1-400 Advertising Standard	Text of Current CA Rule 1-400 Advertising Standard	Retained/ Repealed/ Relocated ¹	New Location, If Any
(1)	A “communication” which contains guarantees, warranties, or predictions regarding the result of the representation.	Relocated	Rule 7.1 Comment [2]
(2)	A “communication” which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as “this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter.”	Relocated	Rule 7.1 Comment [4]
(3)	A “communication” which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.	Repealed	(But see Rule 7.3(b)(2))
(4)	A “communication” which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.	Repealed	(Compare B&P §6152(a)(1) re running/capping)
(5)	A “communication,” except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word “Advertisement,” “Newsletter” or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word “Advertisement,” “Newsletter” or words of similar import on the outside thereof.	Relocated	Rule 7.3(c)
(6)	A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.	Relocated	Rule 7.5(b)

¹ **Retained** – The current Standard has been retained as a Standard in proposed Rule 7.1.
Repealed – The current Standard has been repealed.
Relocated – The substance of the current Standard has been modified and moved to either the black letter text of a proposed rule or to a “Comment” to a proposed rule.

Current CA Rule 1-400 Advertising Standard	Text of Current CA Rule 1-400 Advertising Standard	Retained/ Repealed/ Relocated ¹	New Location, If Any
(7)	A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.	Relocated	Rule 7.5(c)
(8)	A “communication” which states or implies that a member or law firm is “of counsel” to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.	Repealed	(Compare Rule 7.5(c) although that provision does not refer to “of counsel”) See also, Rule 1.0.1 [Terminology] Comment [2] which incorporates a similar definition
(9)	A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.	Repealed	(But see Rule 7.5(a) stating that such names must comply with Rule 7.1, prohibiting false or misleading communications)
(10)	A “communication” which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.	Repealed	(But see Rule 7.1(a) for the general prohibition against any false or misleading content)
(11)	(Repealed. See rule 1-400(D)(6) for the operative language on this subject.)	Repealed	(Note: substance of Rule 1-400(D)(6) found in Rule 7.4(a))

Current CA Rule 1-400 Advertising Standard	Text of Current CA Rule 1-400 Advertising Standard	Retained/ Repealed/ Relocated ¹	New Location, If Any
(12)	A “communication,” except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.	Relocated	Rule 7.2(c) (<u>Note</u> : unlike Stnd. No. 12, a name of a lawyer is not required if a name of a law firm is provided)
(13)	A “communication” which contains a dramatization unless such communication contains a disclaimer which states “this is a dramatization” or words of similar import.	Repealed	(Compare B&P §6157.2(c) re impersonations, dramatizations, & spokespersons)
(14)	A “communication” which states or implies “no fee without recovery” unless such communication also expressly discloses whether or not the client will be liable for costs.	Relocated	Rule 7.1 Comment [3]
(15)	A “communication” which states or implies that a member is able to provide legal services in a language other than English unless the member can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.	<div> <div>Alternatives:</div> <div> Option 1 = Relocated </div> <hr/> <div> Option 2 = Retained </div> </div>	<div> Option 1 Rule 7.1 Comment [5] </div> <hr/> <div> Option 2 Rule 7.1 Standard </div>

Current CA Rule 1-400 Advertising Standard	Text of Current CA Rule 1-400 Advertising Standard	Retained/ Repealed/ Relocated ¹	New Location, If Any
(16)	An unsolicited “communication” transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or “yellow pages” section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.	Relocated	Rule 7.2 Comment [1]

Proposed Rule 7.1 [1-400] Communications Concerning a Lawyer's Services
Synopsis of Public Comments

TOTAL = 1 **A = 0**
D = 1
M = 0
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-21ac	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	D		<p>1. OCTC believes the current rule is working fine and disagrees with separate rules for communications, advertising, and solicitation. A unitary rule is clearer and more enforceable.</p> <p>2. OCTC believes there is no reason to eliminate presumptions.</p>	<p>1. The Commission does not agree that the current rule works well. The Commission continues to believe that the current rule has proven to be outdated and unworkable particularly in regard to the Internet and other modern client development tools. In addition, the Commission continues to believe it is crucial, in light of multijurisdictional practice of law and the Internet, that California move with other jurisdictions toward a national standard for the rules governing advertising and solicitation. Adopting the national approach will afford great public protection.</p> <p>2. The Commission continues to take the position that the standards are not necessary to regulate inherently false and deceptive advertising. As presently framed, the presumptions force lawyers to prove a negative. They create a lack of predictability with respect to how a particular bar regulator will view a given</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Proposed Rule 7.1 [1-400] Communications Concerning a Lawyer's Services
Synopsis of Public Comments

TOTAL = 1 **A = 0**
D = 1
M = 0
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						<p>advertisement. The standards also create a risk of inconsistent enforcement and an unchecked opportunity to regulate "taste" in the name of "misleading" advertisements. In the absence of deception or illegal activities, regulations concerning the content of advertisements are constitutionally permitted only if they are narrowly drawn to advance a substantial governmental interest. <i>Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n</i>, 447 U.S. 557 (1980); <i>Alexander v. Cahill</i>, 598 F.3d. 79 (2d Cir. 2010) (state's ban on "advertising techniques" that are no more than potentially misleading are unconstitutionally broad). In any event, the content of the standards have largely been carried forward as blackletter provisions or comments.</p> <p>In sum, the presumptions are also outdated and serve more as barriers to delivering useful information to consumers rather than as presumptions affecting the burden of proof in disciplinary cases, which is their intended purpose. As drafted, proposed Rule 7.1 is</p>

Proposed Rule 7.1 [1-400] Communications Concerning a Lawyer's Services
Synopsis of Public Comments

TOTAL = 1 **A = 0**
D = 1
M = 0
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						<p>an enforceable standard that will achieve greater public protection and uniformity in regulation while allowing consumers to receive needed information concerning the availability of legal services.</p> <p>Nevertheless, the Commission believes it essential that the Board's authority to promulgate standards be maintained in the event new technology or changes in the delivery of legal services warrant a new standard. Consequently, Rule 7.1(b) has been retained in the rule.</p>

PROPOSED RULES OF PROFESSIONAL CONDUCT 7.2, 7.3, 7.4 & 7.5
(Current Rule 1-400)
Advertising and Solicitation

EXECUTIVE SUMMARY

The Commission evaluated current rule 1-400 (Advertising and Solicitation) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the ABA counterparts to rule 1-400, which comprise a series of rules that are intended to regulate the commercial speech of lawyers: Model Rules 7.1 (Communication Concerning A Lawyer's Services), 7.2 (Advertising), 7.3 (Solicitation of Clients), 7.4 (Communication of Fields of Practice and Specialization), and 7.5 (Firm Names and Letterheads).

Rule As Issued For 90-day Public Comment

The result of the Commission's evaluation is a three-fold recommendation for implementing:

- (1) The Model Rules' framework of having separate rules that regulate different aspects of lawyers' commercial speech:

Proposed Rule **7.1** sets out the general prohibition against a lawyer making false and misleading communications concerning the availability of legal services.

Proposed Rule **7.2** will specifically address advertising, a subset of communication.

Proposed Rule **7.3** will regulate marketing of legal services through direct contact with a potential client either by real-time communication such as delivered in-person or by telephone, or by directly targeting a person known to be in need of specific legal services.

Proposed Rule **7.4** will regulate the communication of a lawyer's fields of practice and claims to specialization.

Proposed Rule **7.5** will regulate the use of firm names and trade names.
- (2) The retention of the Board's authority to adopt advertising standards provided for in current rule 1-400(E). Amendments to the Board's standards, including the repeal of a standard, require only Board action; however, many of the Commission's changes to the advertising rules themselves are integral to what is being recommended for the Board adopted standards. Although the Commission is recommending the repeal of all of the existing standards, many of the concepts addressed in the standards are retained and relocated to either the black letter or the comments of the proposed rules.
- (3) The elimination of the requirement that a lawyer retain for two years a copy of any advertisement or other communication regarding legal services.

The five proposed rules were adopted by the Commission during its March 31-April 1, 2016 meeting for submission to the Board of Trustees for public comment authorization. Following consideration of public comment, there were no substantive changes made to proposed Rules

7.2, 7.3, 7.4, and 7.5. A change was made to proposed Rule 7.1 and is not part of this request for adoption, as we are requesting circulation for a second public comment period. See the Executive Summary for proposed Rule 7.1 provided with the Commission's request for an additional public comment authorization.

1. Recommendation of the ABA Model Rule Advertising & Solicitation Framework.

The partitioning of current rule 1-400 into several rules corresponding to Model Rule counterparts is recommended because advertising of legal services and the solicitation of potential clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts. The current widespread use of the Internet by lawyers and law firms to market their services and the trend in most jurisdictions, including California, toward permitting some form of multijurisdictional practice, warrants such national uniformity. In addition, a degree of uniformity should follow from the fact that all jurisdictions are bound by the constitutional commercial speech doctrine when seeking to regulate lawyer advertising and solicitation.

2. Recommendation to repeal or relocate the current Standards into the black letter or comments of the relevant proposed rule but to retain current rule 1-400(E), which authorizes the Board to promulgate Standards.

The standards are not necessary to regulate inherently false and deceptive advertising. The Commission reviewed each of the standards and determined that most fell into that category. Further, as presently framed, the presumptions force lawyers to prove a negative. They thus create a lack of predictability with respect to how a particular bar regulator might view a given advertisement. The standards also create a risk of inconsistent enforcement and an unchecked opportunity to improperly regulate "taste" and "professionalism" in the name of "misleading" advertisements. In the absence of deception or illegal activities, regulations concerning the content of advertisements are constitutionally permitted only if they are narrowly drawn to advance a substantial governmental interest. *Central Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010) (state's ban on "advertising techniques" that are no more than potentially misleading are unconstitutionally broad).

Nevertheless, although the Commission's review led it to conclude that none of the current standards should be retained as standards, it determined that proposed rule 7.1 should carry forward current rule 1-400(E), the standard enabling provision, in the event future developments in communications or law practice might warrant the promulgation of standard to regulate lawyer conduct.

3. Recommendation to eliminate the record-keeping requirement. Following the lead of most jurisdictions in the country and the ABA itself, the Commission recommends eliminating the two-year record-keeping requirement in current rule 1-400(F). The ABA Ethics 2000 Commission explained the rationale:

"The requirement that a lawyer retain copies of all advertisements for two years has become increasingly burdensome, and such records are seldom used for disciplinary purposes. Thus the Commission, with the concurrence of the ABA Commission on Responsibility in Client Development, is recommending elimination of the requirement that records of advertising be retained for two years." (See ABA Reporter's Explanation of Changes, Rule 7.2(b).)

The Commission also notes that because a "web page" is an electronic communication, (see State Bar Formal Ethics Op. 2001-155), it would be extraordinarily burdensome to require a

lawyer to retain copies of each web page given how often the information on web pages are changed, and how often web pages are deleted. Nevertheless, the Commission also notes that even with the deletion of the requirement in rule 1-400(F), a one-year retention requirement would remain in Business and Professions Code section 6159.1. To address this discrepancy, the rule submission to the Supreme Court should include a note to this effect and recommend that, with the Supreme Court's approval, the State Bar approach the legislature with a recommendation to delete that requirement.

A description of each of the proposed rules follows.

Rule 7.2 (Advertising)

As noted, proposed Rule 7.2 will specifically address advertising, a subset of communication.

Paragraph (a), derived from MR 7.2(a) as modified, permits lawyers to advertise to the general public their services through any written, recorded or electronic media, provided the advertisement does not violate proposed Rule 7.1 (prohibition on false or misleading communications) or 7.3 (prohibition on in-person, live telephone or real-time electronic communications). The addition to MR 7.2(a) language of the terms "any" and "means of" are intended to signal that the different modes of communication listed (written, recorded and electronic) are expansive and not limited to currently existing technologies.

Paragraph (b) prohibits a lawyer from paying a person for recommending the lawyer's services except in the enumerated circumstances set forth in subparagraphs (b)(1) through (b)(5). Subparagraph (b)(1) carries forward current rule 1-320's Discussion paragraph, which does not "preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment." The term "reasonable" was added to modify "costs" to ensure such advertising costs do not amount to impermissible fee sharing with a nonlawyer. Subparagraph (b)(2) clarifies that payment of "usual charges" to a qualified lawyer referral service is not the impermissible sharing of fees with a nonlawyer. Subparagraph (b)(3) carries forward the exception in current rule 2-200(B). Subparagraph (b)(4) has no counterpart in the California Rules. However, permitting reciprocal referral arrangements recognizes a common mechanism by which clients are paired with lawyers or nonlawyer professionals. Because these arrangements are permitted only so long as they are not exclusive and the client is made aware of them, public protection is preserved. Subparagraph (b)(5) carries forward the substance of the second sentence of current rules 2-200(B) and 3-120(B), which permit such gifts to lawyers and nonlawyers, respectively.

Paragraph (c), derived from Model Rule 7.2(c), as modified, requires the name and address of at least one lawyer responsible for the advertisement's content. It carries forward the concept in current Standard No. 12.

There are four comments that provide interpretative guidance or clarify how the rule should be applied. Comment [1] provides interpretive guidance on the kinds of information that would generally not be false or misleading by providing a non-exhaustive list of permissible information. The comment's last sentence carries forward the substance of rule 1-400, Standard No. 16 regarding misleading fee information. Comment [2] clarifies that neither Rule 7.2 nor 7.3 [Solicitation of Clients] prohibits court-approved class action notices, a common form of communication with respect to the provision of legal services. Comment [3] provides interpretive guidance by clarifying that a lawyer may not only compensate media outlets that publish or air the lawyer's advertisements, but also may retain and compensate employees or outside

contractors to assist in the marketing the lawyer's services, subject to proposed Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants). Comment [4] clarifies how the rule should be applied to reciprocal referral arrangements, as permitted under subparagraph (b)(4), specifically focusing on the concept that such arrangements must not compromise a lawyer's independent professional judgment.

Rule 7.3 (Solicitation of Clients)

As noted, proposed Rule 7.3 will regulate marketing of legal services through direct contact with a potential client either by real-time communication such as delivered in-person or by telephone, or by directly targeting a person known to be in need of specific legal services through other means, e.g., letter, email, text, etc. It carries forward concepts that are found in current rule 1-400(B), (C), (D)(5) and Standard Nos. 3, 4 and 5.

Paragraph (a), derived from MR 7.3(a), carries forward the concept of current rule 1-400(C), which contains the basic prohibition against what is traditionally understood to constitute improper "solicitation" of legal business by a lawyer engaging in real-time communication with potential clients. The concern is the ability of lawyers to employ their "skills in the persuasive arts" to overreach and convince a person in need of legal services to retain the lawyer without the person having had time to reflect on this important decision. The provision thus eliminates the opportunity for a lawyer to engage in real-time (i.e., contemporaneous and interactive) communication with a potential client. The term "real-time electronic contact" has been added from Model Rule 7.3 because the same concerns regarding in-person or live telephone communications applies to real-time electronic contact such as communications in a chat room or by instant messaging. The two exceptions to such solicitations are included because there is significantly less concern of overreaching when the solicitation target is another lawyer or has an existing relationship with the soliciting lawyer.

Paragraph (b), derived from MR 7.3(b), is a codification of *Shapero v. Kentucky Bar Ass'n* (1988) 486 U.S. 466, in which the Supreme Court held that a state could not absolutely prohibit direct targeted mailings. The provision, however, recognizes that there are instances in which even any kind of communication with a client, including those permitted under Rule 7.2, are prohibited. Such circumstances include when the person being solicited has made known to the lawyer a desire not to be contacted or when the solicitation by the lawyer "is transmitted in any manner which involves intrusion, coercion, duress or harassment." The latter situation largely carries forward the prohibition in current rule 1-400(D)(5). The Commission, however, determined that additional language in the latter provision, i.e., "compulsion," "intimidation," "threats" and "vexatious conduct," are subsumed in the four recommended terms: "intrusion, coercion, duress and harassment."

Paragraph (c), derived from MR 7.3(c), largely carries forward current rule 1-400, Standard No. 5, and requires that every written, recorded or electronic communication from a lawyer seeking professional employment from a person known to be in need of legal services in a particular matter, i.e., direct targeted communications, must include the words "Advertising Material" or words of similar import. The provision is intended to avoid members of the public being misled into believing that a lawyer's solicitation is an official document that requires their response.

Paragraph (d), derived from MR 7.3(d), would permit a lawyer to participate in a pre-paid or group legal service plan even if the plan engages in real-time solicitation to recruit members. Such plans hold promise for improving access to justice. Further, unlike a lawyer's solicitation of a potential client for a particular matter where there exists a substantial concern for

overreaching by the lawyer, there is little if any concern if the plan itself engages in in-person, live telephone or real-time electronic contact to solicit members in the organization.

Paragraph (e), derived in part from MR 7.3, cmt. [1], has been added to the black letter to clarify that a solicitation covered by this Rule: (i) can be oral, (paragraph (a)) or written (paragraph (b)); and (ii) is a communication initiated by or on behalf of the lawyer. The first point is important because the traditional concept of a “solicitation” is of a “live” oral communication in-person or by phone. The second point is an important reminder that a lawyer cannot avoid the application of the rule by acting through a surrogate, e.g., runner or capper.

There are four comments that provide interpretative guidance or clarify how the rule should be applied. Comment [1] clarifies that a communication to the general public or in response to an inquiry is not a solicitation. Comment [2] provides an important clarification that a lawyer acting pro bono on behalf of a bona fide public or charitable legal services organization is not precluded under paragraph (a) from real-time solicitation of a potential plaintiff with standing to challenge an unfair law, e.g., school desegregation laws. This clarification can contribute to access to justice by alerting lawyers that real-time solicitations under conditions present in the cited Supreme Court opinion, *In re Primus*, are not prohibited. Comment [3] clarifies the application of paragraph (d). Comment [4] clarifies that regardless of whether the lawyer is providing services under the auspices of a permitted legal services plan, the lawyer must comply with the cited rules.

Savings Clause. In addition to the foregoing recommended adoptions, the Commission recommends the deletion of the savings clause in current rule 1-400(C) (“unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California.”) The clause was added to the original California advertising rule in 1978 following the Supreme Court’s decision in *Bates v. State Bar of Arizona*, when it was uncertain the extent to which limitations placed on lawyer commercial speech could survive Constitutional challenge. The clause’s continued vitality is questionable at best. Through its decisions in the decades since *Bates*, the Supreme Court has repeatedly held that a state’s regulation of a lawyer’s initiation of in-person or telephonic contact with a member of the public does not violate the First Amendment. The Commission concluded that the clause is no longer necessary.

Current Rule 1-400(B)(2)(b). The Commission also recommends the deletion of current rule 1-400(B)(2)(b), which includes in that rule’s definition of “solicitation” a communication delivered in person or by telephone that is “(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.” In recommending its deletion, the Commission reasoned that although the conduct described in 1-400(B)(2)(b) might give rise to a civil remedy for tortious interference with a contractual relationship, the provision does not belong in a disciplinary rule. Moreover, there are potential First Amendment issues with retaining this prohibition.

Rule 7.4 (Communication of Fields of Practice and Specialization)

As noted, proposed Rule 7.4 will regulate the communication of a lawyer's fields of practice and claims to specialization. It carries forward concepts that are found in current rule 1-400(D)(6).

Paragraph (a), derived from MR 7.4(d), as modified, states the general prohibition against a lawyer claiming to be a “certified specialist” unless the lawyer has been so certified by the Board of Legal Specialization or any accrediting entity designated by the Board. Placing this provision first is a departure from the Model Rule paragraph order. However, in conformance with the

general style format for disciplinary rules, the Commission concluded that this prohibitory provision should come first, followed by paragraph (b), which identifies statements a lawyer is permitted to make regarding limitations on the lawyer's practice.

Paragraph (b), derived from MR 7.4(a), permits a lawyer to communicate that the lawyer does or does not practice in particular fields of law. A sentence has been added that provides a lawyer may engage in a common practice among lawyers who market their availability by communicating that the lawyer's practice specializes in, is limited to, or is concentrated in a particular field of law.

The Commission does not believe any comments are necessary to clarify the black letter of the proposed rule.

Recommended rejections of Model Rule provisions. The Commission does not recommend adoption of MR 7.4(b) or (c), both of which are statements regarding practice limitations or specializations that have been traditionally recognized (patent law in MR 7.4(b) and admiralty law in MR 7.4(c)), but which come within the more general permissive language of proposed paragraph (b).

Rule 7.5 (Firm Names and Trade Names)

As noted, proposed Rule 7.5 will regulate the use of firm names and trade names. It carries forward concepts in current rule 1-400(A), which identifies the kinds of communications the rule is intended to regulate, and Standard Nos. 6 through 9.

Paragraph (a) sets forth the general prohibition by clarifying that any use of a firm name, trade name or other professional designation is a "communication" within the meaning of proposed Rule 7.1(a) and, therefore must not be false or misleading. The Commission, however, recommends departing from both current rule 1-400 and MR 7.5 by eliminating the term "letterhead," which is merely a subset of "professional designation" and has largely been supplanted by email signature blocks. (See also discussion re the single comment to this Rule.

Paragraph (b), derived from the second sentence of MR 7.5(a), as modified to be prohibitory rather than permissive, carries forward the concept in Standard No. 6 regarding communications that state or imply a relationship between a lawyer and a government agency.¹

Paragraph (c), derived from MR 7.5(d), as modified to be prohibitory rather than permissive, carries forward the concepts in Standard Nos. 7 and 8 that prohibit communications that state or imply a relationship between a lawyer and a law firm or other organization unless such a relationship exists.²

¹ Standard No. 6 provides the following is a presumed violation of rule 1-400:

(6) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.

² Standard Nos. 7 and 8 provide the following are presumed violations of rule 1-400:

(7) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other

There is a single comment that provides an explanation of the scope of the term, “other professional designation,” which includes not only letterheads but also more recent law marketing innovations such as logos, URLs and signature blocks.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made non-substantive stylistic edits to proposed Rule 7.2 and voted to recommend that the Board adopt the proposed rule.

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to proposed rules 7.3, 7.4, and 7.5. The commission voted to recommend that the Board adopt the proposed rule.

lawyer or law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.

(8) A “communication” which states or implies that a member or law firm is “of counsel” to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.

Current CA Rule 1-400 Advertising Standard	Text of Current CA Rule 1-400 Advertising Standard	Retained/ Repealed/ Relocated ¹	New Location, If Any
(1)	A “communication” which contains guarantees, warranties, or predictions regarding the result of the representation.	Relocated	Rule 7.1 Comment [2]
(2)	A “communication” which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as “this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter.”	Relocated	Rule 7.1 Comment [4]
(3)	A “communication” which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.	Repealed	(But see Rule 7.3(b)(2))
(4)	A “communication” which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.	Repealed	(Compare B&P §6152(a)(1) re running/capping)
(5)	A “communication,” except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word “Advertisement,” “Newsletter” or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word “Advertisement,” “Newsletter” or words of similar import on the outside thereof.	Relocated	Rule 7.3(c)
(6)	A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.	Relocated	Rule 7.5(b)

¹ **Retained** – The current Standard has been retained as a Standard in proposed Rule 7.1.
Repealed – The current Standard has been repealed.
Relocated – The substance of the current Standard has been modified and moved to either the black letter text of a proposed rule or to a “Comment” to a proposed rule.

Current CA Rule 1-400 Advertising Standard	Text of Current CA Rule 1-400 Advertising Standard	Retained/ Repealed/ Relocated ¹	New Location, If Any
(7)	A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.	Relocated	Rule 7.5(c)
(8)	A “communication” which states or implies that a member or law firm is “of counsel” to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.	Repealed	(Compare Rule 7.5(c) although that provision does not refer to “of counsel”) See also, Rule 1.0.1 [Terminology] Comment [2] which incorporates a similar definition
(9)	A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.	Repealed	(But see Rule 7.5(a) stating that such names must comply with Rule 7.1, prohibiting false or misleading communications)
(10)	A “communication” which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.	Repealed	(But see Rule 7.1(a) for the general prohibition against any false or misleading content)
(11)	(Repealed. See rule 1-400(D)(6) for the operative language on this subject.)	Repealed	(Note: substance of Rule 1-400(D)(6) found in Rule 7.4(a))

Current CA Rule 1-400 Advertising Standard	Text of Current CA Rule 1-400 Advertising Standard	Retained/ Repealed/ Relocated ¹	New Location, If Any
(12)	A “communication,” except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.	Relocated	Rule 7.2(c) (<u>Note</u> : unlike Stnd. No. 12, a name of a lawyer is not required if a name of a law firm is provided)
(13)	A “communication” which contains a dramatization unless such communication contains a disclaimer which states “this is a dramatization” or words of similar import.	Repealed	(Compare B&P §6157.2(c) re impersonations, dramatizations, & spokespersons)
(14)	A “communication” which states or implies “no fee without recovery” unless such communication also expressly discloses whether or not the client will be liable for costs.	Relocated	Rule 7.1 Comment [3]
(15)	A “communication” which states or implies that a member is able to provide legal services in a language other than English unless the member can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.	<div> <div>Alternatives:</div> <div> <div>Option 1 = Relocated</div> <div>Option 2 = Retained</div> </div> </div>	<div> <div>Option 1</div> <div>Rule 7.1 Comment [5]</div> </div> <div> <div>Option 2</div> <div>Rule 7.1 Standard</div> </div>

Current CA Rule 1-400 Advertising Standard	Text of Current CA Rule 1-400 Advertising Standard	Retained/ Repealed/ Relocated ¹	New Location, If Any
(16)	An unsolicited “communication” transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or “yellow pages” section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.	Relocated	Rule 7.2 Comment [1]

COMMISSION REPORT AND RECOMMENDATION: RULE 7.2 [1-400]

Commission Drafting Team Information

Lead Drafter: Carol Langford

Co-Drafters: Tobi Inlender, Howard Kornberg, Mark Tuft

I. RELEVANT EXCERPTS FROM CURRENT CALIFORNIA RULES 1-400, 1-320 & 2-200

Rule 1-400 Advertising and Solicitation

- (A) For purposes of this rule, “communication” means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

* * *

- (3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or

* * *

Standards:

Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of “communication” defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:

* * *

- (1) A “communication” which contains guarantees, warranties, or predictions regarding the result of the representation.

- (2) A “communication” which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as “this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter.”

* * *

- (10) A “communication” which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.

* * *

(12) A “communication,” except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.

(13) A “communication” which contains a dramatization unless such communication contains a disclaimer which states “this is a dramatization” or words of similar import.

(14) A “communication” which states or implies “no fee without recovery” unless such communication also expressly discloses whether or not the client will be liable for costs.

(15) A “communication” which states or implies that a member is able to provide legal services in a language other than English unless the member can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.

(16) An unsolicited “communication” transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or “yellow pages” section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.

Rule 1-320 Financial Arrangements with Non-Lawyers

(A) Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that:

* * *

(4) A member may pay a prescribed registration, referral, or participation fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California.

(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the

member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

- (C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.

Discussion:

Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment.

Rule 2-200 Financial Arrangements Among Lawyers

* * *

- (B) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 7.2 [1-400]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 7.2 [1-400]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 7.2 [1-400] Advertising

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through any written, recorded or electronic means of communication, including public media.
- (b) A lawyer shall not compensate, promise or give anything of value to a person or entity for the purpose of recommending or securing the services of the lawyer or the lawyer's law firm,* except that a lawyer may:
 - (1) pay the reasonable* costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal services plan or a qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California;
 - (3) pay for a law practice in accordance with Rule 1.17;
 - (4) refer clients to another lawyer or a nonlawyer professional pursuant to an arrangement not otherwise prohibited under these Rules or the State Bar Act that provides for the other person* to refer clients or customers to the lawyer, if
 - (i) the reciprocal referral arrangement is not exclusive, and
 - (ii) the client is informed of the existence and nature of the arrangement;
 - (5) offer or give a gift or gratuity to a person* or entity having made a recommendation resulting in the employment of the lawyer or the lawyer's law firm,* provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.
- (c) Any communication made pursuant to this Rule shall include the name and address of at least one lawyer or law firm* responsible for its content.

Comment

[1] This Rule permits public dissemination of accurate information concerning a lawyer and the lawyer's services, including for example, the lawyer's name or firm* name, the lawyer's contact information; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance. This Rule, however, prohibits the dissemination of false or misleading information, for example, an advertisement that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges or intends to charge a greater fee than that stated in the advertisement.

[2] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as court-approved class action notices.

Paying Others to Recommend a Lawyer

[3] Paragraph (b)(1) permits a lawyer to compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms* with respect to supervising the conduct of nonlawyers who prepare marketing materials and provide client development services.

[4] Paragraph (b)(4) permits a lawyer to make referrals to another lawyer or nonlawyer professional, in return for the undertaking of that person* to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Conflicts of interest created by arrangements made pursuant to paragraph (b)(4) are governed by Rule 1.7. A division of fees between or among lawyers not in the same law firm* is governed by Rule 1.5.1.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULES 1-400, 1-320 & 2-200)

Rule 7.2 Advertising

Proposed Rule 7.2(b) compared to current rule 1-320 (B), (C), (A)(4):

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through any written, recorded or electronic means of communication, including public media.

(Bb) A ~~member~~lawyer shall not compensate, promise or give, ~~or promise~~ anything of value to any person* or entity for the purpose of recommending or securing ~~employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or~~

~~the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.~~the services of the lawyer or the lawyer's law firm,* except that a lawyer may:

- (1) pay the reasonable* costs of advertisements or communications permitted by this Rule;
- ~~(G) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.~~
- ~~(A) Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that:~~
 - ~~(42) A member may pay a prescribed registration,~~the usual charges of a legal services plan or a qualified lawyer referral,~~or participation fee to service. A qualified lawyer referral service is~~ a lawyer referral service established, sponsored, and operated in accordance with the State Bar of ~~California's~~California's Minimum Standards for a Lawyer Referral Service in California.;
 - (3) pay for a law practice in accordance with Rule 1.17;
 - (4) refer clients to another lawyer or a nonlawyer professional pursuant to an arrangement not otherwise prohibited under these Rules or the State Bar Act that provides for the other person* to refer clients or customers to the lawyer, if

Proposed Rule 7.2(b) compared to the 2nd sentence of current rule 2-200(B):

- (i) the reciprocal referral arrangement is not exclusive, and
- (ii) the client is informed of the existence and nature of the arrangement;
- ~~(B5) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving~~offer or give a gift or gratuity to ~~any lawyer who has~~a person* or entity having made a recommendation resulting in the employment of the ~~member~~lawyer or the

~~member's~~lawyer's law firm* ~~shall not of itself violate this rule~~, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

Proposed Rule 7.2(c) compared to current Rule 1-400, Standard (12):

- (c) (12) A "communication," except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it. Any communication made pursuant to this Rule shall include the name and address of at least one lawyer or law firm* responsible for its content.

Comment

[1] This Rule permits public dissemination of accurate information concerning a lawyer and the lawyer's services, including for example, the lawyer's name or firm* name, the lawyer's contact information; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance. This Rule, however, prohibits the dissemination of false or misleading information, for example, an advertisement that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges or intends to charge a greater fee than that stated in the advertisement.

[2] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as court-approved class action notices.

Paying Others to Recommend a Lawyer

[3] Paragraph (b)(1) permits a lawyer to compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms* with respect to supervising the conduct of nonlawyers who prepare marketing materials and provide client development services.

[4] Paragraph (b)(4) permits a lawyer to make referrals to another lawyer or nonlawyer professional, in return for the undertaking of that person* to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Conflicts of interest created by arrangements made pursuant

[to paragraph \(b\)\(4\) are governed by Rule 1.7. A division of fees between or among lawyers not in the same law firm* is governed by Rule 1.5.1.](#)

V. RULE HISTORY

See Rule 7.1 Report and Recommendation, Section VI, for Rule 1-400 rule history.

VI. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC is concerned that with the proposal to make the current rule into several separate rules for communications, advertising, and solicitation for the same reasons expressed in its Comments to 7.1.

Commission Response: Please refer to response to commenter regarding proposed Rule 7.1.

2. If adopted, OCTC supports Comments [2], [3], and [4].

Commission Response: No response required.

3. OCTC is concerned that Comment 1 is unnecessary and merely repeats the Rule.

Commission Response: The Commission disagrees with the commenter's assessment. In addition to providing guidance as to the scope of the rule's application, the Comment's last sentence carries forward the content of current Standard (14).

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

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, six public comments were received. Three comments agreed with the proposed Rule and three comments disagreed. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

See Rule 7.1 Report and Recommendation, Section IX.A, for Rule 1-400 related California law.

B. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 7.2: Communication of Fields of Practice and Specialization,” revised September 15, 2016 is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_2.authcheckdam.pdf [last accessed 2/14/17]
- Six jurisdictions have adopted Model Rule 7.2 verbatim.¹ Fifteen jurisdictions have adopted a slightly modified version of Model Rule 7.2.² Twenty-eight jurisdictions have adopted a version of the rule that is substantially different from Model Rule 7.2.³ Two jurisdictions do not have a single rule counterpart to Model Rule 7.2.⁴

¹ The six jurisdictions are: Alaska, Iowa, Maine, Nebraska, West Virginia, and Wyoming.

² The fifteen jurisdictions are: Colorado, Delaware, Hawaii, Idaho, Illinois, Kansas, Massachusetts, Minnesota, New Hampshire, New Mexico, Oklahoma, Oregon, Vermont, Washington, and Wisconsin.

³ The twenty-eight jurisdictions are: Alabama, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Indiana, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah and Virginia.

⁴ The two jurisdictions are: District of Columbia and Texas. Although the District of Columbia does not have a separate rule, Model Rule 7.2(b) has been imported into D.C. Rule 7.1(c), which provides:

(c) A lawyer shall not pay money or give anything of material value to a person (other than the lawyer's partner or employee) in exchange for recommending the lawyer's services except that a lawyer may:

(1) Pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) Pay the usual and reasonable fees or dues charged by a legal service plan or a lawyer referral service;

(3) Pay for a law practice in accordance with Rule 1.17; and

(4) Refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(A) The reciprocal agreement is not exclusive, and

(B) The client is informed of the existence and nature of the agreement.

Texas has imported some of the concepts of Model Rule 7.2(b) into Texas Rule 7.03 [Prohibited Solicitations and Payments]. Texas addresses the concepts in Model Rule 7.4(a) in much greater detail than the Model Rule in Texas Rule 7.04 [Advertisements in the Public Media].

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of Model Rule 7.2, as modified.

- Pros: Model Rule 7.2 is part of the Commission's decision to adhere to the ABA Model Rule general framework for regulating lawyer advertising and solicitations for business by several separate rules, each of which addresses a general topic.

The partitioning of current rule 1-400 into several Rules corresponding to Model Rule counterparts is recommended because advertising of legal services and the solicitation of potential clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts. The current widespread use of the Internet by lawyers and law firms to market their services and the trend in most jurisdictions, including California, toward permitting some form of multijurisdictional practice, warrants such national uniformity.

Proposed Rule 7.1 sets out the general prohibition against a lawyer making false and misleading communications concerning the availability of legal services.

Proposed Rule 7.2 will specifically address advertising, a subset of communication.

Proposed Rule 7.3 will regulate marketing of legal services through direct contact with a potential client either by real-time communication such as delivered in-person or by telephone, or by directly targeting a person known to be in need of specific legal services.

Proposed Rule 7.4 will regulate the communication of a lawyer's fields of practice and claims to specialization.

Proposed Rule 7.5 will regulate the use of firm names and trade names.

- Cons: There is no evidence that current rule 1-400, when applied in conjunction with Business and Professions Code §§ 6157 et seq., does not provide an adequate basis for regulating the field of lawyer advertising.

2. Recommend adoption of Model Rule 7.2(a), as modified, which permits lawyers to advertise to the general public their services through any written, recorded or electronic media, provided the advertisement does not violate proposed Rule 7.1 (prohibition on false or misleading communications) or 7.3 (prohibition on in-person, live telephone or real-time electronic communications).

- Pros: Having a specific rule that governs communications intended for the general public will permit better understanding of a lawyer's duties as to those

communications as opposed to directed marketing, which is governed by proposed Rule 7.3.

The modifications to Model Rule 7.2(a) include the insertion of the terms “any” and “means of.” These two additional words are intended to signal that the different modes of communication listed (written, recorded and electronic) are expansive and not limited to currently existing technologies.

- Cons: There is no evidence that current rule 1-400 does not effectively regulate lawyer advertising in California. In any event, a separate rule addressing advertising is not necessary as proposed Rule 7.1, which prohibits false and misleading communications regarding the marketing of legal services, together with Business and Professions Code §§ 6157 et seq., adequately cover the field.
3. Recommend adoption of Model Rule 7.2(b), as modified, which prohibits a lawyer from paying a person for recommending the lawyer's services except in the enumerated circumstances.
- Pros: This provision incorporates in a single rule nearly identical provisions in current rules 2-200 and 1-320 which permit a lawyer to pay a gratuity to a person for recommending the lawyer, and also incorporates a Discussion section in 1-320 that permits a lawyer to pay for the cost of advertising. Proposed Rule 7.2 is the logical place for those provisions. The Model Rule language in the introductory paragraph has been strengthened by carrying forward the 1-320/2-200 language that prohibits not only “giving” anything of value, but also compensating or promising anything of value. Further, the prohibition extends to payments, etc., made to a person *or entity* for recommending the lawyer's *law firm*.

With respect to the specific exceptions in the subparagraphs of (b):

(1) Subparagraph (b)(1) carries forward current rule 1-320's Discussion paragraph, which does not “preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment.” The addition of “reasonable” to modify “costs” is appropriate to ensure that the compensation paid is for advertising and does not amount to impermissible fee sharing with a nonlawyer.

(2) Subparagraph (b)(2) clarifies that payment of “usual charges” to a qualified lawyer referral service is not the impermissible sharing of fees with a nonlawyer. The Model Rule language has been modified to more accurately describe the regulatory framework for lawyer referral services in California.

(3) Subparagraph (b)(3) carries forward the exception in current rule 2-200(B), which excepts from paragraph (b)'s prohibition payments made to purchase a law practice.

(4) Subparagraph (b)(4) has no counterpart in the California Rules. However, permitting reciprocal referral arrangements recognizes a common mechanism by which clients are paired with lawyers or nonlawyer professionals. Because these arrangements are permitted only so long as they are not exclusive and the client is made aware of them, public protection is preserved, as a lawyer would not be permitted to enter into an exclusive arrangement that might result in the client being referred to a nonlawyer professional simply because the lawyer will be compensated for the referral. Further, unlike the first Commission's proposed subparagraph (b)(4), these arrangements track Model Rule 7.2(b)(4) in providing that they may be made only with nonlawyer *professionals* to ensure client protection.

(5) Subparagraph (b)(5) carries forward the substance of the second sentence of current rule 2-200(B) and 3-120(B), which currently permit such gifts to lawyers and nonlawyers, respectively.

- Cons: Most of the provisions in paragraph (b) relate to payments to nonlawyers so they are more logically placed in a rule concerning financial arrangements with nonlawyers, i.e., proposed Rule 5.4 [1-320]. Subparagraphs (b)(4) and (b)(5) would also apply to lawyers; those provisions as they apply to lawyers would more logically be placed in the Rule regarding fee divisions with other lawyers, proposed Rule 1.5.1 [2-200].

4. Recommend adoption of Model Rule 7.2(c), as modified, to require the name and address of at least one lawyer responsible for the advertisement's content.

- Pros: Paragraph (c) carries forward the concept in rule 1-400, Standard (12), which provides the following is a presumed violation of rule 1-400:

“(12) A ‘communication,’ except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media **which does not state the name of the member responsible for the communication**. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it. (Emphasis added).

The term “address” has been substituted for “office address” in the Model Rule because the provision of a link to an email address on a web page, which is considered an advertisement, (see State Bar Formal Ethics Op. 2001-155), should provide sufficient information for discipline enforcement if warranted.

- Cons: If there is a requirement to provide an address, it should be the lawyer's physical office address. In deciding whether to retain a lawyer, a

member of the public should have information on that lawyer's physical location. For example, a prospective client in Southern California might want to exclude any lawyers in Northern California because of the difficulty in arranging an in-person meeting.

5. Recommend adoption of Comment [1], a substantially shortened version of Model Rule 7.2, Cmt. [2].

- Pros: The Comment provides interpretive guidance on what kinds of information would generally not be false or misleading by providing a list of typical information that is included. The last sentence of the Comment carries forward the substance of rule 1-400, Standard (16), providing an example of fee information that, if included in an advertisement, would be a violation of the Rule.⁵ (See the Standards Cross-Reference Table, that identifies the disposition of each of the current standards. It is a separate attachment to this Report.)
- Cons: The listing of permitted content is not necessary and is redundant, a similar list being found in Business and Professions Code § 6158.2. If a list is viewed as necessary, a cross-reference to § 6158.2 would be preferable.

⁵ Current rule 1-400, Standard (16), provides that the following facts are presumed to violated rule 1-400:

(16) An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.

The Commission determined that much of content of the second sentence of the standard, with its reference to "yellow pages" and "directories," to be antiquated and so does not recommend it being carried forward in the proposed Rule.

6. Recommend adoption of Comment [2], a modified version of Model Rule 7.2, Cmt. [4], concerning class action notices.
 - Pros: The Comment clarifies that neither Rule 7.2 nor 7.3 [Solicitation of Clients] prohibits court-approved class action notices, a common form of communication with respect to the provision of legal services. There was discussion whether to place this provision in Rule 7.3 rather than in this Rule but, in the interests of national uniformity, the Commission recommends including it here.
 - Cons: None identified.
7. Recommend adoption of Comment [3], a substantially reduced version of Model Rule 7.2, Cmt. [4], concerning payments for advertising pursuant to subparagraph (b)(1).
 - Pros: The Comment provides interpretive guidance by clarifying that a lawyer may not only compensate media outlets that publish or air the lawyer's advertisements, but also may retain and compensate employees or outside contractors to assist in the marketing the lawyer's or a law firm's services.
 - Cons: That a lawyer may retain such intermediaries to assist in the preparation of advertisements is implied in subparagraph (b)(1).
8. Recommend adoption of Comment [4], a substantially reduced version of Model Rule 7.2, Cmt. [8], concerning reciprocal referral arrangements under subparagraph (b)(4).
 - Pros: Comment [4] cautions that any such arrangement must not interfere with the referring lawyer's independent professional judgment, a critical consideration when a lawyer refers a client, to whom the lawyer owes a fiduciary duty, to another professional for either legal or non-legal services. It also notes that a lawyer must be aware that a conflict of interest may arise and refers the lawyer to Rule 1.7 regarding personal interest conflicts. Further, the Comment notes that a fee division arrangement *between lawyers* is governed by proposed Rule 1.5.1, not Rule 7.2.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Retain Model Rule 7.2, Comments [1], [6] and [7] in some form.
 - Pros: None identified.
 - Cons: All of the listed Comments are lengthy, discursive Comments that do not provide guidance on interpreting the blackletter or applying the rule:

Model Rule 7.2, Cmt. [1], provides the policy that underlies allowing and regulating, rather than prohibiting, lawyer advertising: public education about the availability of legal services.

Model Rule 7.2, Cmt. [6], is a lengthy discussion of subparagraph (b)(2) regarding the payment of the usual charges of a lawyer referral service which provides no insights into the rule's application. In any event, the blackletter does not need clarification.

Model Rule 7.2, Cmt. [7], discusses a lawyer's duties regarding a lawyer referral service or legal services plan that might provide the lawyer with a client referral. The duties are all in other rules. To the extent that these duties require explication, it is better done in those rules.

2. Include a Comment to explain paragraph (c), requiring an advertisement to include the address of a lawyer responsible for the advertisement's content.

- Pros: It would be helpful to lawyers to clarify that the required "address" can be a physical address, an email address, or a web link to such an address.
- Cons: Paragraph (c) is sufficiently clear so that no clarification is necessary.

3. Retain the requirement in current rule 1-400(F), which requires lawyers to retain a copy of any written or electronic advertisement for a period of two years.

- Pros: Retaining such advertisements provide evidence of a violation or compliance with the rule.
- Cons: The ABA removed the one-year retention requirement in Model Rule 7.2 in 2001. The Ethics 2000 Commission explained the rationale: "The requirement that a lawyer retain copies of all advertisements for two years has become increasingly burdensome, and such records are seldom used for disciplinary purposes. Thus the Commission, with the concurrence of the ABA Commission on Responsibility in Client Development, is recommending elimination of the requirement that records of advertising be retained for two years." (See ABA Reporter's Explanation of Changes, Rule 7.2(b).)

The Commission also points out that because a "web page" is an electronic communication, (see State Bar Formal Ethics Op. 2001-155), the burden to retain copies of each web page would be extraordinarily burdensome given how often the information on web pages are changed, and how often web pages are deleted.

Note to Board: Please note, however, that even with the deletion of requirement in rule 1-400(F), a one-year retention requirement would remain in Business and Professions Code § 6159.1. The rule submission to the Supreme Court should include a note to this effect and perhaps recommend that, with the

Supreme Court's approval, the State Bar approach the legislature with a recommendation to delete that requirement.

4. Retain current Rule 1-400, Standard (13), concerning dramatizations.

- Pros: Because use of dramatizations is a highly effective way to market services, many lawyers utilize them, so they should be expressly addressed in the Rules.
- Cons: The concern is with false or misleading dramatizations, which is adequately addressed in proposed Rule 7.1. Moreover, dramatizations are covered in Business and Professions Code § 6158.1(b). There is no need to repeat that coverage in the Rule. (See the Standards Cross-Reference Table, that identifies the disposition of each of the current standards. It is a separate attachment to this Report.)

5. Retain current Rule 1-400, Standards (14) and (15) concerning, respectively, a communication that states “no fee, no recovery” and a communication that represents legal services can be provided in a language other than English. (See the Standards Cross-Reference Table, that identifies the disposition of each of the current standards. It is a separate attachment to this Report.)

- Pros: These are very common types of advertising that mislead the public.
- Cons: Because both of these standards are directed to misleading *communications*, they are better addressed in proposed Rule 7.1 concerning false or misleading communications, where the Commission has recommended their retention as either Comments to the rule or as a standard.

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. The only substantive change in the proposed Rule is subparagraph (b)(4), which would permit a lawyer, with notice to the client, to enter into a non-exclusive reciprocal referral arrangement with a nonlawyer. Such an arrangement with another lawyer, on the other would be permitted under current rule 2-200 [proposed Rule 1.5.1].

D. Non-Substantive Changes to the Current Rule:

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

- Pros: The current Rules' use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The

Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

- Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model rules numbering and formatting (e.g., lower case letters).
- Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

The Commission considered retaining the California approach to the regulation of lawyer advertising and solicitation.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 7.2 [1-400] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 7.2 [1-400] in the form attached to this Report and Recommendation.

**Proposed Rule 7.2 [1-400, 1-320(B), (C), & (A)(4), 2-200(B)] Advertising
Synopsis of Public Comments**

TOTAL = 6 **A = 3**
D = 0
M = 3
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43ar	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	M	Cmt. [1]	<p>1. Rule permits better understanding of lawyer's duties relating to communications intended for the general public.</p> <p>2. Comment 1 should be amended to reference B&P Code 6158.2.</p>	<p>1. No response required.</p> <p>2. The Commission is not recommending the addition of a cross-reference to B&P §6158.2 in Rule 7.2 Cmt.[1] for two reasons. <i>First</i>, a cross reference to the entire State Bar Act article on lawyer advertising is included in Rule 7.1 Cmt.[6] and this renders it unnecessary to add a subsequent specific reference §6158.2. <i>Second</i>, § 6158.2 by its terms is limited to electronic media advertising and might lead to confusion about the scope of Rule 7.2 or the guidance in Cmt.[1], which do not share that limitation.</p>
X-2016-66z	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	M	(b)	<p>1. Only false and misleading advertising should result in discipline. The rest of the concepts in the advertising rules should be addressed administratively.</p>	<p>1. The focus of proposed Rule 7.1 is the prohibition of false or misleading communications, and Rule 7.2 specifically addresses advertising to the general public. The Commission disagrees, however, that the other rules, which govern the special circumstances related to</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Proposed Rule 7.2 [1-400, 1-320(B), (C), & (A)(4), 2-200(B)] Advertising
Synopsis of Public Comments**

TOTAL = 6 **A = 3**
D = 0
M = 3
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					2. Paragraph (b) of the rule should be revised to permit firms to compensate attorneys for internal referrals.	solicitation (7.3), specialization (7.4), and firm or trade names (7.5) do not raise concerns of public protection and should be relegated to administrative record-keeping. 2. The Commission declines to make the suggested change. There is nothing in proposed Rule 7.2 that precludes a law firm from compensate firm lawyers for internal referrals. Further, proposed Rule 1.5.1 [2-200] does not apply to referring lawyers in a firm.
X-2016-67f	Orange County Bar Association (OCBA) (Friedland) (9-16-16)	Y	A	7.2	Supports adoption of proposed Rule 7.2.	No response required.
X-2016-96d	Bar Association of San Francisco (BASF), Legal Ethics Committee (Banola) (9-27-16)	Y	A	(a), (b)(4)	1. Supports incorporation of standards into rule and the reference to public media. 2. Supports allowing cross-referrals between professions.	1. No response required. 2. No response required.
X-2016-104bg	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M		1. Concerned about making the advertising rule into several different parts. 2. Comment 1 is unnecessary and merely repeats the rule.	1. Please refer to response to commenter regarding proposed Rule 7.1. 2. The Commission disagrees with the commenter's assessment. In addition to providing guidance as to the

**Proposed Rule 7.2 [1-400, 1-320(B), (C), & (A)(4), 2-200(B)] Advertising
Synopsis of Public Comments**

TOTAL = 6 **A = 3**
D = 0
M = 3
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						scope of the rule's application, the Comment's last sentence carries forward the content of current Standard (14).
X-2016-120p	LGBT Bar Association of Los Angeles (LGBT Bar LA) (King) (9-27-16)	Y	A	7.2	Supports adoption of proposed Rule 7.2.	No response required.

**COMMISSION REPORT AND RECOMMENDATION:
RULE 7.3 [1-400(B), (C), (D)(5) and Stds. (3), (4), (5)]**

Commission Drafting Team Information

Lead Drafter: Carol Langford

Co-Drafters: Tobi Inlender, Howard Kornberg, Mark Tuft

I. RELEVANT EXCERPTS FROM CURRENT CALIFORNIA RULE 1-400

Rule 1-400 Advertising and Solicitation [(B), (C), (D)(5) & Stds. (3), (4), (5)]

* * *

(B) For purposes of this rule, a “solicitation” means any communication:

- (1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and
- (2) Which is:
 - (a) delivered in person or by telephone, or
 - (b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member’s or law firm’s professional duties is not prohibited.

(D) A communication or a solicitation (as defined herein) shall not:

* * *

- (5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

* * *

Standards:

Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of

“communication” defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:

* * *

(3) A “communication” which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.

(4) A “communication” which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.

(5) A “communication,” except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word “Advertisement,” “Newsletter” or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word “Advertisement,” “Newsletter” or words of similar import on the outside thereof.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 7.3

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 7.3

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION’S PROPOSED RULE (CLEAN)

Rule 1-400 [7.3] Solicitation of Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for doing so is the lawyer’s pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

- (b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
 - (1) the person being solicited has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress or harassment.
- (c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from any person known to be in need of legal services in a particular matter shall include the word “Advertisement” or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.
- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person, live telephone or real-time electronic contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.
- (e) As used in this Rule, the terms “solicitation” and “solicit” refer to an oral or written targeted communication initiated by or on behalf of the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services.

Comment

[1] A lawyer’s communication does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] Paragraph (a) does not apply to situations in which the lawyer is motivated by considerations other than the lawyer’s pecuniary gain. Therefore, paragraph (a) does not prohibit a lawyer from participating in constitutionally protected activities of bona fide public or charitable legal-service organizations, or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries. See, e.g., *In re Primus* (1978) 436 U.S. 412 [98 S.Ct. 1893].

[3] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a bona fide group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the

purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm* is willing to offer.

[4] Lawyers who participate in a legal service plan as permitted under paragraph (d) must comply with Rules 7.1, 7.2, and 7.3(b). See also Rules 5.4 and 8.4(a).

IV. COMMISSION'S PROPOSED RULE
(REDLINE TO CURRENT CALIFORNIA RULE 1-400(B), (C) & (D)(5) AND
STANDARDS (3), (4) & (5))

Rule 1-400 ~~Advertising~~ [7.3] Solicitation of Clients

(a) A lawyer shall not by in-person,* live telephone or real-time electronic contact solicit professional employment when a significant motive for doing so is the lawyer's pecuniary gain, unless the person contacted:

~~(B) For purposes of this rule, a "solicitation" means any communication:~~

~~(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and~~

~~(2) Which is: a lawyer; or~~

~~(a2) delivered in person or by telephone, or~~ has a family, close personal, or prior professional relationship with the lawyer.

~~(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.~~

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the person* being solicited has made known* to the lawyer a desire not to be solicited by the lawyer; or

~~(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.~~

~~(D) A communication or a solicitation (as defined herein) shall not:~~

* * * * *

- (52) ~~Be the solicitation is~~ transmitted in any manner which involves intrusion, coercion, duress, ~~compulsion, intimidation, threats, or vexatious or harassing conduct~~ or harassment.

* * * * *

- (c) ~~(5) A “communication,” except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word “Advertisement,” “Newsletter” or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word “Advertisement,” “Newsletter” or words of similar import on the outside thereof. Every written, recorded or electronic communication from a lawyer soliciting professional employment from any person* known* to be in need of legal services in a particular matter shall include the word “Advertisement” or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person* specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.~~
- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person, live telephone or real-time electronic contact to solicit memberships or subscriptions for the plan from persons* who are not known* to need legal services in a particular matter covered by the plan.
- (e) As used in this Rule, the terms “solicitation” and “solicit” refer to an oral or written* targeted communication initiated by or on behalf of the lawyer that is directed to a specific person* and that offers to provide, or can reasonably* be understood as offering to provide, legal services.

Standards:Comment

~~Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of “communication” defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:~~

- (3)[1] ~~A “lawyer’s communication” which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.~~ does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

~~(4) A “communication” which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.~~

[2] Paragraph (a) does not apply to situations in which the lawyer is motivated by considerations other than the lawyer’s pecuniary gain. Therefore, paragraph (a) does not prohibit a lawyer from participating in constitutionally protected activities of bona fide public or charitable legal-service organizations, or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries. See, e.g., *In re Primus* (1978) 436 U.S. 412 [98 S.Ct. 1893].

[3] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a bona fide group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer’s firm* is willing to offer.

[4] Lawyers who participate in a legal service plan as permitted under paragraph (d) must comply with Rules 7.1, 7.2, and 7.3(b). See also Rules 5.4 and 8.4(a).

V. COMMISSION’S PROPOSED RULE (REDLINE TO ABA MODEL RULE 7.3)

Rule 7.3 [1-400] Solicitation of Clients

- (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for ~~the lawyer’s~~ doing so is the lawyer’s pecuniary gain, unless the person contacted:
 - (1) is a lawyer; or
 - (2) has a family, close personal, or prior professional relationship with the lawyer.
- (b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
 - (1) the ~~target of the solicitation~~ person being solicited has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress or harassment.
- (c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from ~~anyone~~ any person known to be in need of legal services in a particular matter shall include the ~~words “Advertising Material”~~ word “Advertisement” or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the

recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.

- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person-~~or, live~~ telephone or real-time electronic contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

- ~~[1]-~~ A(e) As used in this Rule, the terms “solicitation-is-a” and “solicit” refer to an oral or written targeted communication initiated by or on behalf of the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services.

Comment

~~[1] –In contrast, a~~ A lawyer’s communication ~~typically~~ does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

~~[2]- There is a potential for abuse when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.~~

~~[3]- This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm a person’s judgment.~~

~~[4]- The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the~~

~~information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.~~

~~[52] There is far less likelihood that a lawyer would engage in abusive practices against a former client, or a person with whom the lawyer has a close personal or family relationship, or in~~Paragraph (a) does not apply to ~~situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also~~ Therefore~~, paragraph (a) is~~does ~~not intended to~~ prohibit a lawyer from participating in constitutionally protected activities of bona fide public or charitable ~~legal-service~~legal-service organizations, or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to ~~their~~its members or beneficiaries. See, e.g., In re Primus (1978) 436 U.S. 412.

~~[6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).~~

~~[73] This Rule is~~does ~~not intended to~~ prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a bona fide group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or ~~lawyer's~~lawyer's firm is willing to offer. ~~This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.~~

[4] Lawyers who participate in a legal service plan as permitted under paragraph (d) must comply with Rules 7.1, 7.2 and 7.3(b). See also Rules 5.4 and 8.4(a).

~~[8] The requirement in Rule 7.3(c) that certain communications be marked “Advertising Material” does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.~~

~~[9] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).~~

VI. RULE HISTORY

See Rule 7.1 Report and Recommendation, Section VI, for Rule 1-400 rule history.

VII. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC is concerned that with the proposal to make the current rule into several separate rules for communications, advertising, and solicitation for the same reasons expressed in its Comments to 7.1.

Commission Response: Please refer to response to commenter regarding proposed Rule 7.1.

2. If adopted, OCTC supports the Comments to this Rule.

Commission Response: No response required.

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

VIII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, six public comments were received. Six comments agreed with the proposed Rule, three comments disagreed, and one

comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

IX. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

See Rule 7.1 Report and Recommendation, Section IX.A, for Rule 1-400 related California law.

B. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 7.3: Communication of Fields of Practice and Specialization," revised September 9, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_3.authcheckdam.pdf [last checked 2/14/17]
- Seven jurisdictions have adopted Model Rule 7.3 verbatim.¹ Fourteen jurisdictions have adopted a slightly modified version of Model Rule 7.3.² Twenty-nine jurisdictions have adopted a version of the rule that is substantially different from Model Rule 7.3.³ One jurisdiction does not have a version of the Model Rule 7.3.⁴

¹ The seven jurisdictions are: Delaware, Idaho, Illinois, Iowa, Kansas, New Mexico, and Wyoming.

² The fourteen jurisdictions are: Alabama, Alaska, Maryland, Minnesota, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, Utah, Vermont, West Virginia, and Wisconsin.

³ The twenty-nine jurisdictions are: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Washington.

⁴ The jurisdiction is the District of Columbia. Although D.C. does not have a rule numbered 7.3, the concept of Model Rule 7.3 (direct communication with a person known to be in need of legal services) is found in D.C. Rule 7.3(b), (d), (e) and (f). D.C. Rule 7.3(b) provides:

(b) A lawyer shall not seek by in-person contact, employment (or employment of a partner or associate) by a nonlawyer who has not sought the lawyer's advice regarding employment of a lawyer, if:

(1) The solicitation involves use of a statement or claim that is false or misleading, within the meaning of paragraph (a);

(2) The solicitation involves the use of coercion, duress or harassment; or

(3) The potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer.

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of Model Rule 7.3, as modified.

- Pros: Model Rule 7.3 is part of the Commission's decision to adhere to the ABA Model Rule general framework for regulating lawyer advertising and solicitations for business by several separate rules, each of which addresses a general topic.

The partitioning of current rule 1-400 into several Rules corresponding to Model Rule counterparts is recommended because advertising of legal services and the solicitation of potential clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts. The current widespread use of the Internet by lawyers and law firms to market their services and the trend in most jurisdictions, including California, toward permitting some form of multijurisdictional practice, warrants such national uniformity.

Proposed Rule 7.1 sets out the general prohibition against a lawyer making false and misleading communications concerning the availability of legal services.

Proposed Rule 7.2 will specifically address advertising, a subset of communication.

Proposed Rule 7.3 will regulate marketing of legal services through direct contact with a potential client either by real-time communication such as delivered in-person or by telephone, or by directly targeting a person known to be in need of specific legal services.

Proposed Rule 7.4 will regulate the communication of a lawyer's fields of practice and claims to specialization.

Proposed Rule 7.5 will regulate the use of firm names and trade names.

- Cons: There is no evidence that current rule 1-400, when applied in conjunction with Business & Professions Code §§ 6157 et seq., does not provide an adequate basis for regulating the field of lawyer advertising.

2. Recommend adoption of the recently-revised Model Rule title, "Solicitation of Clients".

- Pros: The title accurately describes the principal application of the Rule: the prohibition of real-time (in-person, live telephone or electronic) communications with clients, which are traditionally understood to be

“solicitations”. Further, the former Model Rule 7.3 title (“Direct Contact with Prospective Clients”) needed to be changed because “prospective client” is a defined term in Model Rule 1.18 and its use in Rule 7.3 would be inaccurate and confusing.⁵

- Cons: The ABA Ethics 20/20 Commission revised the rule title in 2012. However, the title is underinclusive. Although paragraph (a) addresses real-time, interactive communications, paragraph (b) also prohibits non-real-time direct marketing communications under certain conditions. The former Model Rule title (“Direct Contact with Prospective Clients”) more accurately conveys the content of the Rule.
3. Recommend adoption of Model Rule 7.3(a), introductory clause, as modified. Proposed paragraph (a) contains the basic prohibition against what is traditionally understood to constitute improper solicitation of legal business by a lawyer engaging in real-time communication with potential clients. The concern is the ability of lawyers to employ their “skills in the persuasive arts” to overreach and convince a person in need of legal services to retain the lawyer without the person having had time to reflect on the decision. The provision eliminates the opportunity for a lawyer to engage in real-time (i.e., contemporaneous and interactive) communication with a potential client. The only modification to Model Rule 7.3(a) is to delete the first instance of “the lawyer’s,” which is unnecessary.
- Pros: Adopting paragraph (a) nearly verbatim will bring California in line with nearly every other jurisdiction in the country regarding the limitations on solicitation. The proposed Rule will not change the law in California. However, unlike the current rule that requires a lawyer to apply two separate provisions (a definition of “solicitation” in 1-400(B) and the prohibitory language in 1-400(C)), the ABA sentence is a clear statement of what conduct is prohibited.
 - Cons: There is no evidence that current rule 1-400(C), in conjunction with 1-400(B) and Standards (3), (4) and (5), does not provide an adequate basis for regulating improper solicitations of legal business.
4. In paragraph (a), include the phrase “real-time electronic contact” which would apply to real-time communications such as a chat room.
- Pros: The same situation that raises concerns about in-person or live telephone communications applies to real-time electronic contact such as communications in a chat room or by instant messaging. The fact that a person can sign or log off from a chat room does not render such

⁵ In Rule 1.18, prospective client would be a person who consults with a lawyer for the purpose of retaining the lawyer or obtaining legal advice. As used in the advertising rules, “prospective client” means a member of the public who might potentially retain a lawyer, regardless of whether that person has consulted with the lawyer.

communications harmless as a person can also hang up a phone, walk away or close the door.

- Cons: The situations presented by in-person and live telephone communications on the one hand and real-time electronic contact on the other are not necessarily the same. Aside from the fact that it is much easier for a polite person to disengage from a conversation taking place in a chat room or by instant messaging, changes of tone or voice modulation, both of which are tools in a lawyer's persuasive toolbox, are not available when merely typing statements for viewing on a computer screen. Moreover, it is not possible to "talk over" the other person.
5. Recommend two exceptions to the application of proposed paragraph (a). Paragraph (a) has two exceptions, i.e., when the solicitation target (i) is another lawyer; or (ii) has a close family, close personal, or prior professional relationship with the lawyer.
- Pros: Inclusion of these exceptions is recommended because there is significantly less concern of overreaching when the solicitation target is another lawyer or has an existing relationship with the soliciting lawyer. Subparagraph (b) would carry forward current rule 1-400(C), which permits solicitation of persons with a family or prior professional relationship.⁶ The inclusion of "close personal" relationship is new and would encompass, for example, co-habitation relationships. It would bring the Rule current by recognizing commonplace living situations.
 - Cons: The phrase "close personal" when used with respect to relationship is vague and overbroad.
6. Recommend adoption of Model Rule 7.2(b), as modified to include "intrusion." In *Shapero v. Kentucky Bar Ass'n* (1988) 486 U.S. 466, the Supreme Court held that a state could not absolutely prohibit direct targeted mailings.⁷ Paragraph (b) would prohibit direct targeted mailings in two situations: (i) where the person being solicited has made known to the lawyer a desire not to be contacted; or (ii) the solicitation is transmitted in a manner that involves "intrusion, coercion, duress or harassment." Paragraph (b) would also prohibit real-time solicitations

⁶ Current rule 1-400(C) provides:

(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.

⁷ A direct targeted mailing would be a letter or email sent "to potential clients known to face particular legal problems." (486 U.S. at 467.)

notwithstanding that they might be permitted under paragraph (a)(1) if either of the two aforementioned situations exist. The first situation is new. The second situation (coercion, duress, harassment) would largely carry forward current rule 1-400(D)(5).

- Pros: Proposed paragraph (b) carries forward current rule 1-400(D)(5) and provides an important limitation on the right of a lawyer to engage in direct targeted marketing of the lawyer's services. The addition of the provision in subparagraph (b)(1) prohibiting such marketing when the target has told the lawyer not to do so is also warranted, as any further communications arguably would be an intrusion on the person's privacy or would constitute harassment. Further, the addition of the term "Intrusion" in subparagraph (b)(2) to supplement the Model Rule's prohibited conduct of "coercion," "duress," and "harassment," provides public protection from overreaching lawyers. The Commission also recommends the deletion of other similar terms in current rule 1-400(D)(5) ["compulsion, intimidation, threats" and "vexatious conduct"] because it determined that the conduct described in those terms are already encompassed by recommended terms.
- Cons: The new provision in subparagraph (b)(1) is not necessary, as it would already be covered by the prohibition on harassment in subparagraph (b)(2).

7. Recommend adoption of Model Rule 7.3(c). Proposed paragraph (c) largely carries forward current rule 1-400, Standard (5). It requires that every written, recorded or electronic communication from a lawyer seeking professional employment from a person known to be in need of legal services in a particular matter must include the word "Advertisement" or words of similar import. Modifications to the model rule provision include: (i) substitution of "any person" for "anyone"; (ii) insertion of the clause, "or words of similar import" [carried forward from Standard (5)]; and (iii) a clause at the end: "or unless it is apparent from the context that the communication is an advertisement."

- Pros: The provision carries forward the concept in current rule 1-400, Standard (5), which is intended to avoid members of the public from being misled into believing that a lawyer's solicitation is an official document that requires their response. Requiring the words "Advertising Material" on the envelope should permit recipients to discard the envelope without opening it if they are not interested in retaining the services of a lawyer. The addition of the ending clause to the effect that the context of the communication may obviate the need for the words recognizes that sometimes the purpose of the communication is obvious, e.g., if the lawyer's communication (e.g., a coupon for legal services) is sent with a packet including other coupon offers or a lawyer's communication is listed as a link in Google ads on a web page. Further, the addition of the clause "at the beginning and ending of any recorded or electronic communication" brings Standard (5) current by recognizing the prevalence of recorded and electronic communications in lawyer marketing today.

- Cons: The proposed paragraph does not include the requirement that the words “Advertising Material” must be in 12 point type. This requirement should be carried forward as including the words in 12 point type provides an absolute defense to an alleged violation of the Rule.
8. Recommend adoption of Model Rule 7.3(d), as modified. Proposed paragraph (d) would permit a lawyer to participate in a pre-paid or group legal service plan even if the plan engages in real-time solicitation to recruit members.
- Pros: These plans hold promise for improving access to justice. Unlike a lawyer’s solicitation of a potential client for a particular matter where there exists a substantial concern for overreaching by the lawyer, there is little if any concern if the plan itself engages in in-person, live telephone or real-time electronic contact to solicit members in the organization. First, it is unlikely that a lawyer will be doing the solicitation on the plan’s behalf because a lawyer who participates in such plans is not permitted to own them. Second, the solicitation would generally not be of persons who are known to be in need of legal services. That is the purpose of pre-paid plans: to recruit members now with the understanding that legal services will be provided as part of the plan if the person might require them at some point in the future.
 - Cons: None identified.
9. Recommend adoption of paragraph (e), which provides a definition of “solicitation” for purposes of the rule. The proposed definition is derived in part from Model Rule 7.3, Cmt. [1].
- Pros: Paragraph (e)’s definition, in combination with Comment [1], clarifies that the rule is directed to regulating communications that are targeted to persons who are known to be in need of legal services as opposed to communications directed to the general public (e.g., billboard, website, etc.), which would come under proposed Rule 7.2. The definition and Comment provide a straightforward distinction for when proposed Rule 7.3 should be applied as opposed to proposed Rule 7.2. Although there may be situations when Rule 7.3 would apply to communications ostensibly directed to the general public (e.g., a billboard offer legal services near the site of a major accident), they do not justify qualifying the description of when Rule 7.3 applies. In any event, most such examples will likely be directed marketing. For instance, the example used, a billboard near the scene of a major accident, is arguably not directed at the general public but at victims or relatives of victims of the accident.
 - Cons: None identified.

10. Recommend adoption of Comment [1], a modified version of Model Rule 7.3, Cmt. [1].

- Pros: See “Pros” for paragraph (9), above.
- Cons: None identified.

11. Recommend adoption of Comment [2], a shortened version of Model Rule 7.3, Cmt. [5].

- Pros: Proposed Comment [2] provides an important clarification that a lawyer acting pro bono on behalf of a bona fide public or charitable legal services organization is not precluded under paragraph (a) from real-time solicitation of a potential plaintiff with standing to challenge an unfair law, e.g., school desegregation laws. In particular, the second sentence is an important clarification of the phrase: “when a significant motive for doing so is the lawyer’s pecuniary gain.” A shortened version of the first sentence of the Model Rule Comment is included to place the second sentence in proper context. A citation to the Supreme Court’s *In re Primus* case, which distinguished such cases from those in which pecuniary gain is the primary motive for the solicitation, (see, e.g., *Ohralik v. Ohio State Bar Ass’n* (1978) 436 U.S. 447, a case decided the same day as *Primus*), is included as further clarification. This clarification can contribute to access to justice by alerting lawyers that real-time solicitations under conditions present in *Primus* are not prohibited.
- Cons: None identified.

12. Recommend adoption of Comment [3], a shortened version of Model Rule 7.3, Cmt. [7].

- Pros: Proposed Comment [3] clarifies that a lawyer may directly contact representatives of organizations or groups that might be interested in establishing a group or prepaid legal service plan for its members. The concerns about overreaching are not present because the representatives act as a filter between the lawyer and those members of the public who actually might require legal services. Similar to Comment [2], such communications can serve to increase access to justice.
- Cons: None identified.

13. Recommend adoption of Comment [4], derived from Model Rule 7.3, Cmt. [9], last sentence. The last sentence has been modified so as not to impose on a lawyer participating in such a plan a duty to “reasonably assure” the plan sponsors are complying with Rules 7.1, 7.2 and 7.3(b).

- Pros: The Comment clarifies that regardless of whether the lawyer is providing services under the auspices of such a plan, the lawyer must comply with the cited Rules. In addition to the Rules cited in the Model Rule

Comment, an additional reference is included to Rule 5.4, which regulates lawyer's activities with nonlawyers.

- Cons: The provision should require that the lawyer make reasonable efforts to assure the plan is in compliance with the cited Rules.

14. Recommend that Standards (3) and (4),⁸ both related to real-time communications with potential clients, not be carried forward.

- Pros: Both of these situations are clear violations of proposed Rule 7.3(a) or (b) and are not necessary as "presumptive" violations of the Rule. In fact, OCTC recognized this when it advised the first Commission that these particular Standards were no longer necessary.
- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Retain the savings clause in current rule 1-400(C) by carrying it forward in paragraph (a). Rule 1-400(C) provides:

"(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, *unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California.* A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited. (Emphasis added).

The issue is whether the italicized savings clause should be retained, as was done by first Commission.

- Pros: The first Commission explained its retention of the clause as follows:

"Paragraph (a) also adds the savings clause, "unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California," language which is currently found in CRPC 1-400(C). It was suggested during Commission deliberations that the United States Supreme Court case, *Edenfield v. Fane* (1993) 507 U.S. 761,

⁸ These standards provide the following situations are presumed violations of rule 1-400's prohibition on in-person or telephone communications with a potential client:

(3) A "communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.

(4) A "communication" which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.

has arguably rendered prohibitions such as those found in Rule 7.3(a) constitutionally infirm and that the provision should be deleted. However, it was noted that this constitutional issue was one for the courts, not for the Commission, requiring a prediction of how a reviewing court might interpret the Rule. Nevertheless, it was determined that the constitutional issue would be adequately addressed and an “all or nothing” invalidation of the Rule avoided by extending and including the savings clause that now appears in current CRPC 1-400(C).”

- Cons: The clause was added to the original California advertising rule in 1978 following the Supreme Court’s decision in *Bates v. State Bar of Arizona*. It continued vitality is questionable at best. Through its decisions during the decades since *Bates*, the Supreme Court has repeatedly held that a state’s regulation of a lawyer’s initiation of in-person or telephonic contact with a member of the public does not violate the First Amendment. The first Commission’s reliance on *Edenfield* requires an exceedingly liberal extension of that case to suggest that it calls into question Rule 7.3. On the contrary, it suggests no such thing. Rather, in that case the Court stated that a state regulation prohibiting accountants from cold-calling customers was unconstitutional. However, the Court expressly distinguished lawyers and accountants, the latter not being “skilled in the persuasive arts.” In light of the Court’s reasoning, it is not likely that Rule 7.3(a), which places reasonable restrictions on lawyer’s solicitations of business, will be found unconstitutional any time soon. Finally, the argument that the first Commission made should have applied equally to its proposed Rules 7.1, 7.2, 7.4 and 7.5, yet no savings clause was included in the first Commission’s versions of those rules.
2. Permit solicitations of nonlawyer professionals. Some have argued that *Edenfield v. Fane*, discussed in paragraph B.1, above, stands for the proposition that lawyers may solicit business from nonlawyer professionals who are less likely to be subject to overreaching by a lawyer.
- Pros: The Court’s holding in *Edenfield* that CPA’s cannot be prohibited from cold-calling potential clients should be extended to permit lawyers to solicit business from nonlawyer professionals.
 - Cons: See “Cons” in paragraph B.1, above.
3. Include legal referral services as coming within the safe harbor provision in proposed Rule 7.2(b).
- Pros: For example, it is possible that a representative of a legal referral service might during a Law Day function, where real-time legal assistance is provided to members of the public participating in the function, direct a member of the public to a lawyer for further assistance. This activity could be viewed as coming within the prohibition of paragraph (a). Given the role that

lawyer referral services play in access to justice, lawyer referral services should be included in paragraph (d).

- Cons: Lawyer referral services do not come within the rule's prohibition and so need not be included in the paragraph (d) safe harbor. It will be a member of the public who initiates the contact with a referral service by either coming to the function or otherwise contacting the service, so paragraph (a)'s prohibition would not apply. Moreover, determining what constitutes a "referral" activity can be complicated; including the concept in this Rule could cause unintended consequences. The safe harbor is appropriately limited to prepaid or group legal service plans. (See paragraph A.8, above.)
4. Carry forward the prohibition in current rule 1-400(B)(2)(b), which includes in the definition of "solicitation" a communication delivered in person or by telephone that is "(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication."
- Pros: The Commission has been directed in its consideration of a rule concept to start with the relevant current rule. There is no evidence that this provision is no longer needed. Five other jurisdictions have a similar provision: Connecticut, Missouri, Montana, Rhode Island and South Carolina.
 - Cons: Although the conduct described in 1-400(B)(2)(b) might give rise to a civil remedy for tortious interference with a contractual relationship, it does not belong in a disciplinary rule. Moreover, there are potential First Amendment issues with retaining this prohibition.
5. Include Model Rule 7.3, Comments [2], [3], [4], [6], [8].
- Pros: Model Rule Comments [2] and [3] provide the underlying policy rationale for the rule (prevent overreaching by lawyers when engaging in real-time solicitation of employment) and thus will help interpret and apply the rule. Comment [4] explains why a lawyer's use of advertising media to the general public is preferable to in-person solicitation. The first sentence of Comment [6] states the reason for prohibitions in subparagraphs (1) and (2) of paragraph (b) (potential abuse of permitted conduct). Comment [8] purports to explain how paragraph (c) should be interpreted.
 - Cons: The black letter is sufficiently clear so as to render the listed Comments unnecessary. Comments [2] and [3], which provide the underlying policy rationale, are not necessary to interpret or apply the rule. Comment [4] may provide a further justification for the prohibition on solicitation but does not explain or provide guidance in applying the rule. Comment [6] largely restates the blackletter of paragraph (b). Comment [8] states the obvious about paragraph (c), which can be implied from the blackletter.

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together

with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. The addition of subparagraph (a)(1) is a substantive change. (See X.A.5, above.)
2. The addition of “close personal” in subparagraph (a)(2) is a substantive change. (See X.A.5, above.)
3. The addition of the term “real-time electronic contact” is a substantive change. (See X.A.4, above.)
4. The addition of paragraph (b)(1) is a substantive change. (See X.A.6, above.)
5. The addition of paragraph (d) is a substantive change. (See X.A.8, above.)
6. The deletion of the savings clause in rule 1-400(C) is a substantive change. (See X.B.1, above.)
7. The deletion of a definition of “solicitation” is a substantive change. (See X.B., above.)
8. The deletion of the concept in rule 1-400(B)(2)(b) is a substantive change. (See X.B.4, above.)

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term “lawyer” for “member”.
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model rules numbering and formatting (e.g., lower case letters).
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that

address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

3. Deleting rule 1-400, Standards (3) and (4) are non-substantive changes. (See X.A.14, above.)

E. Alternatives Considered:

The Commission considered retaining the California approach to the regulation of lawyer advertising and solicitation.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 7.3 [1-400] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 7.3 [1-400] in the form attached to this Report and Recommendation.

**Proposed Rule 7.3 [1-400] Solicitation of Client
Synopsis of Public Comments**

TOTAL = 6 **A = 3**
D = 1
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43as	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	A	7.3	Supports adoption of proposed Rule 7.3.	No response required.
X-2016-66aa	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	M	(a), cmts.	<p>1. Only false and misleading advertising should result in discipline. The rest of the concepts in the advertising rules should be address administratively.</p> <p>2. Eliminate “real-time electronic contact” from rule as such communications are not equivalent to in-person or telephone communications.</p>	<p>1. Please refer to Response to commenter regarding proposed Rule 7.1.</p> <p>2. The Commission declines to make the suggested change. The Commission continues to believe that “real time electronic contact” should be treated the same as in-person and live telephonic communications because each of these types of communication permit immediate interactive exchanges that do not permit the potential client time to reflect and are susceptible to overreaching by a trained advocate. The rule provides the proper balance between a lawyer’s Constitutional right to communicate the lawyer’s availability to provide legal services and the public’s right to be free from overreaching.</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Proposed Rule 7.3 [1-400] Solicitation of Client
Synopsis of Public Comments**

TOTAL = 6	A = 3
	D = 1
	M = 2
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>3. In paragraph (a), enumerate two categories of individual who may solicited in-person: sophisticated users of legal services and persons who needs to be notified about class action pursuant to court order.</p> <p>4. Comments should discuss what “prior professional relationship” means.</p>	<p>3. The Commission declines to make the suggested change. As to class action notices, comment [2] of proposed Rule 7.3 adequately addresses the issue. As to the former suggestion, the Commission believes that the concept of a “sophisticated user of legal services” is too vague. Further, the Supreme Court’s decision in <i>Edenfield v. Fane</i> (1993) 507 U.S. 761, where the court distinguished accountants from lawyers who are view as “skilled in the persuasive arts,” militates against such a provision.</p> <p>4. An explication of “prior professional relationship,” which can take on many shapes and forms, is better left for a law review article or ethics opinion.</p>
X-2016-82d	Polish, James (9-27-16)	N	D	(c)	1. Rule imposes restrictions not imposed on any other profession.	1. Proposed Rule 7.3, although patterned on the corresponding Model Rule, carries forward the substance of current rule 1-400 regarding solicitation. The Supreme Court has repeatedly recognized the potential dangers of lawyers soliciting clients in real time. (See also response to SDCBA, X-2016-66aa, above.)

**Proposed Rule 7.3 [1-400] Solicitation of Client
Synopsis of Public Comments**

TOTAL = 6	A = 3
	D = 1
	M = 2
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>2. Mandating “advertisement” on outside effectively tells the recipient to throw it away.</p> <p>3. Rule doesn’t just cover mass mailings but also narrow, targeted solicitations.</p> <p>4. Consumers are sophisticated enough to handle in person or telephone solicitations.</p>	<p>2. The Commission continues to believe that the requirement to include “advertisement” on an envelope or in an email is necessary to protect the public from solicitations that are designed to mimic official court documents.</p> <p>3. The rule is intended to cover targeted solicitations. The rule does not prohibit them but regulates their use to prevent misleading communications. See Response #2, above.</p> <p>4. The Commission is not aware of any study that has shown “consumers are sophisticated enough to handle in person or telephone communications” from a lawyer skilled in the art of persuasion. Case law, e.g., <i>Edenfield v. Fane</i> (1993) 507 U.S. 761, suggests otherwise. (See also response to SDCBA, X-2016-66aa, above.)</p>
X-2016-96e	Bar Association of San Francisco (BASF), Legal Ethics Committee (Banola) (9-27-16)	Y	A	(d)	<p>1. Supports addition of term “real-time electronic contact.”</p> <p>2. Supports allowing solicitation of prepaid and group legal services participants.</p>	<p>1. No response required.</p> <p>2. No response required.</p>

**Proposed Rule 7.3 [1-400] Solicitation of Client
Synopsis of Public Comments**

TOTAL = 6 **A = 3**
D = 1
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-104bh	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M	7.1 to 7.5	Concerned about making the advertising rule into several different parts.	Please refer to response to commenter re Rule 7.1.
X-2016-120q	LGBT Bar Association of Los Angeles (LGBT Bar LA) (King) (9-27-16)	Y	A	7.3	Supports adoption of proposed Rule 7.3.	No response required.

COMMISSION REPORT AND RECOMMENDATION: RULE 7.4 [1-400(D)(6)]

Commission Drafting Team Information

Lead Drafter: Carol Langford

Co-Drafters: Tobi Inlender, Howard Kornberg, Mark Tuft

I. RELEVANT EXCERPTS FROM CURRENT CALIFORNIA RULE 1-400

Rule 1-400(D)(6) [Specialization Provision]

* * * * *

(D) A communication or solicitation (as defined herein) shall not:

* * * * *

- (6) State that a member is a “certified specialist” unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees, and states the complete name of the entity which granted certification.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 7.4

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 7.4

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION’S PROPOSED RULE (CLEAN)

Rule 7.4 [1-400] Communication of Fields of Practice and Specialization

- (a) A lawyer shall not state that the lawyer is a certified specialist in a particular field of law, unless:
- (1) the lawyer is currently certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees; and

- (2) the name of the certifying organization is clearly identified in the communication.
- (b) Notwithstanding paragraph (a), a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice specializes in, is limited to, or is concentrated in a particular field of law, subject to the requirements of Rule 7.1.

IV. **COMMISSION'S PROPOSED RULE** **(REDLINE TO CURRENT CALIFORNIA RULE 1-400(D)(6))**

Rule **7.4 [1-400(D)(6)] Communication of Fields of Practice and Specialization** **Provision**

~~*****~~

- (~~Da~~) A ~~communication or solicitation (as defined herein) shall not~~ lawyer shall not state that the lawyer is a certified specialist in a particular field of law, unless:

~~*****~~

- (~~61~~) ~~State that a member is a~~ "the lawyer is currently certified ~~specialist" unless the member holds a current~~ certificate as a specialist ~~issued~~ by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees~~;~~ and ~~states the complete name of the entity which granted certification.~~
- (2) the name of the certifying organization is clearly identified in the communication.
- (b) Notwithstanding paragraph (a), a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice specializes in, is limited to, or is concentrated in a particular field of law, subject to the requirements of Rule 7.1.

V. **RULE HISTORY**

See Rule 7.1 Report and Recommendation, Section VI, for Rule 1-400 rule history.

VI. **OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS**

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):
 1. OCTC questions whether this rule is necessary in light of Rules 7.1, 7.2, and 7.3, but has no objection to the rule.

Commission Response: The Commission continues to believe the proposed rule is necessary notwithstanding Rules 7.1 to 7.3 given the importance of a lawyer's claim of specialization to the lawyer's likelihood of being retained by a client and the State Bar's special rules regarding the accreditation of certifying entities.

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

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, four public comments were received. One comment agreed with the proposed Rule, two comments agreed only if modified, and one comment did not indicate a position. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

1. Related California Law

See Rule 7.1 Report and Recommendation, Section IX.A, for Rule 1-400 related California law.

2. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 7.4: Communication of Fields of Practice and Specialization," revised September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_4.pdf [last accessed 2/14/17]
- Eight jurisdictions have adopted Model Rule 7.4 verbatim.¹ Twenty-three jurisdictions have adopted a slightly modified version of Model Rule 7.4.² Eighteen jurisdictions have adopted a version of the rule that is substantially different from Model Rule 7.4.³ Two jurisdictions do not have a version of the Model Rule 7.4.⁴

¹ The eight states are: Delaware, Idaho, Kansas, Minnesota, Nebraska, New Mexico, Utah, and Wisconsin.

² The twenty-three states are: Arizona, Arkansas, Colorado, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maine, Michigan, Montana, New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington, West Virginia, and Wyoming.

³ The eighteen jurisdictions are: Alabama, Alaska, California, Florida, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, South Carolina, Tennessee, Texas and Virginia.

⁴ The two jurisdictions are: District of Columbia and Oregon.

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of Model Rule 7.4, as modified.

- Pros: Proposed Rule 7.4 is part of the Commission's decision to adhere to the ABA Model Rule general framework for regulating lawyer advertising and solicitations for business by several separate rules, each of which addresses a general topic.

The partitioning of current rule 1-400 into several rules corresponding to model rule counterparts is recommended because advertising of legal services and the solicitation of potential clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts. The current widespread use of the Internet by lawyers and law firms to market their services and the trend in most jurisdictions, including California, toward permitting some form of multijurisdictional practice, warrants such national uniformity.

Proposed Rule 7.1 sets out the general prohibition against a lawyer making false and misleading communications concerning the availability of legal services.

Proposed Rule 7.2 will specifically address advertising, a subset of communication.

Proposed Rule 7.3 will regulate marketing of legal services through direct contact with a potential client either by real-time communication such as delivered in-person or by telephone, or by directly targeting a person known to be in need of specific legal services.

Proposed Rule 7.4 will regulate the communication of a lawyer's fields of practice and claims to specialization.

Proposed Rule 7.5 will regulate the use of firm names and trade names.

- Cons: There is no evidence that current rule 1-400, when applied in conjunction with Business & Professions Code §§ 6157 et seq., does not provide an adequate basis for regulating the field of lawyer advertising.

2. Recommend adoption of Model Rule 7.4(d), as modified, as proposed Rule 7.4(a). Paragraph (a)(1) has been modified to state the specific regulatory framework for specialization in California. Similar language can be found in current rule 1-400(D)(6).

- Pros: Paragraph (a) carries forward the substance of the current California rule addressing the requirements for when a lawyer wishes to advertise as a

“certified specialist.” Because this type of designation signifies an advanced degree of knowledge and experience, stating in a rule of professional conduct what is required in order to hold oneself out as a “certified specialist” helps protect the public from being misled. In addition, the language proposed explicitly refers to a lawyer being “currently certified” and this affords public protection against a lawyer who might otherwise erroneously believe it is proper to rely upon a prior certificate that has lapsed due to a failure to renew or has been revoked or is no longer valid for any other reason.

Note: The Commission recommends switching the order of Model Rule 7.4(a) and (d) to conform to the rule style of the proposed Rules under which the prohibition is stated first and any exceptions to that prohibition follow.

- Cons: The activity described in proposed paragraph (a) is addressed in proposed Rule 7.1. Moreover, the language is too narrow. For example, it is possible for a lawyer who is certified as a specialist in another jurisdiction to truthfully state that he or she is a specialist certified by an entity accredited in that jurisdiction. But because the other jurisdiction’s entity was not accredited by the State Bar of California, such statement would violate the rule.
3. Recommend adoption of ABA Model Rule 7.4(a), as modified, as paragraph (b) of the proposed Rule. ABA Model Rule 7.4(a) permits a lawyer to communicate that the lawyer does or does not practice in particular fields of law. Similar to the first Commission, a sentence has been added that provides a lawyer may engage in a common practice among lawyers who market their availability by communicating that the lawyer’s practice is limited to or concentrated in a particular field of law.
- Pros: Permitting a lawyer to indicate his or her area of practice, or state that he or she will not accept matters except in a specific field, in communications about the lawyer’s services will help educate consumers about the legal services offered by a lawyer. The statements permitted by this Rule remain subject to proposed Rule 7.1, which prohibits false or misleading communications. In addition, see Business and Professions Code § 6158.2(b).⁵
 - Cons: Proposed paragraph (b) states a permissive standard rather than a disciplinary standard. Moreover, to the extent the permitted conduct described in paragraph (b) is false or misleading, it is addressed in proposed Rule 7.1.

⁵ Business and Professions Code § 6158.2(b):

The following information shall be presumed to be in compliance with this article for purposes of advertising by electronic media, provided the message as a whole is not false, misleading, or deceptive:

(b) Fields of practice, limitation of practice, or specialization.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of ABA Model Rule 7.4(b), which permits use of the designation “Patent Attorney” or a substantially similar designation.
 - Pros: This permitted designation has long been recognized in the profession. Its deletion from a rule that is plainly derived from the Model Rule might suggest that California does not permit the designation.
 - Cons: ABA Model Rule 7.4(b)’s language is permissive and the example contained therein is adequately addressed by proposed Rule 7.4(a). Any use of such designations would remain subject to Rule 7.1.
2. Recommend adoption of ABA Model Rule 7.4(c) permitting use of the designation “Admiralty,” “Proctor in Admiralty” or a substantially similar designation.
 - Pros: This permitted designation has long been recognized in the profession. Its deletion from a rule that is plainly derived from the Model Rule might suggest that California does not permit the designation.
 - Cons: ABA Model Rule 7.4(c)’s language is permissive and the example contained therein is adequately addressed by proposed Rule 7.4(a). Any use of such designations would remain subject to Rule 7.1.
3. Whether to include any of the Comments to ABA Model Rule 7.4.
 - Pros: The Model Rule Comments provide helpful examples in interpreting and applying the Rule.
 - Cons: The provisions of proposed Rule 7.4 are self-explanatory and do not require a Comment to clarify them further.

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. None of the proposed provisions would be a substantive change in the current law of California regarding the communication of fields of practice and specialization.

D. Non-Substantive Changes to the Current Rule:

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

- Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
- Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.

2. Change the rule number to conform to the ABA Model rules numbering and formatting (e.g., lower case letters).

- Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

The Commission considered retaining the California approach to the regulation of lawyer advertising and solicitation.

In addition, the Commission was provided with the following three alternatives, which were considered by the Commission. However, no motion was made to recommend adoption of any of these alternatives.

1. **Alternative 1**

Rule 7.4 Communications of Specialization

A lawyer shall not state or imply that the lawyer is certified as a specialist in a particular field of law, unless:

- (a) the lawyer is currently certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees; and
- (b) the name of the certifying organization is clearly identified in the communication.

This alternative is materially different from the proposed Rule because it is silent on the issue of whether a lawyer may communicate limitations on field of practice. Compare Business and Professions Code § 6158.2(b) that expressly addresses this issue for purposes of electronic media advertising by lawyers.

2. **Alternative 2**

Rule 7.4 Communications of Specialization

A lawyer shall not state or imply that the lawyer is certified as a specialist in a particular field of law, unless:

- (a) the lawyer is currently certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees; and
- (b) the name of the certifying organization is clearly identified in the communication.

Comment

[1] A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, subject to the requirements of Rule 7.1.

This alternative is materially different from the proposed Rule because it relegates to a comment on the issue of whether a lawyer may communicate limitations on field of practice. Compare Business and Professions Code § 6158.2(b) which is black letter law on this issue in the context of electronic media advertising by lawyers.

3. **Alternative 3**

Do not adopt a rule addressing fields of practice or specialization. This rule is redundant and not necessary because the conduct is already addressed by proposed Rule 7.1 and the State Bar Act in section 6158.2(b).

This alternative is materially different from the proposed Rule because it would omit the existing regulation of the specialization issue in current rule 1-400(D)(6) and it would be silent on the issue of limitations of field of practice that has an analogous precedent in Business and Professions Code § 6158.2(b).

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 7.5 [1-400] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 7.5 [1-400] in the form attached to this Report and Recommendation.

**Proposed Rule 7.4 [1-400] Firm Names and Trade Names
Synopsis of Public Comments**

TOTAL = 4	A = 1
	D = 0
	M = 2
	NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43at	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	M	(b)	Paragraph (b) should more closely parallel the model rule by allowing an attorney to refer to herself as a certified specialist as long as the bona fides of the accrediting authority are disclosed.	1. Although the commenter refers to para. (b) as the provision pertaining to certified specialists references, the Commission believes that proposed Rule 7.4 requires that para. (b) be read in conjunction with para. (a). When read together and compared Model Rule 7.4, it should become apparent that proposed Rule 7.4 is broader than the Model Rule in allowing truthful and non-deceptive information to be communicated to prospective clients. This, in turn, facilitates informed decisions by consumers in selecting a lawyer. Proposed Rule 7.4 is broader because it expressly permits truthful representations that a lawyer “specializes in” a particular field of law. It is not clear that such a communication would be permitted under Model Rule 7.4 because the Model Rule only allows a lawyer to state whether the lawyer “does or does not practice in particular fields.” In California, there may be fields of practice for

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Proposed Rule 7.4 [1-400] Firm Names and Trade Names
Synopsis of Public Comments**

TOTAL = 4	A = 1
	D = 0
	M = 2
	NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						<p>which certification as a specialist is not presently available (e.g., unmanned aircraft or vehicle (drone) laws). For a client who is seeking an attorney who possesses that expertise, a lawyer's ability to communicate that he or she has a practice that is "specializing in" or "concentrated in" that field is significant and promotes access to competent counsel.</p> <p>2. To the extent the commenter believes that paragraph (a) is too restrictive by requiring that a lawyer may seek certification only by a national entity accredited by the State Bar, the rule simply states the current regulatory framework for specialization in California.</p>
X-2016-66ab	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	M	(a)(1)	<p>1. Only false and misleading advertising should result in discipline. The rest of the concepts in the advertising rules should be addressed administratively.</p> <p>2. An advertisement regarding being certified as a specialist is not false or misleading simply because the State Bar is not the</p>	<p>1. Please see response to commenter concerning proposed Rule 7.1.</p> <p>2. Please see response #2 to COPRAC, X-2016-43at, above.</p>

**Proposed Rule 7.4 [1-400] Firm Names and Trade Names
Synopsis of Public Comments**

TOTAL = 4	A = 1
	D = 0
	M = 2
	NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					certifying agency. Rule should parallel the Model Rules.	
X-2016-104bi	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	NI		Question whether rule is necessary in light of rules 7.1, 7.2, and 7.3.	The Commission continues to believe the proposed rule is necessary notwithstanding Rules 7.1 to 7.3 given the importance of a lawyer's claim of specialization to the lawyer's likelihood of being retained by a client and the State Bar's special rules regarding the accreditation of certifying entities.
X-2016-120r	LGBT Bar Association of Los Angeles (LGBT Bar LA) (King) (9-27-16)	Y	A	7.4	Supports adoption of proposed Rule 7.4.	No response required.

COMMISSION REPORT AND RECOMMENDATION: RULE 7.5 [1-400]

Commission Drafting Team Information

Lead Drafter: Carol Langford
Tobi Inlender, Howard Kornberg, Mark Tuft

Co-Drafters:

RELEVANT EXCERPTS FROM CURRENT CALIFORNIA RULE 1-400

I.

There is no current California rule that specifically addresses the subject matter of Model Rule 7.5, from which proposed Rule 7.5 (“Firm Names and Trade Names”) is derived. However, the topic is addressed in both the black letter text of, and Standards to, current rule 1-400. Rule 1-400(A) provides in relevant part:

- (A)¹ For purposes of this rule, “communication” means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:
- (1) Any use of *firm name, trade name*, fictitious name, or *other professional designation* of such member or law firm; or
 - (2) Any *stationery, letterhead*, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or (Emphasis added)

* * *

In addition, Standards (6) through (9) of rule 1-400 provide that the following communications “are presumed to be in violation of rule 1-400”:

- (6) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.

¹ California rule 1-400(D) states that such communications shall not:

- (1) Contain any untrue statement; or
- (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
- (3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public . . .

(7) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.

(8) A “communication” which states or implies that a member or law firm is “of counsel” to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.

(9) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 7.5

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 7.5

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION’S PROPOSED RULE (CLEAN)

Rule 7.5 [1-400] Firm Names and Trade Names

- (a) A lawyer shall not use a firm* name, trade name or other professional designation that violates Rule 7.1.
- (b) A lawyer in private practice shall not use a firm* name, trade name or other professional designation that states or implies a relationship with a government agency or with a public or charitable legal services organization, or otherwise violates Rule 7.1.
- (c) A lawyer shall not state or imply that the lawyer practices in or has a professional relationship with a law firm* or other organization unless that is the fact.

Comment

The term “other professional designation” includes, but is not limited to, logos, letterheads, URLs, and signature blocks.

IV. COMMISSION’S PROPOSED RULE (REDLINE TO ABA MODEL RULE 7.5)

Rule 7.5 [1-400] Firm Names and ~~Letterheads~~Trade Names

- (a) A lawyer shall not use a firm* name, ~~letterhead~~trade name or other professional designation that violates Rule 7.1.
- ~~(b) A trade name may be used by a~~ lawyer in private practice ~~if it does not imply a connection shall not use a firm* name, trade name or other professional designation that states or implies a relationship~~ with a government agency or with a public or charitable legal services organization ~~and is not, or otherwise in violation of violates~~ Rule 7.1.
- ~~(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.~~
- ~~(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.~~
- ~~(dc) Lawyers may~~A lawyer shall not state or imply that ~~they practice in a partnership~~the lawyer practices in or has a professional relationship with a law firm* or other organization ~~only when~~unless that is the fact.

Comment

The term “other professional designation” includes, but is not limited to, logos, letterheads, URLs, and signature blocks.

~~[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm’s identity or by a trade name such as the “ABC Legal Clinic.” A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic,” an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a~~

~~useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.~~

~~[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.~~

V. RULE HISTORY

See Rule 7.1 Report and Recommendation, Section VI, for Rule 1-400 rule history.

VI. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC is concerned that with the proposal to make the current rule into several separate rules for communications, advertising, and solicitation for the same reasons expressed in its Comments to 7.1.

Commission Response: Please refer to response to commenter regarding proposed Rule 7.1.

2. If adopted, OCTC supports the Comments to this rule.

Commission Response: No response required.

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

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, four public comments were received. Three comments agreed with the proposed Rule and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

1. Related California Law

See Rule 7.1 Report and Recommendation, Section IX.A, for Rule 1-400 related California law.

2. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 7.5: Firm Name and Letterheads," revised April 9, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_5.pdf [last visited 2/7/17]
- Twenty-four jurisdictions have adopted Model Rule 7.5 verbatim.² Twenty jurisdictions have adopted a slightly modified version of Model Rule 7.5.³ Seven jurisdictions have adopted a version of the rule that is substantially different from Model Rule 7.5.”⁴

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of the first sentence of Model Rule 7.5(a) as proposed paragraph (a), but substitute “trade name” for the term “letterhead,” and make a similar change to the rule title.
 - Pros: The provision clarifies that any use of a firm name, trade name or other professional designation is a “communication” within the meaning of proposed Rule 7.1(a) and, therefore, may not be false or misleading. As a general prohibition concerning firm names, in part this carries forward current rule 1-400’s restrictions on firm names more specifically stated in Standard No. 9 (re misleading use of multiple names for the same law practice). (See the Standards Cross-Reference Table, that identifies the disposition of each of the current standards. It is a separate attachment to this Report.) The substitution of “trade name” for “letterhead” is intended to update the rules in recognition that in the age of the Internet and electronic communications, lawyers’ letterheads have fallen into disuse. See also discussion of the proposed Comment to the rule.
 - Cons: None identified.
2. Recommend adoption of the second sentence of Model Rule 7.5(a), as modified, as proposed paragraph (b). The second sentence of Model Rule 7.5(a) has been modified so that it is prohibitory rather than permissive. In addition, the phrase

² The twenty-four jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Mexico, Oklahoma, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

³ The twenty jurisdictions are: Alaska, Georgia, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Dakota, and Virginia.

⁴ The seven jurisdictions are: Alabama, California, Florida, Indiana, New Jersey, Ohio, and Texas.

“states or” has been added to “implied” so that the phrase is used consistently in the rules. (see, 7.5(c) and 7.4(b)).

- Pros: Proposed paragraph(b) carries forward the concept that is found in current rule 1-400, Standard (6), which provides that the following communication is presumed to be in violation of rule 1-400:

(6) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.

In addition to making the second Model Rule sentence prohibitory, the Commission recommends assigning the provision its own paragraph to set apart this specific prohibition, which is intended to prevent misleading the public into believing a lawyer has relationships that will enhance that lawyer’s ability to achieve satisfactory results in a legal representation. (See the Standards Cross-Reference Table, that identifies the disposition of each of the current standards. It is a separate attachment to this Report.)

- Cons: The activity described in paragraph (b) is already more generally addressed in proposed Rule 7.1.

3. Recommend adoption of Model Rule 7.5(d), as modified, as proposed Rule 7.5(c). The paragraph has been modified to make the clause prohibitory rather than permissive.

- Pros: Proposed paragraph (c) carries forward the concepts that are found in current rule 1-400, Standards (7) and (8), which provide that the following communications are presumed to be in violation of rule 1-400:

(7) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code §§ 6160-6172 unless such relationship in fact exists.

(8) A “communication” which states or implies that a member or law firm is “of counsel” to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code §§ 6160-6172) which is close, personal, continuous, and regular.

These are important prohibitions that are intended to prevent misleading the public into believing a lawyer has relationships that will enhance that lawyer’s ability to achieve satisfactory results in a legal representation.

- Cons: The activity described in paragraph (c) is already more generally addressed in proposed Rule 7.1.
4. Recommend adoption of the proposed Comment, which explains the scope of the term “other professional designation.”
- Pros: With the advent of the Internet, the means by which lawyers may designate themselves or their law firms has expanded well beyond the traditional letterhead. The proposed Comment provides interpretative guidance concerning the rule’s application by identifying various kinds of professional designations that are subject to the proposed rule.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Include ABA Model Rule 7.5(b), which requires law firms with offices in more than one jurisdiction to identify the jurisdictional limitations of lawyers in an office who are not licensed to practice in the jurisdiction where the office is located.
 - Pros: Although a failure to include an appropriate disclaimer about jurisdictions in which the lawyer is authorized to practice is a violation of Rule 7.1(a) as being misleading, this rule should expressly state that specific requirement, particularly in light of the widespread adoption of Model Rule 7.4(b).
 - Cons: The provision is unnecessary because a failure to include an appropriate disclaimer about where a lawyer is authorized to practice would be inherently misleading under proposed Rule 7.1(a).
2. Include ABA Model Rule 7.5(c) which prohibits using the name of a lawyer holding public office in the name of a law firm, or in communications on the its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the law firm.
 - Pros: Including this specific restriction should help lawyers avoid communications that state truthful facts but nevertheless might be difficult to present to the public in a manner that does not create unjustified expectations.
 - Cons: There is precedent for rejecting this rule. The first Commission included a counterpart to Model Rule 7.5(c) and the Board adopted it. However, after the Board’s adoption of Rule 7.5(c), Legislative staff provided comment on the policy that would result from the proposed rule’s implementation in California. Specifically, Legislative staff inquired as to whether the Model Rule has been applied in Model Rule jurisdictions as a complete ban and prior restraint on lawyer speech, as opposed to a standard that would be aligned with the commercial speech test for false, deceptive or misleading communications. It

was observed that if the rule is susceptible to being applied as a ban, then that policy would be contrary to existing California law set by current rule 1-400 because the current rule prohibits a law firm name that includes the name of a lawyer holding public office *only if* that law firm name is a false, deceptive, misleading or confusing message concerning the availability of legal services. In addition, Legislative staff also observed that the language used in Rule 7.5(c) might be challenged as vague. In particular, there is concern about the undefined, yet critical, phrases “substantial period” and “not actively and regularly practicing.”

3. Include the Comments to ABA Model Rule 7.5.

- Pros: Although the first Model Rule Comment is largely expository, the second Comment provides interpretative guidance regarding the rule’s application to office-sharing arrangements.
- Cons: The provisions of proposed Rule 7.5 are self-explanatory and do not require a Comment to clarify them further.

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Although the proposed rule would create a new rule addressing the use of firm names and letterheads, none of these provisions would be a substantive change in the current law of California regarding the communication and use of firm names and letterheads.

D. Non-Substantive Changes to the Current Rule:

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

- Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
- Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.

2. Change the Rule number to conform to the ABA Model rules numbering and formatting (e.g., lower case letters).

- Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

The Commission considered retaining the California approach to the regulation of lawyer advertising and solicitation.

X. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

The Commission recommends adoption of proposed Rule 7.5 [1-400] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 7.5 [1-400] in the form attached to this Report and Recommendation.

**Proposed Rule 7.5 [1-400] Firm Names and Trade Names
Synopsis of Public Comments**

TOTAL = 4 **A = 3**
D = 0
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43au	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	A	7.5	Supports adoption of proposed Rule 7.5.	No response required.
X-2016-66ac	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	A		Supports adoption of proposed Rule 7.5.	No response required.
X-2016-104bj	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M		Concerned about making the advertising rule into several different parts.	See response to Commenter concerning proposed Rule 7.1.
X-2016-120s	LGBT Bar Association of Los Angeles (LGBT Bar LA) (King) (9-27-16)	Y	A	7.5	Supports adoption of proposed Rule 7.5.	No response required.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

PROPOSED RULE OF PROFESSIONAL CONDUCT 8.1
(Current Rule 1-200)
False Statement Regarding Application for Admission,
Readmission, Certification or Registration

EXECUTIVE SUMMARY

The Commission evaluated current rule 1-200 (False Statement Regarding Admission to the State Bar) and in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 8.1 (Bar Admission and Disciplinary Matters). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 8.1 (False Statement Regarding Application for Admission, Readmission, Certification or Registration).

Rule As Issued For 90-day Public Comment

Proposed rule 8.1 retains the substance of current rule 1-200 while expanding the public policy protections of the current rule. Current rule 2-100 prohibits members (on behalf of another person) from making false statements or omitting material facts in connection with an application for admission to the State Bar. Proposed rule 8.1 would expand the current rule to petitions for reinstatement after disbarment or resignation, applications for certified legal specialization and applications for special or temporary admission.

Paragraph (a) defines with specificity the applications covered under the expanded scope of proposed rule 8.1. The objective of paragraph (a) is to make clear that the rule applies to applications for admission, readmission, certification and registration.¹

Paragraph (b) is new and recognizes the need to expand the public protection policy objectives of proposed rule 8.1 to cover conduct related to applications from both members of the California State Bar as well as non-California lawyer applicants (e.g. non-California lawyer seeking authorization to practice as a registered in-house counsel under the Multijurisdictional Program (MJP)).

Paragraph (c) makes clear that the proscriptions against making false statements, omissions or failure to correct a statement known to be false, equally apply to lawyers who are supporting or opposing the application of another person.

Paragraph (d) is derived from current rule 1-200(C) and clarifies that the rule does not apply to a lawyer representing a client/applicant in proceedings relating to admission, readmission, certification or registration.

Proposed rule 8.1 contains two comments that clarify the rule's application. Comment [1] clarifies that a person making false statements in connection with that person's own application can be subject to discipline or cancellation of that person's admission or other authorization.

¹ One member of the Commission submitted a written dissent expressing concerns that proposed rule 8.1 might overlap with duties imposed by other rules, resulting in a risk of confusion on the part of lawyers seeking to comply and a potential for double-charging in disciplinary matters. The full text of the dissent is attached to this summary.

Comment [2] relates to paragraph (d) and makes clear that a lawyer who represents a client/applicant is subject to other applicable rules and the State Bar Act.

Non-substantive changes in proposed rule 8.1 include: changing the title to accurately reflect the expanded scope of the rule, reordering the rule to place key definitions in the first paragraph and stylistic changes to track the ABA Model Rule numbering system, format and style conventions. These changes include substitution of the word “lawyer” for “member.”

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made several changes to the text and comment of proposed Rule 8.1. These changes follow the Commission’s recommendation that proposed Rule 3.3 (Candor Toward The Tribunal) be adopted. The Commission believes Rule 3.3 is the appropriate source of regulation for statements made to a tribunal. Specifically, Rule 3.3, not Rule 8.1, should apply to applications for certification or registration under the California Rules of Court. (See also the concern expressed in the Dissent, which this change addresses.)

Text. The Commission limited the scope of proposed Rule 8.1 to applications for admission to practice law rather than including within its scope applications for certification or registration under provisions of the Rules of Court. This change is reflected by the substitution of new paragraph (d), which defines “application to practice law” in place of former paragraph (a), which delimited the scope of the rules application to include applications for certification or registration.

In addition to this global change in scope, the Commission has also added a further requirement to former paragraph (b) [now paragraph (a)] that in addition to not making a statement *in connection with his or her own application* that the lawyer knows to be false, the lawyer also must not make such a statement “with reckless disregard to its truth or falsity.” This change was made in response to a public comment received from OCTC.

The Commission also revised former paragraph (c) [now paragraph (b)] to clarify the duties of a lawyer who makes a statement of material fact *in connection with another person’s* application.

The Commission has added new paragraph (c), that imposes a duty on a lawyer, whether in connection with his or her own application or the application of another, to disclose a fact to correct a statement previously made that the lawyer knows has created a “material misapprehension” in the matter, unless the disclosure would violate Bus. & Prof. Code § 6068(e) or Rule 1.6.

Comment. The Commission modified Comment [1] to clarify its application and to provide a citation to a landmark California Supreme Court opinion on admission. The Commission has also added new Comment [2] to clarify the scope of the Rule’s application. It has also revised Comment [3] to identify with specificity the obligations of a lawyer who represents an applicant for admission.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made one non-substantive revision. In paragraph (d), the Commission substituted the word “process” for “provision” to read: “. . . and any similar process relating to admission or certification to practice law in California or elsewhere.”

With this change, the rule Commission voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 8.1 [1-200]

Commission Drafting Team Information

Lead Drafter: Nanci Clinch

Co-Drafters: Joan Croker, Robert Kehr

I. CURRENT CALIFORNIA RULE

Rule 1-200 False Statement Regarding Admission to the State Bar

- (A) A member shall not knowingly make a false statement regarding a material fact or knowingly fail to disclose a material fact in connection with an application for admission to the State Bar.
- (B) A member shall not further an application for admission to the State Bar of a person whom the member knows to be unqualified in respect to character, education, or other relevant attributes.
- (C) This rule shall not prevent a member from serving as counsel of record for an applicant for admission to practice in proceedings related to such admission.

Discussion:

For purposes of rule 1-200 “admission” includes readmission.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 8.1 [1-200]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 8.1 [1-200]

Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION’S PROPOSED RULE (CLEAN)

Rule 8.1 [1-200] False Statement Regarding Application for Admission, Readmission, Certification or Registration

- (a) An applicant for admission to practice law shall not, in connection with that person’s own application for admission, make a statement of material fact that the lawyer

knows* to be false, or make such a statement with reckless disregard as to its truth or falsity.

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

Comment

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

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

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

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-200)

Rule 8.1 [1-200] False Statement Regarding Application for Admission to the State Bar Practice Law

~~(A) A member shall not knowingly make a false statement regarding a material fact or knowingly fail to disclose a material fact in connection with an application for admission to the State Bar.~~

~~(B) A member shall not further an application for admission to the State Bar of a person whom the member knows to be unqualified in respect to character, education, or other relevant attributes.~~

~~(C) This rule shall not prevent a member from serving as counsel of record for an applicant for admission to practice in proceedings related to such admission.~~

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

DiscussionComment

~~For purposes of rule 1-200 "admission" includes readmission.~~

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

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

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

V. RULE HISTORY

The predecessor to current rule 1-200, former rule 1-101, became operative January 1, 1975. It was entitled "Maintaining Integrity and Competence of the Legal Profession." Former rule 1-101 incorporated two concepts from Disciplinary Rule (DR) 1-101 of the ABA Model Code of Professional Responsibility. First, the rule prohibited a member

from furthering the application for admission of another person known to be unqualified in respect to character, education, or other relevant attribute of a lawyer. Second, the rule provided an exception that permitted a member to serve as counsel of record to an applicant for admission in proceedings related to such admission.

Former rule 1-101 was amended, renumbered, and made operative effective May 27, 1989. The amendments included renaming the rule to “False Statement Regarding Admission to the State Bar.” In addition to carrying forward the ABA-derived prohibition and exception identified above, current rule 1-200 was expanded to prohibit false statements on one’s own application for admission. This expansion was based on the Supreme Court’s inherent power to discipline a member for acts committed prior to submission. (*Stratmore v. State Bar* (1975) 14 Cal.3d 887.) The new language was derived from ABA Model Code of Professional Responsibility DR 1-101, language that had previously been rejected in the 1975 version of the rule. In addition, the 1989 amendments added a Discussion section that provides: “For purposes of Rule 1-200 ‘admission’ includes readmission.”

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC has concerns about the use of “knowingly” in this rule for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rule 3.3, 4.1, and the General Comments section of this letter. False statements made with reckless disregard, gross negligence, or willful blindness are, and should be, disciplinable. Moreover, the “knowing” requirement is inconsistent with Supreme Court’s direction for applicants and would lessen the current standards required of applicants by the Supreme Court. In *In re Gossage*, the Supreme Court stated that “Whether it is caused by intentional concealment, reckless disregard for the truth, or an unreasonable refusal to perceive the need for disclosure, such an omission is itself strong evidence that the applicant lacks the ‘integrity’ and/or ‘intellectual discernment’ required to be an attorney.” The Court went on to hold: “Contrary to what the majority of the Review Department found, the unusual severity and scope of Gossage’s criminal record strengthened — not lessened — his obligation to ensure the accuracy of his Application even if independent research was required. . . . To excuse defective preparation of the Application under these circumstances would set a dangerous precedent — encouraging the worst criminal offenders to make the least effort in complying with the disclosure requirements on State Bar applications. In a related vein, we refuse to assume that Gossage or any other applicant in his position cannot reasonably be expected to discover and provide the necessary information. More rigorous intellectual tasks are often performed by attorneys in the practice of law.” (*In re Gossage* (2000) 23 Cal.4th 1080, 1102-1104.)

Commission Response: No response required.

2. OCTC is concerned that this proposed rule and Comment [1] to this rule would only prohibit a false statement of fact or law, not other misleading statements. (See *In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370, 376 [interpreting Canon 5 of the Judicial Code of Ethics to apply only to factual misrepresentations, but not to statements that may be misleading or true statements that might imply or suggest through innuendo false conclusions. The Review Department concluded that on its face the language of Canon 5 only reached factual misrepresentations.].) California has long held that an attorney is required to refrain from misleading and deceptive acts without qualification. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 315.) No distinction is made among concealment, half-truths, and false statements of fact. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Further, express and implied representations, as well as material omissions, support finding a statement misleading. (See e.g. *In re Naney* (1990) 51 Cal.3d 186 [“Both express and implied representations of ability to practice are prohibited”]; *In the Matter of Kirwin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 630, 636-637; *Franklin v. State Bar* (1986) 41 Cal.3d 700, 709.)

Commission Response: The Commission agrees with the commenter regarding paragraph (b) and has made the suggested change. However, the Commission does not agree that “reckless disregard” should be a standard in paragraph (c), which concerns failure to disclose, and has not made the change.

3. OCTC supports Comment [3]. OCTC takes no position as to Comment [2].

Commission Response: No response required.

4. Comment [1] to this rule would only prohibit a false statement of fact or law, not other misleading statements. California has long held that an attorney is required certification to practice law in California or elsewhere” does not seem to follow in that there is no “provision” earlier identified in the definition and the definition lacks parallel construction, which renders it difficult to comprehend. Thus, it is not clear what type of “provision” is being referred to – a legal provision, such as a Rule or statute, or the State Bar providing something to an attorney? If the intent is to refer simply to reinstatement after disbarment or resignation or applications for a certified legal specialty, then that intention should be clearly stated to eliminate this inherent ambiguity.

Further, on its face, it would not appear that “admission or readmission” or “reinstatement” is a type of “provision.” Perhaps changing the word “provision” to “process” or removing the words “provision relating to” would provide the needed clarity. Either way, the sentence as presently constructed does not, in our opinion, clearly convey its meaning and should be clarified.

Commission Response: The Commission previously replied to this comment and continues to believe that a prohibition on misstatements of fact or law is an appropriate

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

1. OCTC supports the revision of paragraph (a) of this rule to include that it can be violated by an applicant making a statement in his or her application in reckless disregard for the truth or falsity of a statement, as well as knowingly. This is consistent with *In re Gossage* (2000) 23 Cal.4th 1080.

Commission Response: No response required.

2. The “reckless disregard” language should be in paragraphs (b) and (c). As previously discussed, gross negligence or recklessness in preparing, responding, or correcting false or misleading statements should be disciplinable.

Commission Response: The Commission agrees with the commenter regarding paragraph (b) and has made the suggested change. However, the Commission does not agree that “reckless disregard” should be a standard in paragraph (c), which concerns failure to disclose, and has not made the change.

3. OCTC supports Comment [3]. OCTC takes no position as to Comment [2].

Commission Response: No response required.

4. Comment [1] to this rule would only prohibit a false statement of fact or law, not other misleading statements. California has long held that an attorney is required to refrain from misleading and deceptive acts without qualification. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 315. No distinction is made among concealment, half-truths, and false statements of fact. Further, express and implied representations, as well as material omissions, support finding a statement misleading.

Commission Response: The Commission previously replied to this comment and continues to believe that a prohibition on misstatements of fact or law is an appropriate limitation in an application process.

- **State Bar Court:** No comment was received from the State Bar court.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, three public comments were received. All three comments agreed only if modified. During the 45-day public comment period, two public comments were received. Both comments agreed with the proposed rule. A public comment synopsis table, with the Commission’s responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. Fiduciary Self-Dealing – Presumption of Undue Influence

California law recognizes a fiduciary's potential for exerting undue influence in transactions with a beneficiary. Under Probate Code, § 16004, the law presumes a fiduciary has used this influence to the fiduciary's advantage in all dealings with the beneficiary of the trust that "... occurs during the existence of the trust or while the trustee's influence with the beneficiary remains" Section 16004 applies to the lawyer-client relationship. (See *BGJ Associates, LLC v. Wilson* (2003) 113 Cal. App.4th 1217, 1227. See also, *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 916.) This standard does not apply to the negotiation of the agreement creating the fiduciary relationship. (See *Seltzer v. Robinson* (1962) 57 Cal.2d 213, 217 [concluding that an attorney should not be put in the "impossible position of becoming the prospective client's attorney while he was attempting to reach an agreement with him as to whether he should become his attorney or not."].)

2. Business and Professions Code, § 6175.3 (Sale of Financial Products to an Elder, Dependent Adult, Client or Former Client)

Business and Professions Code, § 6175.3 is similar to current rule 3-300 in that it governs transactions with persons with whom the lawyer has a fiduciary relationship. It applies to a lawyer selling financial products to an elder, or dependent adult, client or former client and has similar requirements to rule 3-300 (e.g. fair and reasonable terms, requirement to advise client they may seek independent advice, client's written consent). It also includes additional heightened requirements (e.g. the written disclosure must be clear and conspicuous and meet specific formatting requirements, the lawyer must disclose the lawyer's interest in the sale), and applies for three years following the termination of the lawyer-client relationship.

In its 2001 comment, OCTC suggested language changes to rule 3-300 that tracked the requirements under § 6175.3, reasoning that the changes would simply extend protections already provided for some clients to all clients.

3. Duty to Advise Client: Seeking Independent Counsel

Current rule 3-300 requires lawyers to advise the client that the client "may seek the advice" of independent counsel regarding the transaction or acquisition. The State Bar Review Department indicated that the language of the current rule is inconsistent with California Supreme Court authority that require a lawyer to advise the client *to seek* independent advice. *Matter of Silvertown II* (2004) 4 Cal. State Bar Ct. Rptr. 643, n. 16. In *Rose v. State Bar* (1989) 49 Cal.3d 646, 663 [262 Cal.Rptr. 702], where the lawyer told the client that she could consult another lawyer regarding the transaction, but did not advise her to, and implied that doing so would be unnecessary, the court stated that the lawyer, in entering such transactions with the client, was required to advise the client to seek independent counsel. In *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 309

[256 Cal.Rptr. 381], where the client transferred conservatorship funds to the lawyer for investment with the lawyer's former client, who owed the lawyer money, the court stated that the lawyer was required to *encourage* the client to consult with other counsel.

4. Modification of Fee Agreements

No rule of professional conduct specifically addresses modifications to fee agreements. The Discussion to rule 3-300 states the rule is not applicable to agreements by which the lawyer is retained unless it confers an interest adverse to the client, but is silent regarding modification of the initial agreement. Since the last amendments to rule 3-300, numerous diverging interpretations of the rule's applicability to modifications of fee agreements have emerged.¹

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for Model Rule 8.1, which is the direct counterpart to rule 1-200, revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_1.authcheckdam.pdf (Last accessed on 2/7/17)
- 34 jurisdictions have adopted Model Rule 8.1 verbatim (AL, AK, AZ, AR, CT, DE, HI, ID, IL, IN, IA, KS, KY, ME, MA, MN, MS, MT, NE, NV, NJ, NM, NC, ND, OK, PA, SC, SD, TN, UT, VT, WV, WI, WY); 14 jurisdictions have adopted something substantially similar to Model Rule 8.1 (CO, DE, FL, GA, LA, MD, MI, MO, NH, OH, OR, RI, VA, WA); and 3 jurisdictions have adopted a rule that is substantially different from Model Rule 8.1 (CA, NY, TX).²

¹ See, Ethics Hotliner, Ethics Alert: Uncertain Ethics Requirements for Attorney Fee Modifications - Counsel Compliance with Rule 3-300 when Modifying a Fee Agreement (COPRAC 2009) found at:

http://ethics.calbar.ca.gov/Portals/9/documents/Publications/EthicsHotliner/Ethics_Hotliner-Fee_Modification_Rule_3-300-Summer_09.pdf

² New York Rule 8.1 provides:

8.1 Candor in Admission Process

(a) A lawyer shall be subject to discipline if, in connection with the lawyer's own application for admission to the bar previously filed in this state or in any other jurisdiction, or in connection with the application of another person for admission to the bar, the lawyer knowingly:

(1) has made or failed to correct a false statement of material fact; or

(2) has failed to disclose a material fact requested in connection with a lawful demand for information from an admissions authority

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

A. Concepts Accepted (Pros and Cons):

1. Change title of the Current Rule
 - Pros: Conforms the title to expanded scope of the proposed rule. See Section IX.A.2, below.
 - Cons: None identified.
2. Expand the scope of the current rule to include other forms of applications related to the practice of law.
 - Pros: The policy and intended public protection of current rule 1-200 should extend to other lawyer applications related to law practice. For example, a lawyer who knowingly makes a false statement of a material fact in connection with an application to become a certified specialist commits misconduct that involves deception and demonstrates a probable intent to mislead clients and the public. False statements of material fact in all such applications pose a similar danger to the public and to the reputation of the Bar and the legal system.
 - Cons: Although there are no known cons to this proposed change, one might criticize the expansion as incomplete because it does not cover all lawyer submissions to the State Bar. Such submissions include, but are not limited to, the following: submissions concerning MCLE compliance cards, applications for registration as a law corporation or limited liability partnership, IOLTA account update forms, applications to be transferred to or from voluntary inactive status, or applications for membership fee waivers.
3. Expand the scope of the rule to include applications by individuals who are not members of the State Bar to appear and practice in California, such as an

[Footnote continued...]

Texas Rule 8.01 provides:

8.01 Bar Admission, Reinstatement, and Disciplinary Matters

An applicant for admission to the bar, a petitioner for reinstatement to the bar, or a lawyer in connection with a bar admission application, a petition for reinstatement, or a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact; or
- (b) fail to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admission, reinstatement, or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.05.

application by a lawyer licensed in another state for registration as a registered in-house counsel in California.

- Pros: This change increases public protection and recognizes multijurisdictional practice (“MJP”) developments that have occurred since the last comprehensive revision of the Rules. Given the reality of MJP, the current rule is too narrow in only protecting the public from conduct committed by persons seeking admission or readmission as members of the State Bar. Non-California lawyers who apply for or otherwise seek express authorization to practice law in California without becoming a member of the Bar pose the same risk of harm and should be included within the scope of this Rule. In terms of the need for oversight and public protection, there is little difference between an application submitted by a bar applicant seeking to become a member of the State Bar and an application, for example, by a non-California lawyer seeking authorization to practice as a registered in-house counsel in California.
 - Cons: The administrative costs associated with pursuing discipline against a person who is not a California lawyer and possibly a not a California resident might be higher than the costs when disciplining a member.
4. As part of the foregoing expansion of the rule, identify with some specificity what kinds of applications for admission, readmission, certification or registration are covered by the rule. (See proposed paragraph (d).)
- Pros: The proposed paragraph adds clarity as to what conduct is prohibited and facilitates both compliance and enforcement.
 - Cons: None identified.
6. Clarify that current rule 1-200(A) prohibits false statement *by an applicant* for admission from making a statement of material fact that the applicant knows to be false. The Commission recommends revising rule 1-200(A) to include that the applicant also be prohibited from making such a statement with reckless disregard as to its truth or falsity. This addition adds clarity and is consistent with *In re Gossage* (2000) 23 Cal.4th 1080.
- Pros: In order to clarify rule 1-200(A), the Commission included the additional prohibition recommended by the Office of Chief Trial Counsel, which is set forth in proposed Rule 8.1(a). The reckless disregard standard in proposed paragraph (a), which is omitted from proposed paragraph (b) (see below), emphasizes the breadth of an applicant’s duties by adding a gross negligence standard.
 - Cons: COPRAC commented that the recommended paragraph (a) and ABA Model Rule 8.1 “both include the materiality limitation, but each applies only to statements made in connection with an application for admission to the State Bar, not applications made to a tribunal, such that the inconsistent standard of truthfulness present in proposed Rule 8.1 is not present in either.” (See proposed Rule 3.3 which addresses candor toward the tribunal.)

7. Current rule 1-200(B) is indefinite in addressing a lawyer “furthering” an application. A more tightly written and objective standard would clarify the application of the prohibition.
 - Pros: Proposed paragraph (b) clarifies that its prohibition applies to statements of material fact and not to other undefined conduct, and that it applies only to statements made in connection with an other’s person’s application, not the lawyer’s own application. The “reckless disregard” standard of proposed paragraph (a) is not included in proposed paragraph (b) so that a lawyer aiding another person’s application does not carry the same burden as the applicant. The Commission believes that many applicants solicit support from someone, such as a judge or law professor, who is not in a position to do any investigation, and it is better for the process to not discourage such persons from providing their assistance.
 - Cons: The application would be improved by imposing a duty to investigate on lawyers who support the applications of others.
8. Remove current paragraph (C), which states that the current rule does not prohibit a lawyer from representing another lawyer in an application, and replace it with guidance as to the standards that apply in the representational setting. See proposed Comment [3].
 - Pros: Current paragraph (C) is unneeded because it goes without saying that an applicant is entitled to legal representation. Proposed Comment [3] provides guidance by way of cross-references to the standards that apply in that situation.
 - Cons: None identified.
9. Add a provision establishing a duty to correct prior errors.
 - Pros: Current paragraph (A) addresses the making of a false statement, but the current rule does not require the correction of any prior misleading statements. Proposed paragraph (c) adds a duty to disclose facts necessary to correction material misapprehension.
 - Cons: None identified.
10. Add a statement reminding that a person who makes a false statement in connection with that person’s own application for admission or readmission may be subject to discipline after admission. This is included in proposed Comment [1].
 - Pros: To be effective, the Rule should deter the prohibited conduct. The prospect of discipline offers a level of deterrence but additional deterrence should be achieved by indicating that a person’s law license may be subject to cancellation.

- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Substituting the term “lawyer” for “member”.
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Including a definition of “material fact,” for example: “(1) ‘Material fact’ as used in this rule 1-200 means a substantial likelihood that a reasonable person would consider it important in evaluating whether an applicant for admission, readmission, certification or registration by the State Bar is of requisite good moral character. (See *In the Matter of Pasyanos* (Rev. Dept. 2005) 4 Cal. State Bar Ct. Rptr. 746.” This addition could be part of the rule or in a Comment paragraph.
 - Pros: Including a definition of “material fact,” which is part of the standard in paragraphs (b) and (c), would provide important guidance to lawyers concerning what statements will violate the rule, thus promoting compliance with the rule.
 - Cons: Neither the Rules nor Comments should be burdened with definitions of concepts of general legal application, as opposed to words or phrases that are defined for the Rules.
3. Expanding the scope of the current rule to cover a member’s submission of MCLE compliance cards.
 - Pros: Similar to the other expansions proposed to the drafting team, this change would be a substantive change that expands a lawyer’s duties and enhances public protection.
 - Cons: The State Bar’s recent MCLE audit activity suggests that this change is not necessary to redress deceptive submissions of MCLE compliance. See, e.g., *In the Matter of Anna Christina Yee* (Rev. Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330 [2014 WL 3748590] [Gross negligence amounting to moral turpitude found in an attorney’s failure to accurately report compliance MCLE requirements to the State Bar.]

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together

with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. The proposed rule would be expanded to cover: (1) applications by individuals who are not members of the State Bar to appear and practice in California, such as an application by a lawyer licensed in another state for registration as a registered in-house counsel in California; and (2) member applications made to the State Bar for certification, such as a member's application for certification as a specialist. Both of these proposed expansions are substantive changes to the current rule that add new duties in the Rules.
2. The proposed rule would establish a definite distinction between the burden of accuracy and completeness imposed on a lawyer with regard to the lawyer's own application and the burden imposed on a lawyer who aids another person's application, and this can be seen as a substantive change.
3. Proposed paragraph (c) imposes a duty to disclose facts necessary to correction material misapprehension.

D. Non-Substantive Changes to the Current Rule:

1. Change of title to accurately reflect expanded scope of the proposed rule.
2. Reordering the rule to include a description of the rule's expanded scope in the first paragraph so that a reader will understand when the rule applies.

E. Alternatives Considered:

1. Retain the current rule without any changes. Retaining the current rule would promote continuity on this longstanding disciplinary standard. On the other hand, ambiguities in current rule 1-200 would be perpetuated and an opportunity to expand the scope of the rule would be lost. Retaining the current rule would also fail to address the development of MJP in California.
2. As suggested by OCTC, the Commission considered a change to the current rule's prohibition that would have included an explicit "gross negligence" standard with regard to both false statements and failures to disclose material facts. The Commission decided not to recommend this change. The Commission sees no need for a gross negligence standard with respect to the applicant because he or she will know the accuracy of information provided in any of the settings addressed by the rule; the applicant already is subject to professional discipline for providing material false information. The Commission also declined to recommend such a change for a lawyer who supports or opposes an applicant because doing so would interfere with the processing of applications by making it more difficult for an applicant to obtain support or for the State Bar to receive important negative information about applicants. It is foreseeable that this would

occur because of the additional investigatory burden placed on the second lawyer and the threat of discipline for investigating badly. Nevertheless, although the Commission declined to recommend “codification” of a gross negligence standard in the proposed amended rule, there is no intent to change existing case law that might permit OCTC to seek discipline on a gross negligence theory. (See above for the cases concerning gross negligence cited by OCTC in Section VI and the reference to *In the Matter of Anna Christina Yee* in Section IX.B.2.)

3. Regarding the proposed expansion to cover other applications besides admission or readmission, the Commission considered the alternative of simply having the disciplinary authorities rely on existing general law, such as rule 1-100(D)(2) (re applicability of rules generally to non-California lawyers), the prohibition against conduct involving moral turpitude, and the ability to seek discipline for signing a document under penalty of perjury that includes false statements of material fact. Although such an approach might be feasible, the Commission determined that a more precisely targeted rule would enhance public protection, facilitate greater lawyer awareness and improve compliance. (See Sections IX.A.2 & 3, above.)

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 8.1 [1-200] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 8.1 [1-200] in the form attached to this Report and Recommendation.

**Proposed Rule 8.1 [1-200] False Statement Regarding Application for
Admission, Readmission, Certification or Registration
Synopsis of Public Comments**

TOTAL = 2 **A = 0**
D = 0
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-Xx	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	M	8.1	<p>1. OCTC supports the revision of paragraph (a) of this rule to include that it can be violated by an applicant making a statement in his or her application in reckless disregard for the truth or falsity of a statement, as well as knowingly. This is consistent with <i>In re Gossage</i> (2000) 23 Cal.4th 1080.</p> <p>2. The “reckless disregard” language should be in paragraphs (b) and (c). As previously discussed, gross negligence or recklessness in preparing, responding, or correcting false or misleading statements should be disciplinable.</p> <p>3. OCTC supports Comment 3. OCTC takes no position as to Comment 2.</p> <p>4. Comment 1 to this rule would only prohibit a false statement of fact or law, not other misleading statements. California has long held that an attorney is required</p>	<p>1. No response required.</p> <p>2. The Commission agrees with the commenter regarding paragraph (b) and has made the suggested change. However, the Commission does not agree that “reckless disregard” should be a standard in paragraph (c), which concerns failure to disclose, and has not made the change.</p> <p>3. No response required.</p> <p>4. The Commission previously replied to this comment and continues to believe that a prohibition on misstatements of fact or law is an appropriate</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Proposed Rule 8.1 [1-200] False Statement Regarding Application for
Admission, Readmission, Certification or Registration
Synopsis of Public Comments**

TOTAL = 2 **A = 0**
D = 0
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					to refrain from misleading and deceptive acts without qualification. (<i>Rodgers v. State Bar</i> (1989) 48 Cal.3d 300, 315. No distinction is made among concealment, half-truths, and false statements of fact. Further, express and implied representations, as well as material omissions, support finding a statement misleading.	limitation in an application process.
Y-2016-7s	State Bar Standing Committee on Professional Responsibility and Conduct (Spencer) (01-6-17)	Yes	M	8.1	<p>COPRAC supports the change in scope of proposed Rule 8.1, which addresses the issue of potential inconsistencies between this proposed Rule and proposed Rule 3.3.</p> <p>We find somewhat confusing new paragraph (d), which states as follows:</p> <p>As used in this Rule, 'admission to practice law' includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; and any similar provision relating to admission or certification to practice law in California or elsewhere.</p> <p>The phrase "any similar provision relating to admission or</p>	The Commission agrees and has made the suggested change.

**Proposed Rule 8.1 [1-200] False Statement Regarding Application for
Admission, Readmission, Certification or Registration
Synopsis of Public Comments**

TOTAL = 2	A = 0
	D = 0
	M = 2
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>certification to practice law in California or elsewhere” does not seem to follow in that there is no “provision” earlier identified in the definition and the definition lacks parallel construction, which renders it difficult to comprehend. Thus, it is not clear what type of “provision” is being referred to – a legal provision, such as a Rule or statute, or the State Bar providing something to an attorney? If the intent is to refer simply to reinstatement after disbarment or resignation or applications for a certified legal specialty, then that intention should be clearly stated to eliminate this inherent ambiguity.</p> <p>Further, on its face, it would not appear that “admission or readmission” or “reinstatement” is a type of “provision.” Perhaps changing the word “provision” to “process” or removing the words “provision relating to” would provide the needed clarity. Either way, the sentence as presently constructed does not, in our opinion, clearly convey its meaning and should be clarified.</p>	

Rule 8.1 [1-200] False Statement Regarding Application for Admission to Practice Law

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

Comment

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

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

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

PROPOSED RULE OF PROFESSIONAL CONDUCT 8.1.1
(Current Rule 1-110)
Compliance with Conditions of Discipline and Agreements in Lieu of Discipline

EXECUTIVE SUMMARY

The Commission evaluated current rule 1-110 (Disciplinary Authority of the State Bar) in accordance with the Commission Charter. There is no corresponding ABA Model Rule to current rule 1-110. However, there is a comparable rule 10(B) in the ABA Model Rules for Lawyer Disciplinary Enforcement. The result of the Commission's evaluation is proposed rule 8.1.1 (Compliance with Conditions of Discipline and Agreements in Lieu of Discipline).

Rule As Issued For 90-day Public Comment

Current rule 1-110 states: "A member shall comply with conditions attached to public or private reprovals or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 9.19 California Rules of Court." Rule 10(B) of the ABA Model Rules for Lawyer Disciplinary Enforcement provides that "[w]ritten conditions may be attached to an admonition or a reprimand. Failure to comply with such conditions shall be grounds for reconsideration of the matter and prosecution of formal charges against the respondent."

The Commission is recommending two clarifying revisions to the current rule. First, the Commission is recommending the addition of a reference to "an agreement in lieu of discipline." An agreement in lieu of discipline is a disposition of a disciplinary matter that might include "conditions" with which a lawyer should be required to comply. Second, the Commission is recommending substituting the phrase "the terms and conditions" for "conditions" as the former is a more inclusive reference than the latter. The Commission believes that both changes further the function of the rule as a charging vehicle that helps assure that lawyers can be held accountable if terms or conditions of a disciplinary disposition are violated.

The single comment recommended in proposed rule 8.1.1, recognizes that there are other provisions which also require a lawyer to comply with conditions of discipline. See e.g., Business and Professions Code § 6068 subdivisions (k) and (l).

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 8.1.1 [1-110]

Commission Drafting Team Information

Lead Drafter: Dan Eaton

Co-Drafters: James Ham, Mark Tuft

I. CURRENT CALIFORNIA RULE

Rule 1-110 Disciplinary Authority of the State Bar

A member shall comply with conditions attached to public or private reprovls or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 9.19, California Rules of Court.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 8.1.1 [1-110]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 8.1.1 [1-110]

Vote: 12 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 8.1.1 [1-110] Compliance with Conditions of Discipline and Agreements in Lieu of Discipline

A lawyer shall comply with the terms and conditions attached to any agreement in lieu of discipline, any public or private reprovsl, or to other discipline administered by the State Bar pursuant to Business and Professions Code §§ 6077 and 6078 and California Rules of Court, rule 9.19.

Comment

Other provisions also require a lawyer to comply with agreements in lieu of discipline and conditions of discipline. See e.g., Business and Professions Code § 6068, (k) and (l).

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-110)

Rule 8.1 [1-110] ~~Disciplinary Authority of the State Bar~~ Compliance with Conditions of Discipline and Agreements in Lieu of Discipline

A ~~member~~ lawyer shall comply with the terms and conditions attached to any agreement in lieu of discipline, any public or private ~~reprovals or~~ reproval, or to other discipline administered by the State Bar pursuant to Business and Professions Code ~~sections~~ §§ 6077 and 6078 and ~~rule 9.19,~~ California Rules of Court, rule 9.19.

Comment

Other provisions also require a lawyer to comply with agreements in lieu of discipline and conditions of discipline. See e.g., Business and Professions Code § 6068, (k) and (l).

V. RULE HISTORY

The predecessor to current rule 1-110 was approved as rule 9-101 in 1983 at the same time the Supreme Court approved the predecessor to current rule 9.19 of the Rules of Court. Together, these rules provide the State Bar with the “authority to attach conditions to reprovals that would allow the bar to tailor the discipline more closely to the lawyer’s misconduct and provide more protection to the public.”

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule and its Comment.

Commission Response: No response required.

- **State Bar Court:** No comment was received from State Bar Court.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, three public comments were received. Two comments agreed with the proposed Rule and one comment agreed only if modified. A public comment synopsis table, with the Commission’s responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

See Section V on the history of the current rule. In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- California Rules of Court, rule 9.19

B. ABA Model Rule Adoptions

The Commission has been informed that there is no corresponding ABA Model Rule of Professional Conduct, nor has any jurisdiction adopted a rule of professional conduct similar to rule 1-110. However, there is a comparable rule 10(B) in the ABA Model Rules of Disciplinary Enforcement¹ that provides: “Written conditions may be attached to an admonition or a reprimand. Failure to comply with such conditions shall be grounds for reconsideration of the matter and prosecution of formal charges against the respondent.” Current rule 1-110 is similar in concept to the ABA disciplinary enforcement rule but it is tailored to California’s lawyer disciplinary system. The existence of these similar concepts achieves a degree of uniformity and promotes a national standard. This is because the subject matter of this particular professional conduct rule is one which is tied to a jurisdiction’s specific system of discipline.

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

A. Concepts Accepted (Pros and Cons):

1. Changing Title of the Current Rule
 - Pros: Conforms the title to the substance of the rule.
 - Cons: None identified.
2. Change “conditions” to “terms and conditions”
 - Pros: Conforms to the proposed addition of agreements in lieu of discipline as those agreements have “terms” while reprimands typically have “conditions.”
 - Cons: None identified.

¹ The following jurisdictions appear to have discipline enforcement rules based, in whole or in part, on the ABA Model Rules of Disciplinary Enforcement: Alabama, Alaska, Delaware, Florida, Idaho, Louisiana, Michigan, Mississippi, Montana, Nevada, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, and West Virginia. In addition, Maine recently proposed a similar rule.

3. Include in the rule an express reference to “any agreement in lieu of discipline.”
 - Pros: As noted in the comment submitted by OCTC, including an “agreement in lieu of discipline” removes ambiguity concerning a member’s duties under disciplinary orders and such agreements and emphasizes the importance of strict compliance with such orders and agreements.
 - Cons: Violations of agreements in lieu of discipline already constitute a violation of Business and Professions Code § 6068, subdivision (l). There is no need for a rule that also addresses violations of agreements in lieu of discipline..

B. Concepts Rejected (Pros and Cons):

1. Including in the rule an express reference to “disciplinary probation.” If the foregoing reference had been included, the rule would have provided: “A lawyer shall comply with the terms and conditions attached to public or private reprovls, *disciplinary probation*, and any agreement in lieu of discipline administered by the State Bar pursuant to Business and Professions Code §§ 6077 and 6078 and rule 9.19, California Rules of Court.” (Emphasis added).
 - Pros: Adding the term “disciplinary probation” is consistent with the duty of an attorney under Business and Professions Code § 6068(k) providing that an attorney must “comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.” Including “disciplinary probation” in an amended rule 1-110 should improve public protection by increasing awareness of this duty and by promoting compliance through deterrence because any condition imposed as part of probation would likely include a warning to the lawyer that failure to comply with the condition would subject the lawyer to a rule 1-110 violation. (See *In the Matter of Respondent Y* (Rev. Dept. 1998) 3 Cal State Bar Ct. Rptr. 862 [1998 WL 240126] for an example of the rule 1-110 admonishment given to a respondent in a State Bar Court order imposing conditions attached to a reproof.) Notwithstanding the current rule’s reference to “other discipline,” the current rule arguably is deficient to the extent that the significance of conditions arising in the context of “probation” is not specifically identified.
 - Cons: Including “disciplinary probation” in an amended Rule 1-110 could result in unnecessary and inefficient double charging of the same misconduct (i.e., a count for violation of Rule 1-110 and a count for violation § 6068(k)) without having any effect on the outcome of the matter or the degree of discipline imposed. Unnecessary duplicative charging needlessly increases the cost of the discipline system with no corresponding measurable benefit. “Disciplinary probation” is neither a category nor type of discipline. Adding that term risks possible confusion in a rule that has been historically non-controversial. Public protection and increased awareness of the rules is not

enhanced by unnecessary repetition or by the inclusion of terms that do not correctly describe the discipline process and its terms and conditions. Probation is regularly required as a condition of formal discipline, such as a public reproof or actual suspension. Probation can also be a condition of an agreement in lieu of discipline. As recommended, the proposed rule would cover both reprovals and agreements in lieu of discipline. The addition of “disciplinary probation” is unnecessary, imports confusing terminology that is not used in State Bar court proceedings, and would not as a practical matter increase public protection.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Including in the rule an express reference to “any agreement in lieu of discipline” is a substantive change to current rule 1-110. However, it is not a change in the underlying duties of an attorney because this is found in Business and Professions Code § 6068, subdivision (l).

D. Non-Substantive Changes to the Current Rule:

1. Substituting the term “lawyer” for “member”.
 - Pros: The current rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

The Rules of Professional Conduct apply to all lawyers authorized to practice in California, including out-of-state lawyers admitted *pro hac vice*. The application of the rules is not limited to members of the California State Bar.
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. All three concepts accepted for inclusion in the rule (title change, changing “member” to “lawyer,” and substituting “terms and conditions” for “conditions”) are intended as non-substantive, clarifying changes.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 8.1.1 [1-110] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 8.1.1 [1-110] in the form attached to this Report and Recommendation

**Proposed Rule 8.1.1 [1-110] Compliance with Conditions of Discipline
and Agreements in Lieu of Discipline
Synopsis of Public Comments**

TOTAL = 3	A = 2
	D = 0
	M = 1
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response NI = 0
X-2016-43an	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-12-16)	Yes	A		Supports adoption of proposed Rule 8.1.1.	No response required.
X-2016-76v	Los Angeles County Bar Association (LACBA) – Professional Responsibility and Ethics Committee of Los Angeles (PREC) (Schmid) (09-24-16)	Yes	M		PREC recommends that reference in Proposed Rule 8.1.1 [Compliance with Conditions of Discipline and Agreements in Lieu of Discipline (current Rule 1-110)] to “any agreement in lieu of discipline” be deleted as it is unnecessary. Violations of agreements in lieu of discipline already constitute a violation of Business and Professions Code section 6068, subdivision (I). There is no need for a rule that also addresses violations of agreements in lieu of discipline.	The Commission has not made the suggested change. The Commission continues to believe that including the term “agreement in lieu of discipline” removes ambiguity concerning a member’s duties under disciplinary orders and such agreements and emphasizes the importance of strict compliance with such orders and agreements.
X-2016-104bl	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A		Supports adoption of proposed Rule 8.1.1 and its comments.	No response required.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

PROPOSED RULE OF PROFESSIONAL CONDUCT 8.2
(Current Rule 1-700)
Judicial Officials

EXECUTIVE SUMMARY

The Commission evaluated current rule 1-700 (Member as Candidate for Judicial Office) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of ABA Model Rule 8.2 (Judicial And Legal Officials). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 8.2 (Judicial Officials).

Rule As Issued For 90-day Public Comment

Current rule 1-700 requires that a member who is a candidate for judicial office comply with Canon 5 of the Code of Judicial Ethics. The current rule, includes a provision defining "candidate for judicial office" describing when such candidacy starts and ends (the Model rule does not). Both Model Rule 8.2 and current rule 1-700 require compliance with the applicable provision of the Code of Judicial Ethics. Model Rule 8.2 also prohibits lawyers from making false statements of fact concerning the qualifications or integrity of a judge, legal officer or candidate for election or appointment to judicial or legal office. Proposed rule 8.2 tracks this aspect of Model Rule 8.2 by including a revision to paragraph (a) prohibiting lawyers from making false or reckless statements concerning the qualifications or integrity of a judge or judicial officer, or of a candidate for election or appointment to judicial office.

Paragraph (a) of proposed rule 8.2 prohibits a lawyer from making a false or reckless statement concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office. The rationale for adding this provision is to enhance public confidence in the legal profession. This concept has precedent generally in a lawyer's duty of respect to the courts and judicial officers (Bus. & Prof. Code § 6068 (b)) and specifically in disciplinary case law (*In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370 [during a lawyer's campaign for judicial election, the lawyer made false statements regarding his opponent's involvement in fraudulent activities]).

Paragraph (b) of proposed rule 8.2 makes clear that a lawyer who is a candidate for judicial office shall comply with Canon 5 of the California Code of Judicial Ethics. Like current rule 1-700(B), proposed rule 8.2 defines "candidate for judicial office" and addresses the determination of when a member is a candidate for judicial office as well as sets forth the criteria for determination of when the lawyer's judicial candidacy ends.

Paragraph (c) is a new paragraph that governs the conduct of a lawyer who seeks appointment to judicial office and requires the candidate's compliance with Canon 5B(1) of the California Code of Judicial Ethics. Similar to the policy and intended function of the current rule, new paragraph (c) could result in State Bar disciplinary charges for violations of the applicable provisions of the Code of Judicial Ethics.

There are two new comments to proposed rule 8.2. Both new comments promote lawyer compliance with obligations imposed by the rule and are revisions to the corresponding ABA Model Rule 8.2. Comment [1] recognizes the duties of lawyers to maintain respect due to the courts and judges (Bus. & Prof. Code § 6068(b)) and encourages lawyers to defend judges and courts unjustly criticized. Comment [2] in part explains that false statements by lawyers about candidates for judicial office harm confidence in the legal profession.

Post Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission deleted Comment [2] because it was deemed aspirational and unnecessary and made non-substantive stylistic edits. The Commission voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 8.2 [1-700]

Commission Drafting Team Information

Lead Drafter: Judge Dean Stout

Co-Drafters: Danny Chou, Judge Karen Clopton

I. CURRENT CALIFORNIA RULE

Rule 1-700 Member as Candidate for Judicial Office

- (A) A member who is a candidate for judicial office in California shall comply with Canon 5 of the Code of Judicial Ethics.
- (B) For purposes of this rule, “candidate for judicial office” means a member seeking judicial office by election. The determination of when a member is a candidate for judicial office is defined in the terminology section of the California Code of Judicial Ethics. A member’s duty to comply with paragraph (A) shall end when the member announces withdrawal of the member’s candidacy or when the results of the election are final, whichever occurs first.

Discussion:

Nothing in rule 1-700 shall be deemed to limit the applicability of any other rule or law.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 8.2 [1-700]

Vote: 13 (yes) – 1 (no) – 1 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 8.2 [1-700]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION’S PROPOSED RULE (CLEAN)

Rule 8.2 [1-700] Judicial Officials

- (a) A lawyer shall not make a statement of fact that the lawyer knows* to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or judicial officer, or of a candidate for election or appointment to judicial office.

- (b) A lawyer who is a candidate for judicial office in California shall comply with Canon 5 of the California Code of Judicial Ethics. For purposes of this Rule, “candidate for judicial office” means a lawyer seeking judicial office by election. The determination of when a lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A lawyer’s duty to comply with this Rule shall end when the lawyer announces withdrawal of the lawyer’s candidacy or when the results of the election are final, whichever occurs first.
- (c) A lawyer who seeks appointment to judicial office shall comply with Canon 5B(1) of the California Code of Judicial Ethics. A lawyer becomes an applicant seeking judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A lawyer’s duty to comply with this Rule shall end when the lawyer advises the appointing authority of the withdrawal of the lawyer’s application.

Comment

To maintain the fair and independent administration of justice, lawyers should defend judges and courts unjustly criticized. Lawyers also are obligated to maintain the respect due to the courts of justice and judicial officers. See Business and Professions Code § 6068(b).

IV. COMMISSION’S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-700)

Rule 8.2 [1-700] ~~Member as Candidate for~~ Judicial ~~Office~~Officials

- (a) A lawyer shall not make a statement of fact that the lawyer knows* to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or judicial officer, or of a candidate for election or appointment to judicial office.
- (~~Ab~~) A ~~member~~lawyer who is a candidate for judicial office in California shall comply with Canon 5 of the California Code of Judicial Ethics.
- (~~B~~) For purposes of this ~~rule~~Rule, “candidate for judicial office” means a ~~member~~lawyer seeking judicial office by election. The determination of when a ~~member~~lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A ~~member’s~~lawyer’s duty to comply with ~~paragraph (A)~~this Rule shall end when the ~~member~~lawyer announces withdrawal of the ~~member’s~~lawyer’s candidacy or when the results of the election are final, whichever occurs first.
- (c) A lawyer who seeks appointment to judicial office shall comply with Canon 5B(1) of the California Code of Judicial Ethics. A lawyer becomes an applicant seeking judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A lawyer’s duty to

comply with this Rule shall end when the lawyer advises the appointing authority of the withdrawal of the lawyer's application.

Comment-Discussion

To maintain the fair and independent administration of justice, lawyers should defend judges and courts unjustly criticized. Lawyers also are obligated to maintain the respect due to the courts of justice and judicial officers. See Business and Professions Code § 6068(b).

~~Nothing in rule 1-700 shall be deemed to limit the applicability of any other rule or law.~~

V. RULE HISTORY

On January 3, 1996, the Supreme Court of California sent a letter to the State Bar requesting consideration of a proposed new rule of professional conduct to regulate an attorney's conduct as a temporary judicial officer and as a candidate for judicial office. The Court's request was intended to fill a regulatory gap. The Code of Judicial Ethics sets the standards for regulating temporary judicial officers and candidates for judicial office. However, the jurisdiction of the Commission on Judicial Performance extends only to sitting judges and does not extend to attorneys who are serving as temporary judicial officers or who are candidates for judicial office. The Court's request was intended to incorporate the relevant portions of the California Code of Judicial Ethics into the California Rules of Professional Conduct in order to allow the State Bar to discipline attorneys who violate the Code of Judicial Ethics while serving as temporary judicial officers or as candidates for judicial office.

The State Bar studied the Supreme Court's request and published two rules for public comment. Following public comment, the State Bar Board of Trustees unanimously adopted two proposed new rules of professional conduct for submission to the Court. Rule 1-700 (Member as Candidate for Judicial Office) became operative by order of the Court on November 21, 1997. Rule 1-710 (Member as Temporary Law Judge, Referee, or Court-Appointed Arbitrator) became operative by order of the Court on March 18, 1999.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC is concerned that this proposed rule would only prohibit a false statement of fact, not other misleading statements. (See *In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370, 376 [interpreting Canon 5 of the Judicial Code of Ethics to apply only to factual misrepresentations, but not to statements that may be misleading or true statements that might imply or suggest through innuendo false conclusions. The Review Department concluded that on its face the language of Canon 5 only reached factual

misrepresentations.].)¹ California has long held that an attorney is required to refrain from misleading and deceptive acts without qualification. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 315.) No distinction is made among concealment, half-truths, and false statements of fact. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Further, express and implied representations, as well as material omissions, support finding a statement misleading. (See e.g. *In re Naney* (1990) 51 Cal.3d 186 [“Both express and implied representations of ability to practice are prohibited”]; *In the Matter of Kirwin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 630, 636-637]; *Franklin v. State Bar* (1986) 41 Cal.3d 700, 709.)

Commission Response: The Commission declines to make the suggested change. The prohibition is limited to false and misleading statements of fact to avoid Constitutional infirmities. Compare *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1438 (lawyer may freely criticize the judiciary if the criticisms are supported by a reasonable factual basis).

The Commission declines to delete the first sentence of Comment [1]. The sentence states the public policy underpinning the rule. By doing, the sentence clarifies both the scope of the rule and how it should be applied, and thus enhances compliance and facilitates enforcement.

2. Comments [1] and [2] are unnecessary and merely a philosophical discussion of the reasons for the rule, which are evident.

Commission Response: The Commission declines to make the suggested change. The prohibition is limited to false and misleading statements of fact to avoid Constitutional infirmities. Compare *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1438 (lawyer may freely criticize the judiciary if the criticisms are supported by a reasonable factual basis).

The Commission declines to delete the first sentence of Comment [1]. The sentence states the public policy underpinning the rule. By doing, the sentence clarifies both the scope of the rule and how it should be applied, and thus enhances compliance and facilitates enforcement.

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

¹ Canon 5B(1)(b) prohibits a judge or candidate for judicial office from making “knowing misrepresentations, including false or misleading statements, during an election campaign because doing so would violate Canons 1 and 2A, and may violate other canons.” There is a proposal to amend this Canon to include not only false statements of fact, but misleading statements as well.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, three public comments were received. One comment agreed with the proposed rule and two comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. California law related to current rule 1-700.

In a case of first impression, the State Bar Court Review Department considered violations of rule 1-700 in *In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370. The State Bar's Notice of Disciplinary Charges asserted that during the respondent lawyer's campaign for judicial election, the lawyer sent a mailer that was critical of his opponent who was a sitting judge, and the lawyer made statements about himself that inaccurately reflected his experience and endorsements.

As to the statements in the mailer, the Review Department found that the attorney violated rule 1-700 with his false statements that implicated the judge in bribery and corporate fraud. However, the Review Department held that other statements in the mailer, which were not false statements of fact but which may have created a false impression as to the judge's involvement with the commutation of a convicted murderer, did not violate rule 1-700 because the rule only reaches factual misrepresentations. Rule 1-700 and Canon 5 of the Code of Judicial Ethics "do not purport to regulate true statements that may be misleading or true statements that might imply or suggest through innuendo that voters draw false conclusions." *Id.*

As to the lawyer's statements about himself, the Review Department held that there was no violation of rule 1-700 because one statement was a reasonable representation and the other was a de minimus mistake that was promptly corrected.

B. California law related to concepts in Model Rule 8.2(a).

Business and Professions Code § 6068, subdivision (b) provides that it is the duty of an attorney "[t]o maintain the respect due to the courts of justice and judicial officers." Disciplinary case law establishes that false statements about a judge's qualifications or integrity are subject to discipline under this section. *Matter of Anderson* (1997) 3 Cal. State Bar Ct. Rptr. 775, 778 (holding a lawyer subject to discipline for making "false statements that impugn the honesty or integrity of the court if those statements either are knowingly false or are made with reckless disregard for their truth or falsity")². The

² Relying on *Standing Committee v. Yagman* (9th Cir.1995) 55 F.3d 1430, the Review Department also held that OCTC bears the burden of proving the falsity of the statements and remanded the case to determine whether OCTC met its burden.

following case law demonstrates the type of conduct that is subject to discipline under subdivision (b).

- Attorney falsely accused court clerk/ex officio judge of taking bribes. *In re Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160, 167.
- Attorney's statement that the presiding judge was prejudiced against certain witnesses because of their religion was found false by a local administrative committee, whose findings were adopted by the State Bar's Board of Governors. *Hogan v. State Bar* (1951) 36 Cal.2d 807, 808-809.
- In an effort to disqualify a judge, attorney made a knowingly false statement that the judge had sent her client home prior to entering an adverse *ex parte* order. *Lebbos v. State Bar* (1991) 53 Cal.3d 37, 42.

C. ABA Model Rule Adoptions

ABA Model Rule 8.2 is a counterpart to the current rule but with several key differences. Like rule 1-700, Model Rule 8.2 requires compliance with the applicable provision of the Code Of Judicial Ethics (Cf. MR 8.2(b) with 1-700(B).) However, unlike rule 1-700, Model Rule 8.2 prohibits lawyers from making false statements of fact concerning the qualifications or integrity of a judge, legal officer or candidate for election or appointment to judicial or legal office. Also unlike the current rule, the model rule does not include provisions defining "candidate for judicial office" or describing when such candidacy starts and ends.

The ABA State Adoption Chart for the ABA Model Rule 8.2, revised December 12, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_2.authcheckdam.pdf (Last accessed on 2/7/17)
- Thirty-two jurisdictions have adopted Model Rule 8.2 verbatim.³ Fourteen jurisdictions have adopted a slightly modified version of Model Rule 8.2.⁴ Four jurisdictions either have no comparable rule, or have adopted a version of the rule that is substantially different from Model Rule 8.2.⁵

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

³ The thirty-two jurisdictions are: Arizona, Arkansas, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

⁴ The fourteen jurisdictions are: Alabama, Alaska, Colorado, Florida, Maryland, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Tennessee, Texas, and Washington.

⁵ The four jurisdictions are: District of Columbia, Georgia, Massachusetts, and Virginia.

A. Concepts Accepted (Pros and Cons):

1. Recommend that the provisions of the current rule be continued.
 - Pros: There are no known issues with the application of the current rule as a disciplinary standard. OCTC does not recommend any changes to the current rule. The origin of the current rule is a recommendation of the judicial committee that drafted revisions to the Code of Judicial Ethics.
 - Cons: None identified
2. Recommend a new paragraph (a) that prohibits a lawyer from making a false or reckless statement concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
 - Pros: Although new, this concept has precedent generally in a lawyer's duty of respect to the courts and judicial officers (Bus. & Prof. Code § 6068(b)) and specifically in disciplinary case law (*In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370. [During a lawyer's campaign for judicial election, the lawyer made false statements regarding his opponent's involvement in fraudulent activities.]) Adding this provision protects public confidence in the legal profession.
 - Cons: Adding this provision is unnecessary as it largely overlaps with the existing requirement of Canon 5B(1)(b) of the Code of Judicial Ethics.
3. Recommend a new paragraph (c) that governs the conduct of a lawyer who seeks appointment to judicial office and requires the candidate's compliance with Canon 5B(1) of the California Code of Judicial Ethics.
 - Pros: This is a conforming change that implements revisions to the Code of Judicial Ethics that became operative after the current rule was adopted. Similar to the policy and intended function of the current rule, new paragraph (c) would serve as a State Bar disciplinary charging vehicle for violations of the applicable provision of the Code of Judicial Ethics.
 - Cons: None identified.
4. Recommend the addition of a new Comment. The first sentence of the Comment is derived from counterpart Comment [3] to Model Rule 8.2. As referenced in the Comment, the second sentence is derived from Business and Professions Code § 6068(b).
 - Pros: In part, the Comment clarifies that false statements by lawyers about candidates for judicial office harm confidence in the legal profession. The Comment also recognizes the cross-over regulation with the duty of an attorney, in general, to maintain the respect due to courts and judges. The Comment promotes lawyer compliance with obligations imposed by the Rule,

and states important policies underlying the Rule, both of which provide helpful guidance in interpreting and applying the Rule.

- Cons: This Comment might be criticized as unnecessary for the application of the rule.
5. Delete the current Discussion paragraph to existing rule 1-700 that states the rule does not limit the applicability of other law
- Pros: This Discussion paragraph arguably does not qualify as a necessary Comment under the Commission's charter.
 - Cons: We are not aware of any problems caused by the existing Discussion paragraph.

B. Concepts Rejected (Pros and Cons):

None. However, other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. The recommended new paragraph (c) which governs the conduct of a lawyer who seeks appointment to judicial office and requires compliance with Canon 5B(1) of the California Code of Judicial Ethics is a substantive change to the extent that it adds an explicit State Bar charging vehicle in the Rules of Professional Conduct. However, duties under Canon 5B(1) are already imposed on a lawyer applicant for judicial office. If a lawyer is appointed to judicial office but subsequently is found to have violated Canon 5B(1) during the application process, that lawyer would be subject to the discipline by the Commission on Judicial Performance regardless of the terms of Rule 1-700.

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".
 - Pros: The current rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 8.2 [1-700] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopt proposed amended Rule 8.2 [1-700] in the form attached to this Report and Recommendation.

**Proposed Rule 8.2 [1-700] Judicial Officials
Synopsis of Public Comments**

TOTAL = 3	A = 1
	D = 0
	M = 2
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43ao	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8/12/16)	Yes	A	8.2	COPRAC supports the adoption of proposed Rule 8.2	No response required.
X-2016-76w	Los Angeles County Bar Association (LACBA) (Schmid) (9/21/16)	Yes	M	8.2	<p>1. Paragraph (a) of Proposed Rule 8.2 [Judicial Officials (current Rule 1-700)] precludes a lawyer from making a statement of fact the lawyer knows to be false or with reckless disregard as to its truth concerning the qualifications or integrity of a judge. This restriction (which is not contained in current Rule 1-700) is overbroad, too subjective, and raises serious First Amendment issues. In addition, the conduct proscribed here is already subject to B&P Code Section 6106, and therefore not necessary.</p> <p>2. Also, the first sentence of Comment [1] is aspirational, unnecessary and should be deleted. Similarly, Comment [2] adds nothing and should be deleted.</p>	<p>1. The Commission declines to make the suggested change. The prohibition is limited to false and misleading statements of fact to avoid Constitutional infirmities. Compare <i>Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman</i> (9th Cir. 1995) 55 F.3d 1430, 1438 (lawyer may freely criticize the judiciary if the criticisms are supported by a reasonable factual basis).</p> <p>2. The Commission declines to delete the first sentence of Comment [1]. The sentence states the public policy underpinning the rule. By doing, the sentence clarifies both the scope of the rule and how it should be applied, and thus enhances compliance and facilitates enforcement.</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Proposed Rule 8.2 [1-700] Judicial Officials
Synopsis of Public Comments**

TOTAL = 3	A = 1
	D = 0
	M = 2
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						The Commission agrees that the second comment can be deleted and has done so.
X-2016-104bm	Office of Chief Trial Counsel (OCTC) (Dresser) (9/27/16)	Yes	M	8.2	<p>1. OCTC is concerned that this proposed rule would only prohibit a false statement of fact, not other misleading statements. California has long held that an attorney is required to refrain from misleading and deceptive acts without qualification. No distinction is made among concealment, half-truths, and false statements of fact. Further, express and implied representations, as well as material omissions, support finding a statement misleading.</p> <p>2. Comments 1 and 2 are unnecessary and merely a philosophical discussion of the reasons for the rule, which are evident.</p>	<p>1. Please see response to LACBA, X-2016-76w, above.</p> <p>2. Please see response to LACBA, X-2016-76w, above.</p>

PROPOSED RULE OF PROFESSIONAL CONDUCT 8.4
(Current Rule 1-120)
Misconduct

EXECUTIVE SUMMARY

The Commission evaluated current rule 1-120 (Assisting, Soliciting, or Inducing Violations) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 8.4 (concerning professional misconduct of a lawyer). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 8.4 (Misconduct).

Rule As Issued For 90-day Public Comment

Proposed rule 8.4 carries forward the substance of current rule 1-120 by prohibiting a lawyer from knowingly assisting in, soliciting or inducing a violation of the Rules of Professional Conduct or the State Bar Act. The proposed rule also adopts the substance of ABA Model Rule 8.4 which contains a similar prohibition as well as additional provisions addressing misconduct that warrants imposition of discipline. The proposed rule is designed to collect in a single rule various misconduct provisions that are currently found in other California rules of professional conduct or in the Business and Professions Code. The rule is intended to facilitate compliance and enforcement by clearly stating these principles in a single rule where lawyers, judges and the public can identify basic standards of conduct addressing honesty, trustworthiness and fitness to practice with which a lawyer must comply.

Paragraph (a), which carries forward the substance of current rule 1-120, prohibits a lawyer from violating the rules of professional conduct, or the State Bar Act, or knowingly assist, solicit or induce another to do so. In addition, this paragraph prohibits a lawyer from doing any of the aforementioned through the acts of another.

One issue considered was whether to follow the approach in ABA Model Rule 8.4(a) which would generally prohibit a lawyer from "attempting" to violate a rule or a provision of the State Bar Act. The Commission determined that the question of whether an attempted violation should be an independent basis for discipline is better addressed on a rule-by-rule basis. This approach means that any prohibition on an attempt would be tailored to a specific rule's violation and potential harm rather than a generalized standard for all of the rules and the State Bar Act. This avoids possible unintended consequences of a one size fits all attempt standard that would not account for the specific purpose of individual rules. For example, in proposed rule 1.5 [4-200], the Commission has recommend a rule that provides a lawyer "shall not make an agreement for, charge, or collect an unconscionable fee or illegal fee." The terms "make" and "charge" in effect prohibit an attempt to "collect" an unconscionable fee.¹ Although only the actual collection of an unconscionable fee will result in harm to a client, even an attempt to impose a legal obligation on a client to pay an unconscionable or illegal fee should be prohibited

¹ This is similar to the standard in Business and Professions Code section 6090.5 that, in part, prohibits a lawyer from agreeing or seeking an agreement that professional misconduct shall not be reported to the State Bar. This section was revised in 1996 in response to a State Bar Court finding that the prior version of the section did not include terms that could be construed fairly as a prohibition on attempts. (See [Assembly Bill No. 2787 \(Kuehl\)](#) 1995-1996 session; and *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752.)

as disciplinable misconduct. On the other hand, the Commission also recommends adoption of proposed rule 4.2 [2-100], which prohibits a lawyer who represents a client in a matter from communicating about the subject of the representation with a person who is represented by a lawyer in the same matter. For this rule, the harm is the actual communication with the represented person that could result in the disclosure of privileged information or otherwise interfere with a lawyer-client relationship. A generalized prohibition against an attempt to engage in such a communication does not further the purpose of this rule and it would pose a risk of unduly interfering with a lawyer's ability to investigate a claim as a lawyer often cannot know that a person is represented until the lawyer has contacted the person.

Paragraph (b) adopts the language of MR 8.4(b) but adds a reference to "moral turpitude." This provision focuses on crimes committed by a lawyer that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer, all of which are central principles in lawyer conduct. The reference to moral turpitude is added to maintain conformity with the broader public protection afforded by Business and Professions Code section 6106.

Paragraph (c) adopts the language of MR 8.4(c) but adds the words "reckless or intentional" to modify "misrepresentation." The conduct prohibited in this provision – dishonesty, fraud, deceit and reckless or intentional misrepresentation – are central concepts of conduct in which lawyers must not engage if respect for the legal profession and the proper administration of justice is to be maintained. The addition of "reckless or intentional" is intended to clarify that negligent misrepresentation is not regarded as dishonesty that should result in discipline under this rule.²

Paragraph (d) adopts the language of MR 8.4(d) concerning conduct "prejudicial to the administration of justice." The Commission concluded that a lawyer's fitness to practice law is called into question by conduct prejudicial to the administration of justice regardless of whether the conduct occurs in connection with the practice of law.

Some members of the Commission raised a concern that this provision may not survive a Constitutional challenge if it is not limited to situations where the lawyer's conduct occurs "in connection with the practice of law." Compare, *United States v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996) (former Bus. & Prof. Code § 6068(f), prohibiting "offensive personality," was found to be unconstitutional.) Proposed Comment [6] seeks to address this concern by specifying that paragraph (d) does not apply to constitutionally-protected conduct.

Paragraph (e) adopts the language of MR 8.4(e) prohibiting a lawyer from stating or implying the ability to improperly influence a government agency or official.

Paragraph (f) adopts the language of MR 8.4(f) prohibiting a lawyer from knowingly assisting a judge in violation of judicial conduct rules. Expressly stating that such conduct is prohibited should contribute to the confidence that the public places in the legal profession and administration of justice is justified.

Finally, non-substantive changes to the current rule include rule numbering to track the Commission's general proposal to use the Model Rule numbering system and the substitution of the term "lawyer" for "member."

² Compare proposed rule 1.1, under which discipline is imposed only if a lawyer has "intentionally, recklessly, repeatedly, or with gross negligence" failed to act competently.

Proposed Rule 8.4 contains six comments intended to clarify how the rule is to be applied. Of particular note is Comment [6] which, as noted above, has been added to clarify that the paragraph (d) does not apply to constitutionally-protected conduct.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission removed the references to “moral turpitude” from both 8.4(b) and 8.4(c). Paragraph (f) was modified to be parallel with paragraph (a) to include inducement and solicitation, and to clarify the meaning of judge and judicial officer. The Commission also modified Comment [4] to provide notice to lawyers that Bus. & Prof. Code § 6106 remains a source of discipline for acts of moral turpitude, dishonesty, or corruption. Finally, Comment [6] was modified to clarify that paragraph (c) does not extend to activities protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 8.4 [1-120]

Commission Drafting Team Information

Lead Drafter: George Cardona

Co-Drafters: Judge Karen Clopton, Robert Kehr, Howard Kornberg, Carol Langford,
Toby Rothschild, Dean Zipser

I. CURRENT CALIFORNIA RULE

Rule 1-120 Assisting, Soliciting, or Inducing Violations

A member shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 8.4 [1-120]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 8.4 [1-120]

Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 8.4 [1-120] Misconduct

It is professional misconduct for a lawyer to:

- (a) violate these Rules or the State Bar Act, knowingly* assist, solicit or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud,* deceit or reckless or intentional misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules, the State Bar Act, or other law; or

- (f) knowingly* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this Rule, “judge” and “judicial officer” have the same meaning as in Rule 3.5(c).

Comment

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

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

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

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

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

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

IV. COMMISSION’S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-120)

Rule 8.4 [1-120] ~~Assisting, Soliciting, or Inducing Violations~~ Misconduct

It is professional misconduct for a lawyer to:

- (a) violate these Rules or the State Bar Act, ~~A member shall not~~ knowingly* assist ~~in,~~ solicit, or induce ~~any violation of these rules or the State Bar Act~~ another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud,* deceit or reckless or intentional misrepresentation;

- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules, the State Bar Act, or other law; or
- (f) knowingly* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this Rule, “judge” and “judicial officer” have the same meaning as in Rule 3.5(c).

Comment

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

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

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

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

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

V. RULE HISTORY

Rule 1-120 was originally a part of the comprehensive proposed rules considered by the Board in 1987. Rule 1-120 was entirely new and had not been contained in the original proposal of the first Commission. Therefore, no public comment had been solicited on the rule. Based on the recommendation of a Board committee, the full Board determined to withdraw the rule from the comprehensive proposal and circulate it for a 90-day public comment period. (At that time, the rule was numbered as proposed new rule 1-110. It was later renumbered as rule 1-120 when another proposal was adopted by the Board as rule 1-110.) The comment period extended from August 29, 1987, through November 30, 1987. Three comments were received on the rule.

The Bar Association of San Francisco stated that “[t]he Board of Directors adopted the position of the Association’s Ethics Committee in support of the rule itself.” The second comment was received from Robert C. Fellmeth, State Bar Discipline Monitor.

Mr. Fellmeth urged adoption of the proposed rule. Mr. Fellmeth stated that in his position as Discipline Monitor, he had seen time and time again that a major cause of attorney misfeasance was the refusal to self-enforce ethical standards. Mr. Fellmeth believed that adoption of the rule would signal to the public that attorneys are taking steps necessary to identify and prohibit misconduct and that attorneys must not be a party to another attorney's misconduct. The third comment, from the Los Angeles County Bar Association, stated that, "[t]he LACBA Board of Trustee approved this rule as proposed."

Following discussion of the public comments, the Commission recommended that the rule be adopted in the form in which it was circulated for public comment. The Board Committee considered the recommendation of the Commission at its May 6, 1988 meeting and recommended that the Board adopt the rule as proposed by the Commission. At its June 18, 1988 meeting, the Board adopted the rule in the form recommended by the Commission and directed that the rule be forwarded to the California Supreme Court with a request that the Court approve the rule. (Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Supplemental Memorandum and Supporting Documents in Explanation, September 1988, at pp. 16 – 19.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC is concerned that subsection (a) prohibits only knowingly assisting, soliciting, or inducing another to violate the rules for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rule 3.3, 4.1, and the General Comments section of this letter. The rules should not encourage willful blindness or a failure to investigate. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].)

Commission Response: The definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the "knowingly" standard is appropriately used in paragraph (a) in imposing vicarious liability for a Rule violation committed by another, and will not encourage willful blindness or failure to investigate. The Rule does not apply the "knowingly" standard to violations committed by the lawyer him or herself.

2. OCTC is concerned that this rule does not prohibit attempting to violate these rules or the State Bar Act for the same reasons expressed in OCTC's comment to proposed Rule 1.2.1. Moreover, by excluding attempts to violate the rules or the State Bar Act, the proposed rule deviates unnecessarily from the ABA Model Rules and the rule in most jurisdictions, which call for discipline for an attorney's attempt to violate the rules. (See, e.g., Model Rule 8.4(a); *People v. Katz* (Colo. 2002)

58 P.3d 1177, 1192 [“The fortuitous discovery and frustration of his intended misappropriation of those funds does not lessen the seriousness of his actions.”].) California law also provides for discipline for attempting to violate an attorney’s ethical standards. (*Werner v. State Bar* (1944) 24 Cal.2d 611, 618 [attempted bribe, whether or not there was any intention to carry it out, is an act of moral turpitude]. See also *In re Conflenti* (1981) 29 Cal.3d 120, 124 [moral turpitude found following conviction for attempt to receive stolen property]; *In re Lesansky* (2001) 25 Cal.4th 11, 17 [moral turpitude found following conviction for attempt to commit a lewd or lascivious act on a child].¹) Exempting attempts to violate the rule and the State Bar Act is contrary to the purposes of attorney discipline: to inquire into the fitness of the attorney to continue in that capacity for the protection of the courts and legal profession. (*Bradpiece v. State Bar* (1974) 10 Cal.3d 742, 748. See also *In re Attorney Discipline* (1998) 19 Cal.4th 582, 609 [“The basic purpose [of disciplinary proceedings] is to protect the public and the profession from the objectionable activities of persons unfit to practice law . . .”].) An attorney who attempts to violate a rule or the State Bar Act by a direct act, but does not complete the act due to some fortuity, still raises concerns about his fitness to be an attorney. The Supreme Court should not have to wait until the attorney causes actual harm.

Commission Response: The Commission debated at length whether to include a general attempt prohibition in this Rule. As discussed in the Report and Recommendation, the Commission rejected this approach as overbroad given that certain Rules do not lend themselves to discipline for attempted violations.

3. Concerned with subsection (f)’s “knowing” standard. Also concerned with use of “judge” or “judicial officer” as opposed to “tribunal.” Rule should administrative law judges or arbitrators. Subsection (f) should also include “solicitation” as grounds for violation.

Commission Response: The Commission has modified paragraph (f) to be parallel with paragraph (a) to include inducement and solicitation. The Commission believes that paragraph (f)’s reference to “judicial officers” includes administrative law judges. The Commission does not believe that extending paragraph (a) to a “tribunal” makes sense, and notes that assisting, soliciting, or

¹ In *In re Lesansky*, *supra*, 25 Cal.4th at p. 17, the Supreme Court wrote: “Here, petitioner’s conviction was for an attempt rather than for a completed offense, and it does not appear that any child was actually harmed, but neither of these circumstances alters our conclusion that his criminal conduct necessarily involves moral turpitude. ‘An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.’ (Pen. Code, § 21a.) The act “must go beyond mere preparation, and it must show that the perpetrator is putting his or her plan into action.” (*People v. Kipp* (1998) 18 Cal.4th 349, 376 [75 Cal.Rptr.2d 716, 956 P.2d 1169].) Thus, by his commission of an attempt, petitioner fully demonstrated a readiness to engage in a serious sexual offense likely to result in harm to a child. This is sufficient to warrant discipline.” There is no principled reason why an attorney’s attempt to violate the rules should not be disciplinable if the attorney commits a direct but ineffectual act toward its commission.

inducing a violation of applicable portions of the Code of Judicial Ethics by a lawyer serving as a temporary judge, referee, or court-appointed arbitrator would violate Rule 8.4(a) through Rule 2.4.1 (Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator).

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

1. Subsection (a)'s use of the word "knowingly" is problematic and inconsistent with California law. The rules should not encourage willful blindness, gross negligence, recklessness, or failure to investigate.

Commission Response: The definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the "knowingly" standard is appropriately used in paragraph (a) in imposing vicarious liability for a Rule violation committed by another, and will not encourage willful blindness or failure to investigate. The Rule does not apply the "knowingly" standard to violations committed by the lawyer him or herself.

2. The rule does not prohibit attempted violations of the rules.

Commission Response: The Commission debated at length whether to include a general attempt prohibition in this Rule. As discussed in the Report and Recommendation, the Commission rejected this approach as overbroad given that certain Rules do not lend themselves to discipline for attempted violations.

3. Paragraph (b) does not include other misconduct warranting discipline and thus creates a different standard than under Business and Professions Code § 6101.

Commission Response: The Commission believes that paragraph (b) as drafted reflects consistency with the ABA Model Rule and appropriately highlights a focus on criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness. Comment 3 makes clear that discipline may still be imposed for criminal acts triggering application of the referenced State Bar Act sections.

4. OCTC supports subsections (c), (d), and (e).

Commission Response: No response required.

5. Subsection (f) only prohibits "knowingly" assisting a judge or judicial officer in conduct that is a violation of applicable rules and is thus inconsistent with California law.

Commission Response: See response to #1, above

6. Concerned with use of the word judge or judicial officer as opposed to “tribunal.” This subsection should also include assisting an administrative law judge or arbitrator.

Commission Response: The Commission believes that paragraph (f)’s reference to “judicial officers” includes administrative law judges. The Commission does not believe that extending paragraph (a) to a “tribunal” makes sense, and notes that assisting, soliciting, or inducing a violation of applicable portions of the Code of Judicial Ethics by a lawyer serving as a temporary judge, referee, or court-appointed arbitrator would violate Rule 8.4(a) through Rule 2.4.1 (Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator).

7. Subsection (f) should also include soliciting or inducing a judge or judicial officer to violate the applicable rules.

Commission Response: Paragraph (f) as drafted is parallel with paragraph (a) and includes inducement and solicitation.

8. OCTC supports the Comments to this rule.

Commission Response: No response required.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, ten public comment were received. One comment agreed with the proposed Rule, one comment disagreed, seven agree only if modified, and one did not indicate a position. During the 45-day public comment period, one public comment was received. That one comment agreed with the proposed Rule if modified. A public comment synopsis table, with the Commission’s responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was in support of the proposed rule if modified.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Professional Competence is not aware of any provisions in California law that are directly related to rule 1-120. However, there are some provisions that appear to be consistent with the general policy that a lawyer should be subject to regulation when assisting, soliciting or inducing another person’s actions. Examples include: (1) a lawyer’s use of a “runner” or “capper” to procure clients (Business and Professions Code § 6150 et. seq.; (2) a lawyer aiding in the unauthorized practice of law (rule

1-300(B)); (3) a lawyer's association with, or employment of, a disciplined attorney (rule 1-311 and Business and Professions Code § 6133); (4) a lawyer's duty to supervise other lawyers and nonlawyers (rule 3-110 (and case law cited in the Discussion section); and (5) a lawyer's role in special admissions (MJP) circumstances (such as serving as the attorney of record in a non-California lawyer's application to appear as counsel pro hac vice pursuant to rule 9.40 of the California Rules of Court). Regarding the duty to report another person's misconduct, the California Code of Judicial Ethics includes a provision concerning a judge's possible reporting of misconduct by another judge (Canon 3D(1)) and a provision on a judge's possible reporting of lawyer misconduct (Canon 3D(2)).

B. ABA Model Rule Adoptions

- **Model Rule 8.4.** The ABA State Adoption Chart for Model Rule 8.4 addresses paragraph (a) of the model rule which is the direct counterpart to rule 1-120 as well as other provisions referenced in OCTC's recommendation. The chart is posted at:
 - http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4.authcheckdam.pdf [Last visited 2/7/17]
 - Thirteen jurisdictions have adopted Model Rule 8.4 verbatim.² Thirty-one jurisdictions have adopted a slightly modified version of Model Rule 8.4.³ Eight jurisdictions have adopted a version of the rule that is substantially different from Model Rule 8.4.⁴
- **Model Rule 8.4, Comment [3] & Proposed Rule 8.4.1.** Comment [3] to Model Rule 8.4 prohibits lawyers from knowingly manifesting bias or prejudice by words or conduct when such actions are prejudicial to the administration of justice. Similar language was also included in Comment [3] of the first Commission's proposed Rule 8.4. The subject matter of Comment [3] is addressed in proposed Rule 8.4.1. (See Rule 8.4.1 Report and Recommendation.)

Twelve jurisdictions have adopted Model Rule 8.4, Comment [3] verbatim.⁵ Seven jurisdictions have adopted a slightly modified version of Model Rule 8.3,

² The thirteen jurisdictions are: Arizona, Arkansas, Connecticut, Idaho, Montana, Mississippi, Nevada, New Mexico, Oklahoma, Pennsylvania, South Dakota, Utah and West Virginia.

³ The thirty-one jurisdictions are: Alabama, Alaska, Colorado, Delaware, District of Columbia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming.

⁴ The eight jurisdictions are: California, Florida, Georgia, Illinois, Maine, New York, Texas, and Washington.

⁵ The twelve jurisdictions are: Delaware, Idaho, Illinois, Nebraska, New Hampshire, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wisconsin.

Comment [3].⁶ Fourteen jurisdictions have adopted a version of Comment [3] that is substantially different from Model Rule 8.3.”⁷ Eighteen jurisdictions have not adopted a version of Comment [3].”⁸

C. ABA Model Rule Adoptions

The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 8.4: Misconduct, Comment [3],” revised September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4_cmt_3.authcheckdam.pdf [Last visited 2/7/17]

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

A. Concepts Accepted (Pros and Cons):

General Concepts. The Commission has used as its starting point current rule 1-120, which prohibits a lawyer from knowingly assisting in, soliciting or inducing a violation of the Rules or the State Bar Act, and ABA Model Rule 8.4, which contains a similar prohibition as well as additional misconduct provisions.

1. In accordance with the approach of Model Rule 8.4, expand the scope of current rule 1-120 and collect in a single rule various misconduct provisions that are currently found in other rules of professional conduct or in the Business and Professions Code.
 - Pros: There would be a single Rule that lawyers, judges and the public can consult to identify basic standards of conduct addressing honesty, trustworthiness and fitness to practice with which a lawyer must comply. Placing these standards in a single Rule should facilitate compliance with and enforcement of the Rules by clearly stating these basic principles and also

⁶ The seven jurisdictions are: Arizona, Colorado, Connecticut, Iowa, Maine, North Dakota, and Tennessee.

⁷ The fourteen jurisdictions are: Alaska, Arkansas, District of Columbia, Florida, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, New York, Ohio, Texas, and Washington.

⁸ The eighteen jurisdictions are: Alabama, California, Georgia, Hawaii, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nevada, North Carolina, Oklahoma, Oregon, Pennsylvania, Virginia, and Wyoming.

promote confidence in the legal profession and the administration of justice by prominently placing the principles in a single Rule.⁹

- Cons: The principles already exist in the current rules or the State Bar Act. Collecting them in a single Rule will create another source for a disciplinary charge, risking duplication of charging in the disciplinary process.
2. Address the concept of discrimination by a lawyer either in the practice of law or in the operation and management of a law practice in a separate rule, proposed Rule 8.4.1, rather than addressing it as either a blackletter provision¹⁰ or Comment¹¹ to this Rule.
- Pros: See discussion in Report & Recommendation re proposed Rule 8.4.1.
 - Cons: See discussion in Report & Recommendation re proposed Rule 8.4.1.
3. Address the concept of an “attempt” to violate a rule or a provision of the State Bar Act in individual rules rather than generally make an “attempt” a potential violation of any rule.
- Pros: Similar to the first Commission, the Commission believes¹² that the Commission should address on a rule-by-rule basis whether an attempted violation should be a basis for professional discipline. This approach should result in any prohibition on an attempt being tailored to a specific rule’s violation

⁹ The ABA similarly collected dispersed principles into Model Rule 8.4 by bringing together concepts from ABA Model Code of Professional Responsibility, DR [Disciplinary Rule] 1-102(A), DR 9-101(C), EC [Ethical Consideration] 7-34, and EC 9-1.

¹⁰ Although there is no blackletter provision in the Model Rules that expressly addresses discrimination by a lawyer, the ABA Standing Committee on Ethics and Professional Responsibility has recently proposed adoption of new paragraph 8.4(g), which would provide it is professional misconduct for a lawyer to:

(g) in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

The proposed amendment also includes a substantial reworking of MR 8.4, Cmt. [3]. Both proposed paragraph 8.4(g) and the original and reworked comment [3] are discussed in detail in the Report & Recommendation relating to proposed Rule 8.4.1.

¹¹ Currently, Model Rule 8.4, Cmt. [3] provides:

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

and potential harm, and avoid creating a blunt instrument for discipline that would serve little purpose when applied to most rules. For example, in proposed Rule 1.5 [4-200], this Commission has recommended a rule that provides a lawyer “shall not make an agreement for, charge, or collect an unconscionable or illegal fee.” The terms “make” and “charge” in effect prohibit an attempt to “collect” an unconscionable fee. Although only the actual collection of an unconscionable fee will result in harm to a client, even an attempt to impose a legal obligation on a client to pay such a fee should be prohibited. On the other hand, the Commission also recommends adoption of proposed Rule 4.2 [2-100], which prohibits a lawyer who represents a client in a matter from communicating about the subject of the representation with a person who is represented by a lawyer in the same matter. The harm is in the actual communication with the represented person that could result in the disclosure of privileged information or otherwise interfere with the lawyer-client relationship. Prohibiting an attempt to engage in such a communication poses the risk of unduly interfering with a lawyer’s ability to investigate a claim as a lawyer often cannot know that a person is represented until the lawyer has contacted the person. An additional example where problems would be created by a general provision authorizing discipline for an attempted violation is Rule 1.4, which requires a lawyer to “promptly” provide information to clients. With a general attempt provision, any delay not long enough to constitute an actual violation of Rule 1.4 might be characterized as indicating an attempt subject to discipline.

- Cons: ABA Model Rule provides it is misconduct to “attempt to violate” any rule, so the proposed rule reflects a divergence from the national model.

Blackletter Provisions. Each of the proposed blackletter provisions is discussed in the following paragraphs:

4. Recommend adoption of paragraph (a) of Model Rule 8.4, without the concept of “attempt”.

- Pros: Paragraph (a) largely carries forward current rule 1-120. Concerning the concept of “attempt,” see paragraph 3, above.
- Cons: Proposed paragraph (a) does not go far enough in modifying Model Rule 8.4(a). The first Commission deleted from the Model Rule not only the concept of attempt, but also the concept that it is misconduct to “violate the Rules of Professional Conduct.” As the first Commission explained: “[A]ny conduct that violates any Rule already is subject to discipline, so the quoted Model Rule language has no consequence except to create the risk that lawyers will be charged twice for every alleged Rule violation.” Ultimately,

¹² It should also be noted that during the initial consideration of a rule based on current rule 1-120 in May 2015, the Chair inquired and determined that it was the view of a significant majority of the Commission that attempts should be addressed on a rule-by-rule basis. Similarly, RRC-1 appears to have voted unanimously to reject inclusion of a general attempt provision.

however, the proposed rule circulated by the Board included the concept that it was professional misconduct to violate the Rules or the State Bar Act.

5. Recommend adoption of paragraph (c) of Model Rule 8.4, with the words “reckless or intentional” added to modify “misrepresentation.”

- Pros: The conduct prohibited in this provision – dishonesty, fraud, deceit and reckless or intentional misrepresentation – are central concepts of conduct in which lawyers must not engage if respect for the legal profession and the proper administration of justice is to be maintained. The addition of “reckless or intentional” is intended to clarify that negligent misrepresentation is not regarded as dishonesty that would trigger this Rule. This clarification is consistent with the intended scope of the ABA’s rule and with the interpretation in disciplinary proceedings in states that have adopted the Model Rule. (See, e.g., *State ex rel. Oklahoma Bar Ass’n v. Besly* (Okla., 2006) 136 P.3d 590 [2006 OK 18] and *In re Clark* (Ariz. 2004) 207 Ariz. 414 [87 P.3d 827].) Including these modifiers avoids the aspirational nature of the Model Rule provision. Compare proposed Rule 1.1, under which discipline is imposed only if a lawyer has “intentionally, recklessly, repeatedly, or with gross negligence” failed to act competently.
- Cons: None identified.

6. Recommend verbatim adoption of paragraph (d) of Model Rule 8.4, concerning conduct “prejudicial to the administration of justice.”

- Pros: A lawyer’s fitness to practice law is called into question by conduct prejudicial to the administration of justice in whatever capacity the lawyer acts. See also Comment [1], which clarifies that a violation of this Rule can occur even when a lawyer is not practicing law or acting in a professional capacity.
- Cons: There is a concern that this provision might not pass Constitutional challenge if it is not limited to situations where the lawyer’s conduct occurs “in connection with the practice of law.” (Compare *United States v. Wunsch* (9th Cir. 1996) 84 F.3d 1110 [Former Bus. & Prof. Code § 6068(f), prohibiting “offensive personality,” was found to be unconstitutional.].) Proposed Comment [6] seeks to address this concern by specifying that paragraph (d) does not apply to constitutionally-protected conduct.

7. Recommend adoption of paragraph (e) of Model Rule 8.4, prohibiting a lawyer from stating or implying the ability to improperly influence a government agency or official.

- Pros: This provision, which in the original Model Rules (1983) was part of the advertising rules, (MR 7.1(b)), more properly belongs in this general Rule regarding professional misconduct, as the prohibition should not be limited to advertising or soliciting legal business.

- Cons: None identified.
8. Recommend adoption of paragraph (f), prohibiting a lawyer from knowingly assisting a judge in a violation of judicial conduct rules.
- Pros: Expressly stating that such conduct is prohibited acts to ensure the confidence the public places in the legal profession and the administration of justice is justified.
 - Cons: None identified.

Comments to Proposed Rule 8.4. The Commission recommends six comments, some derived from Model Rule comments, some derived from comments proposed by the first Commission, and some new comments to address California-specific law.

9. Recommend adoption of Comment [1], which has no counterpart in the Model Rule.
- Pros: Comment [1] clarifies that the Rule applies to lawyer misconduct not only in connection with the representation of a client but also applies when the lawyer acts *in propria persona* as well as when the lawyer is not acting in a professional capacity.
 - Cons: The clarification is unnecessary as there is nothing in the language of the rule that limits its application to when a lawyer is representing a client.
10. Recommend adoption of Comment [2], which is derived from the last sentence of Model Rule 8.4, Cmt. [1].
- Pros: This comment provides interpretative guidance by providing assurance that the prohibitions in paragraph (a) against assisting in violating a rule or the State Bar Act, or doing so through the acts of another, do not preclude a lawyer from advising a client concerning actions the client is legally entitled to make.
 - Cons: This sentence, taken out of context from the rest of Model Rule 8.4, Cmt. [1] seems simply to state the obvious. It should be deleted, or the substance of the first part of the model rule comment should be restored to provide the necessary context.
11. Recommend adoption of Comment [3], which is derived from the first Commission's proposed Comment [2A].
- Pros: Comment [3] provides important guidance as to what is intended by the concept in California case law, "other misconduct warranting discipline." The cited case, *In re Kelley*, is the seminal Supreme Court case on this concept.

- Cons: The Comment does not provide guidance in applying or interpreting the Rule but instead appears to identify a separate basis for discipline. If that is the case, then it should appear in the blackletter of the Rule.

12. Recommend adoption of Comment [4], which is also derived from the first Commission's proposed Comment [2A].

- Pros: Comments [3] and [4] are both related to the concept of "other misconduct warranting discipline." This sentence, originally in the first Commission's Comment [2A] with proposed Comment [3], has been split into a separate comment to emphasize the fact that a lawyer can be subject to discipline for acts involving gross negligence.
- Cons: The comment does not provide guidance in applying or interpreting the Rule but instead appears to identify a separate basis for discipline. If that is the case, then it should appear in the blackletter of the Rule.

13. Recommend adoption of Comment [5], which is derived from the first Commission's proposed Comment [2C].

- Pros: The first Commission drafted this comment in response to a public comment from the Department of Justice. Given the first Commission's decision not to recommend a version of Model Rule 4.1 [Truthfulness in Statements To Others], the language addressing covert activity that the first Commission previously had considered for inclusion as Rule 4.1(b), was added as a comment to Rule 8.4. The comment clarifies that Rule 8.4(c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules. Consideration was given to placing this comment in Rule 4.1, but it was determined that it should be included here in connection with proposed Rule 8.4(c)'s more general prohibition. A cross-reference has been recommended in the Comments to proposed Rule 4.1. (See proposed Rule 4.1, Cmt. [4].)
- Cons: None identified as to substance. However, this Commission has recommended a version of Model Rule 4.1, and this comment might more appropriately be placed in that rule.

14. Recommend adoption of Comment [6], which is derived from RRC1's proposed Comment [2D].

- Pros: This comment provides important interpretive guidance. It stresses that constitutional rights in a disciplinary context must be protected so that activities protected by the First Amendment do not become the subject of disciplinary proceedings or their exercise is not chilled. (See, e.g., *Ramirez v. State Bar* (1980) 28 Cal.3d 402, 411 [169 Cal.Rptr. 206] [a statement impugning the honesty or integrity of a judge will not result in discipline unless

it is shown that the statement is false and was made knowingly or with reckless disregard for truth]; *Matter of Anderson* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr 775 [disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment]; *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1443 [a lawyer's statement unrelated to a matter pending before the court may be sanctioned only if the statement poses a clear and present danger to the administration of justice].)

- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of paragraphs (b) of Model Rule 8.4 but add a reference to “moral turpitude” to the paragraph.

- Pros: “Moral turpitude” and “fitness as a lawyer in other respects” means essentially the same thing. If the purpose of the rule is to alert lawyers to the case law in California concerning moral turpitude, it should be done by means of a comment.
- Cons: As explained more fully in in ABA Model Rule 8.4, Cmt. [2], this provision focuses only on crimes committed by a lawyer that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer, central principles in lawyer conduct. The reference to moral turpitude is included to maintain conformity with the broader public protection afforded by the Business and Professions Code, specifically § 6106. The Model Rules deleted moral turpitude as a basis for discipline that had been in the ABA Model Code. Some jurisdictions have retained that standard, or have interpreted the rest of section (b) as being the equivalent of moral turpitude. However, the long and evolving history of case law in California interpreting moral turpitude has expanded the scope of public protection beyond the factors set forth in Model Rule 8.4(b). For these reasons, the Commission recommends adding “moral turpitude” to the proposed rule. In addition, there is a long history in California of discipline referrals of attorneys who have been convicted in criminal matters to the State Bar for discipline pursuant to Business and Professions Code §§ 6101 and 6102. That the crime is one of moral turpitude is a critical component of those referrals for interim suspension or summary disbarment upon proof of conviction.

2. Include in the Rule the concept of “attempt” to violate a rule.

- Pros: See Section IX.A.3, above.
- Cons: See Section IX.A.3, above.

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together

with the Commission's reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. The Commission believes that none of the proposed revisions of current rule 1-120 constitutes a change in duties for California lawyers, all of the provisions in the proposed Rule having counterparts in the current Rules, the State Bar Act, or case law. (See also Section IX.A.1, above).

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".
 - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See, e.g., rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to approximate the ABA Model Rules numbering and formatting (e.g., lower case letters).
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

None.

X. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

The Commission recommends adoption of proposed Rule 8.4 [1-120] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 8.4 [1-120] in the form attached to this Report and Recommendation.

Proposed Rule 8.4 [1-120] Misconduct
Synopsis of Public Comments

TOTAL = 1 **A = 0**
 D = 0
 M = 1
 NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-21ae	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	M	(a), (b)	<p>(1) Subsection (a)'s use of the word "knowingly" is problematic and inconsistent with California law. The rules should not encourage willful blindness, gross negligence, recklessness, or failure to investigate.</p> <p>(2) The rule does not prohibit attempted violations of the rules.</p> <p>(3) Paragraph (b) does not include other misconduct warranting discipline and thus creates a different standard than under Business and Professions Code section 6101.</p> <p>(4) OCTC supports subsections (c), (d), and (e).</p> <p>(5) Subsection (f) only prohibits "knowingly" assisting a judge or judicial officer in conduct that is a violation of applicable rules and is thus inconsistent with California law.</p> <p>(6) Concerned with use of the word judge or judicial officer as opposed to "tribunal." This subsection should also include assisting an administrative law</p>	<p>(1) The definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the "knowingly" standard is appropriately used in paragraph (a) in imposing vicarious liability for a Rule violation committed by another, and will not encourage willful blindness or failure to investigate. The Rule does not apply the "knowingly" standard to violations committed by the lawyer him or herself.</p> <p>(2) The Commission debated at length whether to include a general attempt prohibition in this Rule. As discussed in the Report and Recommendation, the Commission rejected this approach as overbroad given that certain Rules do not lend themselves to discipline for attempted violations.</p> <p>(3) The Commission believes that paragraph (b) as drafted reflects consistency with the</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Proposed Rule 8.4 [1-120] Misconduct
Synopsis of Public Comments**

TOTAL = 1 **A = 0**
D = 0
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>judge or arbitrator.</p> <p>(7) Subsection (f) should also include soliciting or inducing a judge or judicial officer to violate the applicable rules.</p> <p>(8) OCTC supports the Comments to this rule.</p>	<p>ABA Model Rule and appropriately highlights a focus on criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness. Comment 3 makes clear that discipline may still be imposed for criminal acts triggering application of the referenced State Bar Act sections.</p> <p>(4) No response required.</p> <p>(5) See response in (1) above.</p> <p>(6) The Commission believes that paragraph (f)'s reference to "judicial officers" includes administrative law judges. The Commission does not believe that extending paragraph (a) to a "tribunal" makes sense, and notes that assisting, soliciting, or inducing a violation of applicable portions of the Code of Judicial Ethics by a lawyer serving as a temporary judge, referee, or court-appointed arbitrator would violate Rule 8.4(a) through Rule 2.4.1 (Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator).</p>

**Proposed Rule 8.4 [1-120] Misconduct
Synopsis of Public Comments**

TOTAL = 1 **A = 0**
D = 0
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						<p>(7) Paragraph (f) as drafted is parallel with paragraph (a) and includes inducement and solicitation.</p> <p>(8) No response required.</p>

PROPOSED RULE OF PROFESSIONAL CONDUCT 8.4.1
(Current Rule 2-400)
Prohibited Discrimination, Harassment and Retaliation

EXECUTIVE SUMMARY

The Commission has evaluated current rule 2-400 (Prohibited Discriminatory Conduct in a Law Practice) in accordance with the Commission Charter. Current Rule 2-400 was first adopted effective March 1, 1994. There is no counterpart to rule 2-400 in the ABA Model Rules. However, ABA Model Rule 8.4(d) addresses discrimination by individual lawyers while representing a client.¹ The result of the Commission's evaluation is proposed rule 8.4.1 (Prohibiting Discrimination, Harassment and Retaliation).

Rule As Issued For 90-day Public Comment

The main issue considered when drafting proposed Rule 8.4.1 was whether to expand the rule by eliminating the requirement that there be a final civil determination of wrongful discrimination before a disciplinary investigation can commence or discipline can be imposed, which is found in current Rule 2-400(C).² A majority of the Commission believes current Rule 2-400(C) renders the rule difficult to enforce. Eliminating the requirement would give the Office of Chief Trial Counsel original jurisdiction to investigate and prosecute under the current procedures of the disciplinary system any claim of discrimination that comes within the scope of the Rule.

In addition to changes to address the main issue identified above, the Commission proposes the following substantive changes to the current rule:

- (1) Expanding the proposed rule beyond the management or operation of a law firm to also encompass discrimination or harassment more generally in "representing a client, or in terminating or refusing to accept representation of any client." Current Rule 2-400 already applies to discrimination in the management or operation of a law firm in "accepting or terminating representation of any client." The Commission believes the rule's prohibition should not be limited to law firm management.

¹ Model Rule 8.4(d) provides it is misconduct for a lawyer to: "(d) engage in conduct that is prejudicial to the administration of justice." A Model Rule comment clarifies the application of paragraph (d):

"[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule."

² Current Rule 2-400(C) provides:

"No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed."

Adopting a rule that generally prohibits unlawful discrimination or harassment while engaged in representing a client is consistent with current ABA Model Rule 8.4(d), Comment [3] to that rule, and proposed ABA Model Rule 8.4(g)³ and several other professions that prohibit this same behavior in their codes of conduct.⁴

- (2) Expanding the proposed rule to cover additional protected categories. Current Rule 2-400's list of protected characteristics is substantially narrower than current California law. Because the identity of protected characteristics protected under anti-discrimination law is not static, the Commission added paragraph (c)(1) to delimit the scope of "protected characteristics" for purposes of the rule that not only is consistent with current California law but also includes a catchall provision for any "other category of discrimination prohibited by applicable law." This latter addition would authorize professional discipline pursuant to whatever applicable anti-discrimination laws might exist in the future without the need to amend the rule.
- (3) Expanding the proposed rule to encompass unlawful discrimination and harassment engaged in for the purpose of retaliation. This addition would permit professional discipline where a lawyer, in representing a client or in relation to a law firm's operations, unlawfully discriminates against or harasses a person for the purpose of retaliating against that person because the person has taken action to oppose unlawful discrimination or harassment. This provision is intended to provide protection for lawyers obligated under the rule (e.g., lower level lawyers within a law firm) to advocate corrective action where they know of unlawful discrimination or harassment within the firm, even when the unlawful conduct is being committed by higher level lawyers within the firm.
- (4) Adoption of paragraph (d),⁵ which requires a lawyer who has been charged with, or is being investigated for, a violation of the Rule, to give notice to the State Bar of any parallel administrative or judicial proceeding, such as an EEOC or DFEH investigation. In part, this notice is intended to provide the Office of Chief Trial Counsel with information necessary to determine whether or not to hold in abeyance

³ Proposed ABA Model Rule 8.4(g) would provide it is professional misconduct for a lawyer to:

"(g) in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status."

⁴ Examples include: (1) American Dental Association, Code of Conduct, Section 4.A. "Patient Selection" (dentist shall not refuse to accept patients because of the patient's race, creed, color, sex or national origin); and (2) American Psychological Association, Ethical Standard 1.12 "Other Harassment" (prohibition against behavior that is harassing or demeaning based on factors such as a person's age, gender, race, ethnicity, national origin, religion, sexual orientation, disability, language, or socioeconomic status).

⁵ Proposed Rule 8.4.1(d) states:

"(d) A lawyer who is the subject of a State Bar investigation of 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."

See also, Business & Professions Code section 6068(i) [re duty of an attorney to cooperate and participate in any disciplinary investigation or proceeding].

the State Bar investigation or disciplinary proceeding pending the outcome of a related proceeding.

- (5) Adoption of paragraph (e)(1), which requires the State Bar to provide a copy of the notice of a disciplinary charge for a charge arising under paragraph (a) of the proposed rule to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review. Paragraph (e)(2) requires the State Bar to provide a copy of the notice of a disciplinary charge for a charge arising under paragraph (b) to the California Department of Fair Employment and Housing and the United State Equal Employment Opportunity Commission. The purpose of these provisions is to provide to the relevant government agencies an opportunity to become involved in the matter so that they may implement and advance the broad legislative policies with which they have been charged.
- (6) Adoption of paragraph (f), which is intended to clarify that the proposed rule does not prevent a lawyer from representing another person alleged to have engaged in unlawful discrimination, harassment, or retaliation.

Finally, non-substantive changes to the current rule include rule numbering to track the Commission's general proposal to use the Model Rule numbering system and the substitution of the term "lawyer" for "member."

Proposed Rule 8.4.1 contains six comments all of which provide interpretive guidance or clarify how the rule is to be applied. Of particular note is Comment [2] which, among other things, has been added to clarify that the rule does not apply to constitutionally-protected conduct. Comment [4] has been added to clarify that paragraph (d) permits the State Bar to use discretion in abating a disciplinary investigation or proceeding when the State Bar is made aware of a parallel administrative or judicial proceeding premised on the same conduct. Comment [5] clarifies that paragraph (e) is intended to recognize the important public policy served by enforcing the laws and regulations prohibiting unlawful discrimination.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission edited paragraphs (a), (b), and (c)(4) for clarity. The Commission modified paragraph (e) to impose the reporting obligation on the lawyer receiving the notice of disciplinary charge rather than on the State Bar. The Commission also modified paragraph (f) to state the rule does not preclude a lawyer from declining or withdrawing from a representation as required or permitted by the Rule 1.16 [Declining or Terminating Representation], nor does the rule preclude a lawyer from providing advice and engaging in advocacy as required or permitted by the Rules or the State Bar Act.

In addition, the Commission added three new comments. New Comment [3] states that a lawyer does not violate the Rule by "limiting the scope or subject matter of the lawyer's practice," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law." The Commission believes that this eliminates any potential conflict with other Rules relating to competence and conflicts, and makes clear that the Rule does not improperly interfere with a lawyer's selection of clients. New Comment [4] states that the 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. Finally, the Commission added Comment [9] which

is taken from the Discussion section to current Rule 2-400. This Comment is intended to make clear that conduct falling within this Rule may also be subject to discipline under other applicable provisions.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 8.4.1 [2-400]

Commission Drafting Team Information

Lead Drafter: George Cardona

Co-Drafters: Judge Karen Clopton, Robert Kehr, Howard Kornberg, Carol Langford,
Toby Rothschild, Dean Zipser

I. CURRENT CALIFORNIA RULE

Rule 2-400 Prohibited Discriminatory Conduct in a Law Practice

(A) For purposes of this rule:

- (1) "law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;
- (2) "knowingly permit" means a failure to advocate corrective action where the member knows of a discriminatory policy or practice which results in the unlawful discrimination prohibited in paragraph (B); and
- (3) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.

(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:

- (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or
- (2) accepting or terminating representation of any client.

(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

Discussion:

In order for discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this rule.

A complaint of misconduct based on this rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding is thereafter appealed.

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

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 8.4.1 [2-400]

Vote: 13 (yes) – 1 (no) – 1 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 8.4.1 [2-400]

Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation

- (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.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 2-400)

Rule 8.4.1 ~~[2-400]~~ Prohibited ~~Discriminatory Conduct in a Law Practice~~ Discrimination, Harassment and Retaliation

(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.
- (Ac) For purposes of this rule:
- (1) ~~“law practice” includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;~~ 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 ~~a failure to fail~~ to fail to advocate corrective action where the ~~member~~ lawyer knows* of a discriminatory policy or practice ~~which that~~ results in the unlawful discrimination or harassment prohibited ~~in by~~ paragraph (Bb); and
 - (3) “unlawfully” and “unlawful” shall be determined by reference to applicable state ~~or and~~ federal statutes ~~or 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:
- ~~(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:~~

 - ~~(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or~~ representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;
 - ~~(2) accepting or terminating~~ declining or withdrawing from a representation ~~of any client.~~ 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.~~
- ~~(G) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.~~

Comment~~Discussion~~

~~In order for discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this rule.~~

~~A complaint of misconduct based on this rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding is thereafter appealed.~~

[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 ruleRule may also be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections§§ 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

V. RULE HISTORY

In 1990, the Judicial Council's Subcommittee on Gender Bias in the Courts recommended promulgation of a Rule of Professional Conduct prohibiting employment discrimination. In addition, in 1989, 1991 and 1992, the Conference of Delegates of the State Bar approved resolutions recommending State Bar promulgation of a new Rule of Professional Conduct that would subject attorneys to discipline for discrimination, including discrimination in the acceptance and termination of clients. In response, the State Bar prepared a new rule 2-400 that was adopted by the Board on March 6, 1993, and approved by the Supreme Court, effective March 1, 1994. (The foregoing origin of current rule 2-400, including studies by the Commission and a specially formed State Bar Anti-Bias Rule Committee, is discussed fully in the State Bar's "Request that the Supreme Court of California Approve Proposed Rule 2-400 of the Rules of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation," July, 1993, Supreme Court case number S034144.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports subsections (a) and (d) of this rule.

Commission Response: No response required.

2. OCTC supports the general concepts in subsections (b) and (c), but is concerned that subsections (b)(1) and (2) and (c)(2) require “knowingly” for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rules 3.3 and 4.1, and the General Comments section of this letter. The rules should not encourage willful blindness or a failure to investigate. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].)

Commission Response: The definition of “knowingly” in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the “knowingly” standard is appropriately used in (b) and (c).

3. OCTC is concerned that subsection (e) and Comment [4] places requirements on the State Bar and is not a disciplinable offense. The purpose of the Rules of Professional Conduct is to regulate the practice of law, not to regulate the State Bar. This is beyond the direction and the authority the Supreme Court provided the Commission. Moreover, subsection (e) is vague as to which division of the State Bar is required to provide this information, the State Bar Court, OCTC, General Counsel, or some other unit.

Commission Response: The Commission has modified subsection (e) to impose the reporting obligation on the lawyer receiving the notice of disciplinary charge rather than on the State Bar.

4. OCTC supports Comments [2].

Commission Response: No response required.

5. OCTC is concerned that Comments [1] and [5] are more appropriate for treatises, law review articles, and ethics opinions. They are merely a philosophical discussion of the reasons for the rule.

Commission Response: Comment [1] explains the application of the rule in relation to Rule 8.4(a) and the supervision rules. Rule 8.4 and the supervision rules are new rules and the discrimination rule should facilitate compliance with these related rules. Regarding “knowingly” see the response to point #2, above.

6. OCTC is concerned that Comment [3] is unnecessary. Further, OCTC is concerned with the use of the term “knowingly” in this Comment for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rules 3.3 and 4.1, and the General Comments section of this letter. The rules should not encourage willful blindness or a failure to investigate. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].)

Commission Response: Both Comments provide appropriate information. Comment [3] describes the application Rule 8.4.1 in limited scope representations. Comment [6] explains paragraph (d) and highlights that the rule would be subject to the usual State Bar Court abatement policies.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

1. OCTC supports subsections (a) and (d) of this rule.

Commission Response: No response required.

2. OCTC supports the general concepts in subsections (b) and (c), but is concerned that subsections (b)(1) and (2) and (c)(2) require “knowingly” for the same reasons expressed regarding that term in proposed Rules 1.9 and 3.3 of this letter and the General Comments section of OCTC’s September 27, 2016 letter. The rules should not encourage willful blindness, gross negligence, recklessness, or a failure to investigate. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].)

Commission Response: The definition of “knowingly” in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the “knowingly” standard is appropriately used in (b) and (c).

3. OCTC supports Comments [2], [7], [8], and [9].

Commission Response: No response required.

4. Comments [1] and [5] are more appropriate for treatises, law review articles, and ethics opinions. They are merely a philosophical discussion of the reasons for the rule. Further, OCTC is concerned with the use of the term “knowingly” in Comment [5] for the same reasons expressed regarding that term in proposed Rules 1.9 and 3.3 in this letter, and the General Comments section of OCTC’s September 27, 2016 letter.

Commission Response: Comment [1] explains the application of the rule in relation to rule 8.4(a) and the supervision rules. Rule 8.4 and the supervision rules are new rules and the discrimination rule should facilitate compliance

with these related rules. Regarding “knowingly” see the response to point #2, above.

5. Comments [3] and [6] are unnecessary.

Commission Response: Both Comments provide appropriate information. Comment [3] describes the application rule 8.4.1 in limited scope representations. Comment [6] explains paragraph (d) and highlights that the rule would be subject to the usual State Bar Court abatement policies.

- **Colin Wong, State Bar Court, 11/02/2015:**

The State Bar Court appreciates the opportunity to respond to the proposed revisions to rule 2-400 of the Rules of Professional Conduct, regarding prohibiting discriminatory conduct in a law practice. Specifically, the Court wishes to comment on the proposed revisions by the Committee on Access and Fairness.

The current proposal seeks to delete subsection (c) which provides that:

"No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed."

We believe that the deletion of 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. While the State Bar Court makes no comment on the desirability or feasibility of such a possibility, the Court would like the Commission to consider the following:

Limited Discovery in State Bar Court Proceedings

Discovery in State Bar Court proceedings is generally limited and permitted only upon Court order. (Rules of Proc. of State Bar, rule 5.65) [No discovery subpoenas without prior Court order (Rule 5.61(A)); Depositions allowed only upon court order (Rule 5.61(C)); Additional discovery only upon motion and showing of good cause (Rule 5.66(A)).]

Burden of Proof in State Bar Court Proceedings

Unlike in civil proceedings, in a disciplinary proceeding, the State Bar must prove culpability by clear and convincing evidence. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

Evidence Code Not Applicable in State Bar Court Proceedings

State Bar Court proceedings are not conducted according to the Evidence Code as applied in civil cases. Instead, 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. (Rule

5.104(C).) In addition, hearsay evidence may be used for the purpose of supplementing or explaining other evidence. (Rule 5.104(D).)

No Jury Trials

In disciplinary proceedings, attorneys are not entitled to a jury trial. (*Johnson v. State Bar of Cal.* (1935) 4 Cal.2d 744, 758. Instead, all trials are conducted by a Hearing Department Judge. (Bus. & Prof. Code, § 6079.1(1).)

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.

Note: State Bar Court's comment was provided as a preliminary comment prior the formal 90-day public comment period. The Commission took into consideration the State Bar Court's comment when developing the proposed rule.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, forty-nine public comments were received. Eleven comments agreed with the proposed Rule, thirty comments disagreed, six comments agreed only if modified, and two comments did not indicate a position. During the 45-day public comment period, three public comments were received. Two comments agreed with the proposed Rule, and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was not in support of the proposed rule. That testimony and the Commission's response is also in the public comment synopsis table

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Former California Law Encompassing Bias

Currently, California does not have a rule or commentary prohibiting conduct prejudicial to the administration of justice or prohibiting bias or prejudice where that conduct is prejudicial to the administration of justice. (See ABA Model Rule 8.4 and Comment [3].) However, former Business and Professions Code § 6068, subdivision (f) prohibited in part "offensive personality." (See also, Code of Civ. Proc. Sec. 282(6), discussed in *Peters v. State Bar* (1933) 219 Cal. 218.) In *U.S. v. Wunsch* (9th Cir. 1996) 84 F.3d 1110, that part of § 6068(f) was found unconstitutionally vague and a regulation against personality rather than speech or conduct. The following case law demonstrates how this provision was applied prior to invalidation and demonstrates what type of conduct was considered to reflect an "offensive personality."

- Attorney described a judge as under a "political obligation" to opposing counsel. *Peters v. State Bar* (1933) 219 Cal. 218.
- Attorney charged the presiding judge with acting as a prosecutor and attorney for the plaintiff and being prejudiced against certain witnesses because of their religion. *Hogan v. State Bar* (1951) 36 Cal.2d 807.
- Defense attorney referred to prosecutor as a "high-priced lawyer." *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108.
- In a dispute with a former client, attorney disclosed the irrelevant fact that client's sister was having an affair. *Dixon v. State Bar* (1982) 32 Cal.3d 728.
- Attorney described a judge as having a "boudoir." *Maltaman v. State Bar* (1987) 43 Cal.3d 924.
- Attorney referred to the court as "dirty," characterized judges as "the four stooges," and told a court clerk that a judge is a "swine." *Lebbos v. State Bar* (1991) 53 Cal.3d 37.
- Attorney called opposing counsel "a slob." *People v. Brown* (1992) 7 Cal.Rptr.2d 370 (ordered not published, previously published at: 5 Cal.App.4th 950).

B. California Law Related to Sexual Harassment of Clients

Issues relating to preventing discrimination and bias in the legal profession overlap with issues concerning sexual harassment. In addition to current rule 3-120, which prohibits attorneys from demanding sexual relations with clients, or from using coercion, intimidation, or undue influence in entering into a sexual relationship with a client, California case law also addresses sexual harassment and sexual offenses by attorneys. For example, the Court of Appeal held that an attorney engaging in sexual harassment of a client, and withholding legal services where sexual favors were not granted, could constitute outrageous conduct for purposes of intentional infliction of emotional distress. *McDaniel v. Gile* (1991) 230 Cal.App.3d 363, 373. Additionally, the

State Bar has imposed discipline against attorneys for sexual harassment and other sexual offenses under Business and Professions Code § 6106, which subjects attorneys to discipline for acts involving moral turpitude. In one instance, an attorney was disciplined for sexual harassment of a client and intentional infliction of emotional distress. *In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138. In other cases, attorneys have been disciplined for sexual crimes involving moral turpitude. *In re Lesansky* (2001) 25 Cal.4th 11 [104 Cal.Rptr.2d 409] (lewd act on a child); *In re Safran* (1976) 18 Cal.3d 134 [133 Cal.Rptr. 9] (annoying or molesting a child under 18); *In the Matter of Meza* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 608 (three or more acts of sexual conduct with a child under age 14).

C. Incentives for Diversity.

Related to the elimination of bias and prejudice in the workplace, various California statutes offer incentives to minority and women business enterprises. For contracts awarded by state entities, Public Contract Code §§ 10115 et. seq. sets participation goals for minority, women, and disabled veteran business enterprises, and requires that the awarding entity consider the efforts of the bidders to meet the diversity goals set forth in the statute. Similar participation goals are included for state agencies awarding contracts for professional bond services. Government Code § 16850 et. seq. Similar to the goals behind rule 2-400, these incentives seek to encourage diversity in the workplace as well as the elimination of bias and discrimination.

D. Attorney Oath.

Recent amendments to California Rule of Court 9.4 added new language to the oath taken by attorneys upon admission to practice law. The additional language states: “As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.” Similar to the policies and concepts behind current rule 2-400 of preventing discrimination, promoting diversity, and eliminating bias in the legal profession, the attorney oath provision seeks to ensure the legal profession displays respect and courtesy to other lawyers, clients, and the public.

E. ABA Model Rule Adoptions

Prior to August 8, 2016, there was no Model Rule counterpart for 2-400 (although, as discussed below, Comment [3] to ABA Model Rule 8.4(d) specified that it addressed discrimination by individual lawyers while representing a client). Twenty-three jurisdictions have adopted rules of professional conduct that prohibit discrimination.¹ Sixteen of those jurisdictions have rules that specifically prohibit discrimination in

¹ The twenty-three jurisdictions are: Colorado, District of Columbia, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, Texas, Vermont, Washington, and Wisconsin.

conduct that occurs by a lawyer in a professional capacity.² Four jurisdictions have rules that prohibit discrimination in representing a client.³ Two jurisdictions have rules that prohibit discrimination in connection with a proceeding before a tribunal.⁴ Michigan Rule 6.5 requires lawyers to treat all persons involved in the legal process with courtesy and respect. A Comment to Michigan Rule 6.5 provides that “a supervisory lawyer should make reasonable efforts to ensure that the firm has in effect policies and procedures that do not discriminate against members or employees of the firm.”

Prior to August 8, 2016, Comment [3] to Model Rule 8.4(d) was related and prohibited lawyers, in the course of representing a client, from knowingly manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, when such actions are prejudicial to the administration of justice. Of the jurisdictions with no black letter rule on discrimination, thirteen have adopted Commentary with language identical or substantially similar to Comment [3]. Similar language was also included in proposed Comment [3] to the first Commission’s proposed Rule 8.4. Fourteen jurisdictions do not have a rule or commentary addressing these issues. The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 8.4: Misconduct, Comment [3],” revised September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4_cmt_3.authcheckdam.pdf [Last visited 2/6/17]

On or about August 8, 2016, the ABA House of Delegates adopted amendments to Model Rule 8.4 to add a new section (g) and accompanying Comments [3], [4], and [5] that would make it professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.

Comment

* * *

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or

² The sixteen jurisdictions are: District of Columbia, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, Ohio, Rhode Island, Vermont, Washington, and Wisconsin.

³ The four jurisdictions are: Colorado, Missouri, North Dakota, and Oregon.

⁴ The two jurisdictions are: New Mexico and Texas.

prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

In adopting these amendments, the ABA House of Delegates had before it a memorandum issued by the ABA Standing Committee on Ethics and Professional Responsibility (the "ABA Memo") setting out the reasoning for the amendments. Because much of this reasoning applies as well to the Commission's proposal for this rule, a copy of the ABA Memo is attached to this Report & Recommendation for reference.

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

A. Concepts Accepted (Pros and Cons):

1. Expand the Rule beyond management or operation of a law firm to also encompass discrimination or harassment more generally in "representing a client, or in terminating or refusing to accept the representation of any client".
 - Pros: The current rule already applies to discrimination in the management or operation of a law firm in "accepting or terminating representation of any

client,” and there seems no justification for not extending this prohibition outside the arena of law firm management. Adopting a rule prohibiting unlawful discrimination or harassment generally while engaged in representing a client is consistent with former ABA Model Rule 3.8(d), Comment [3], and, as noted in the ABA Memo, with new ABA Model Rule 3.8(g) and many other professions that prohibit this same behavior in their codes of conduct. Finally, particularly for a profession that is dedicated to enforcing the rule of law, it seems appropriate to impose a professional obligation that requires lawyers not to unlawfully discriminate or harass while engaged in the core conduct of that profession, representing clients. Proposed paragraph (a) applies to conduct “in representing a client” rather than using the language of the ABA’s new Rule 3.8(g) “conduct related to the practice of law” because, consistent with current California rule 2-400, we have retained separate section (b) addressing conduct “in the management or operation of a law firm” rather than trying to have a single provision apply to all conduct, and rather than extending the rule’s prohibitions (as does the ABA’s new Rule 3.8(g) to bar association, business or social activities in connection with the practice of law. Any concern that the expansion of the Rule may pose First Amendment issues is addressed by the requirement in the Rule itself that conduct be “unlawful” by reference to applicable federal and state statutes and decisions and by inclusion of proposed Comment [4] that makes clear that the Rule does not apply to conduct permitted by the First Amendment or Article 1.

- Cons: None identified.

2. Expand the Rule to cover protected categories other than those listed in current Rule 2-400.

- Pros: Current rule 2-400’s limited list of protected characteristics on the basis of which discrimination is unlawful is narrower than current California law. Moreover, identification of protected characteristics is not static. The Commission therefore recommends adding in section (c)(1) a definition of “protected characteristic” that is consistent with current California law and that also includes a catchall for any “other category of discrimination prohibited by applicable law”. Lawyers are obligated to obey the law as are nonlawyers, and this addition would permit professional discipline whatever applicable anti-discrimination laws might exist in the future without the need to amend this Rule.

- Cons: None Identified.

3. Expand the Rule to encompass unlawful retaliation, as well as unlawful discrimination and harassment based on a protected characteristic.

- Pros: Lawyers are obligated to obey the law as are nonlawyers, and this addition would permit professional discipline where a lawyer, in representing a client or in the management or operation of a law firm, unlawfully retaliates against a person because the person has taken action to oppose unlawful

discrimination or harassment. The addition of this prohibited conduct serves as additional protection for those obligated by the Rule itself, which includes lower level lawyers within a law firm, to advocate corrective action where they know of unlawful discrimination or harassment within the firm, even if by higher level lawyers within the firm.

- Cons: None identified.
4. Expand the current rule by removing the requirement that there be a final civil determination of wrongful discrimination before a disciplinary investigation can commence or discipline can be imposed.
- Pros: No other rule in the California Rules of Professional Conduct contains a similar limitation on State Bar original jurisdiction. It is not clear why such a limitation should be placed on a rule that is intended to prevent discrimination in the legal profession. In fact, including any such limitation may be viewed as inappropriately detracting from the intended message of the proposed rule that unlawful discriminatory conduct should provide a basis for discipline.
 - Cons: Eliminating current rule 2-400's threshold requirement that a court of competent jurisdiction has found that the alleged unlawful conduct had occurred raises substantial concerns, including due process, (see comment from State Bar Court, above), lack of OCTC resources and expertise to prosecute the charge effectively, and the potential that disciplinary proceedings would be used as the testing ground for new theories of discrimination, or as leverage in otherwise unrelated civil disputes between lawyers and former clients.
5. Add a new requirement (see proposed paragraph (d) and Comment [6]) of notice to the State Bar of any parallel administrative or judicial proceeding, and leave it to the State Bar to determine whether or not to hold the disciplinary proceeding in abeyance pending the outcome of the related proceeding.
- Pros: See discussion under Section IX.E., "Alternatives Considered."
 - Cons: See discussion under Section IX.E., "Alternatives Considered."
6. Add a new requirement (see proposed paragraph (e) and Comment [7]) that, upon receiving a notice of disciplinary charge under the Rule, a lawyer is required to provide notice of the charge to the State and/or Federal agencies tasked with investigating and addressing the type of conduct that underlies the notice of disciplinary charge.
- Pros: This provision 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.

- Cons: Such notice should be left to the discretion of the State Bar. With respect to proposed Comment [7], the language of the proposed Rule addition is clear, and the Comment is unnecessary.

7. Add to the Comments (proposed Comment [2]) a sentence making clear that the conduct prohibited by paragraph (a) of the Rule includes the conduct of a lawyer in a proceeding before a judicial officer.

- Pros: As noted in proposed Comment [2], this is consistent with Canon 3B(6) of the Code of Judicial Ethics. The addition of this language to the Comment, with a citation to this Canon, provides interpretive guidance that will be of assistance to lawyers in understanding the Rule.
- Cons: The language of paragraph (a) of the Rule is already clear and does not contain any limitation that would exclude prohibited conduct occurring in a proceeding before a judicial officer. As a result, the addition of this language to the Comments is unnecessary.

8. Add to the Comments (proposed Comment [3]) explicit statements that the rule is not violated by limitations on the scope or subject matter of the lawyer's practice or for restricting who will be accepted as clients for advocacy-based reasons.

- Pros: This avoids any possible conflict with other rules requiring lawyers to accept only clients who they can competently and diligently represent. It also avoids issues and clarifies the intent not to impinge on a lawyer's associational rights derived from either the constitution or other sources that might be implicated by a lawyer's lawful selection of clients. The recognition that this conduct is outside the Rule's intended scope is consistent with the Rule's limitation to conduct that is unlawful as defined by reference to applicable federal and state statutes and decisions, as well as with the exceptions to the Rule set forth in paragraph (f). The addition of this language is consistent with Comment [5] to new ABA Model Rule 8.4(g).
- Cons: Given that the proposed Rule applies only to "unlawful" discriminatory, harassing, or retaliatory conduct, as well as the exceptions in paragraph (f), this seems implicit, rendering such a statement not strictly necessary.

9. Add to the Comments (proposed Comment [4]) an explicit statement that the Rule does not apply to conduct protected by the First Amendment.

- Pros: To the extent it avoids issues and clarifies the intent not to impinge on First Amendment activities, there would appear to be no harm in adding such an explicit statement to the Comments.

- Cons: Given that the proposed Rule applies only to “unlawful” discriminatory or harassing conduct, this seems implicit, rendering such a statement not strictly necessary.
10. Add to the Comments (proposed Comment [8]) language clarifying that discipline can be imposed for conduct that is a violation of this Rule, that is discriminatory, harassing, or retaliatory conduct that is unlawful as determined by reference to applicable state and federal law, even if certain additional elements over and above the unlawful conduct itself (for example, severity and pervasiveness in the context of sexually harassing conduct) would have to be established for that conduct to result in the award of a civil or administrative remedy in a civil or administrative proceeding.
- Pros: Holds lawyers to a higher standard, focusing on their conduct in the particular instance(s) at issue, rather than requiring proof of additional elements that, while held necessary for civil or administrative remedies, do not negate the unlawfulness of the conduct.
 - Cons: Additional elements have been developed in civil and administrative proceedings for a reason, and permitting discipline in their absence removes a level of clarity and leaves too much discretion with the State Bar to seek discipline for single instances of conduct.
11. Carryover to the Comments (proposed Comment [9]) the current rule 2-400 Discussion making clear that disciplinary proceedings for conduct coming within this Rule may also be commenced under applicable provisions of the State Bar Act, the California Supreme Court’s inherent authority, or other disciplinary standards.
- Pros: Consistent with the current California Rule. Provides important notice to lawyers of alternative sources of disciplinary authority.
 - Cons: Implicit in the Rules and State Bar Act so any such Comment is unnecessary.

B. Concepts Rejected (Pros and Cons):

1. Expand the current Rule by including conduct unrelated to the practice of law.
- Pros: This additional requirement could improve lawyer conduct.
 - Cons: This requirement would be inconsistent with current ABA Model Rule 8.4(d), Comment [3], and new ABA Model Rule 8.4(g) and accompanying Comments [3], [4], and [5], all of which limit themselves to conduct related to the practice of law. Extending the rule beyond such conduct also increases the risk of impinging on First Amendment rights.

2. Expand the current rule or add a new rule to educate lawyers on promoting diversity in the legal profession.
 - Pros: This additional rule could improve lawyer conduct.
 - Cons: This would be an aspirational rule that would conflict with the Commission's Charter to adhere to rules written narrowly for disciplinary purposes. Any deficiency in lawyers' continuing education could be addressed through mandatory continuing education requirements.
3. Recommend rejection of the rule as interfering with the lawyer-client relationship..
 - Pros: The proposed Rule interferes with the lawyer-client relationship by requiring lawyers to accept clients that they otherwise do not wish to represent.
 - Cons: Lawyers, no less than any other citizens, have an obligation to obey applicable anti-discrimination laws and regulations. The limitations in the Rule to conduct that is unlawful by reference to applicable federal and state statutes and decisions, the exceptions set forth in paragraph (f), and Comment [5] all address the ability of lawyers to choose their clients.
4. Restrict the current rule so that it applies only to managerial and supervisory lawyers within a law firm.
 - Pros: The first Commission recommended this change, apparently under the theory that proposed Rule 5.1 would not require subordinate lawyers to advocate for improvement in law firm conduct because proposed Rule 5.2 would permit a subordinate lawyer to accept a senior lawyer's reasonable directions. This Rule should be consistent with those Rules.
 - Cons: There is no compelling reason why this Rule must be consistent with proposed Rules 5.1 and 5.2. In fact, under proposed Rule 5.2(a), each lawyer has an affirmative obligation to comply with non-discrimination law by virtue of their professional obligations under the Rules and the State Bar Act. Further, the anti-retaliation provision will protect junior lawyers who advocate for correction of discriminatory conduct involving a senior lawyer.
5. Remove from the Comments (proposed Comment [2]) the language stating that a finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).
 - Pros: This would address the concern that this language could be read as limiting a court's discretion on whether to refer conduct for discipline.
 - Cons: Including the language is consistent with Comment [5] to new ABA Model Rule 8.4(g). Removing the language might pose a risk of deterring parties from raising, or judges from finding, violations of Batson/Wheeler out

of concern that such a finding would automatically subject an attorney to discipline. The concern that the language could be read as limiting a trial judge's discretion on whether to refer conduct for discipline seems highly speculative. Moreover, this concern is addressed by the addition to the Comment of language making clear that both the court and the parties retain the discretion to refer Batson/Wheeler violations for discipline.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables..

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Expands the Rule to prohibit unlawful discriminatory or harassing conduct generally in the course of representing a client.
2. Expands the Rule to prohibit unlawful discriminatory or harassing conduct on the basis of protected characteristics beyond those referenced in the current Rule.
3. Expands the Rule to prohibit unlawful retaliation.
4. Expands the Rule by eliminating the requirement that there be a final civil determination of wrongful discrimination before a disciplinary investigation can commence or discipline can be imposed. This change would give OCTC original jurisdiction to investigate and prosecute any claim of discrimination that is described as coming within the scope of this Rule under the current procedures of the disciplinary system.

D. Non-Substantive Changes to the Current Rule:

1. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting them more easily to determine whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
2. Substituting the term “lawyer” for “member”.
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
 3. The proposal also replaces “law practice” with “law firm” because the latter phrase is a defined term used throughout the Rules.

E. Alternatives Considered:

1. Former ABA Model Rule 8.4(d), Comment [3].

For many of the same reasons discussed in the ABA Memo, the Commission concluded that the prohibition against unlawful discrimination and harassment in connection with representing clients should be incorporated in the blackletter text of the Rule itself, rather than in a Comment interpreting the Rule prohibiting “conduct prejudicial to the administration of justice.”

2. The first Commission’s proposed Rule 8.4(d), Comment [3] and Rule 8.4.1 with accompanying Comments.

For many of the same reasons discussed in the ABA Memo, the Commission concluded that the prohibition against unlawful discrimination and harassment in connection with representing clients should be in the Rule itself, rather than in a Comment interpreting the rule prohibiting conduct prejudicial to the administration of justice. As discussed in Section IX.A.1, above, the Commission has agreed with the first Commission in limiting the application of paragraph (a) to conduct “in representing a client.” Further, consistent with current California rule 2-400, the Commission recommends retaining separate provisions addressing conduct in the management or operation of law firm.

3. New ABA Model Rule 8.4(g) and accompanying Comments [3], [4], [5].

The Commission agrees with the reasoning of the ABA Memo in proposing paragraph (a), which moves into the blackletter text of the Rule itself the bar on discrimination and harassment. As discussed in Section IX.A.1, above, the Commission has agreed with the first Commission in limiting paragraph (a) to

conduct “in representing a client.” Further, consistent with current California rule 2-400, the Commission recommends retaining separate provisions addressing conduct in the management or operation of law firm.

4. With respect to the elimination of the current requirement that there be a final civil determination of wrongful discrimination before a disciplinary investigation can commence or discipline can be imposed, the Commission supports as an alternative what is set out in paragraph (d) and Comment [6]. The Commission believes that this approach provides an appropriate mechanism for addressing various concerns regarding State Bar original jurisdiction over claims of discriminatory conduct and avoiding the potential that the State Bar’s determination on such a claim might conflict with the determination of the same claim by another tribunal. These concerns are reflected in the comments from OCTC and the State Bar Court, and were the subject of lengthy discussion by the Commission. Some of these concerns are specifically flagged in item (e) below. Countervailing concerns include that no other rule has a similar limitation on State Bar original jurisdiction, and that including any such limitation may be viewed as inappropriately detracting from the intended message of the proposed rule that unlawful discriminatory conduct should provide a basis for discipline. Given the lengthy debate around this issue, the significant change from the current California rule that proposed section (d) and Comment [6] would implement, and the recognition that there are legitimate pros and cons for the varying positions, set out below are the various options considered by the Commission in arriving at the current proposal, listed in an order based on their restriction of State Bar original jurisdiction over claims of discrimination, from least to most restrictive, with notes regarding some of the pros and cons of each alternative:

(a) Nothing in the Rule or Comments addressing this issue, with the understanding that the current State Bar Rules of procedure already provide the State Bar with the ability to hold proceedings in abeyance. This would be consistent with the fact that no other Rule has a provision limiting State Bar original jurisdiction or highlighting State Bar procedures for holding disciplinary actions in abeyance. It would also be consistent with the policy goal of deterring discriminatory, harassing, or retaliatory conduct, by emphasizing the absence of limitations on the State Bar’s ability to discipline such conduct regardless of whether other civil or administrative remedies are pursued. On the other hand, by saying nothing about parallel proceedings, it poses the greatest risk of potential conflicts between State Bar determinations and those of other tribunals.

(b) Require notice to the State Bar of any parallel administrative or judicial proceeding, and leave it to the State Bar to determine whether or not to hold the disciplinary proceeding in abeyance pending the outcome of the related proceeding. This is the approach taken by paragraph (d) and Comment [6]. It reflects a compromise between alternative (a) above, and the more restrictive alternatives set out below, and as such, is viewed as most appropriately balancing the relative pros and cons of the various alternatives.

(c) Require notice to the State Bar of any parallel administrative or judicial proceeding and mandate that the State Bar hold the disciplinary proceeding in abeyance pending a tribunal's ruling in the related proceeding. An earlier draft of paragraph (d) considered by the Commission included a paragraph along these lines which read as follows: "If a person who is the subject of an alleged violation of paragraph (b) files an administrative or civil action premised on the same discriminatory conduct, the State Bar shall hold disciplinary proceedings regarding the alleged violation in abeyance pending an adjudication by a tribunal of competent jurisdiction finding that the alleged unlawful conduct occurred. Upon such adjudication, the State Bar may resume the disciplinary proceeding, and the tribunal finding or verdict shall be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in that disciplinary proceeding. If the State Bar elects to continue to hold the disciplinary proceeding in abeyance pending the adjudication becoming final, whether as the result of the time for appeal expiring or judgment on appeal, the State Bar may impose conditions requiring the lawyer subject to the disciplinary proceeding [TBD]." This approach too would reflect a compromise between alternative (a) above and the more restrictive alternatives set out below, but it was rejected both because it is more restrictive in terms of permitting State Bar action and because of concerns that the Rules should not serve as a mechanism for directing OCTC or the State Bar Court to apply their procedures differently for purposes of one particular Rule.

(d) Limit State Bar original jurisdiction to address claims of discriminatory conduct to those circumstances "where there is a clear 'per se' act of discrimination witnessed by an independent witness or corroborated by clear and convincing evidence." This would result in a modified form of current rule 2-400(c) that would require the State Bar to wait on some triggering determination by another tribunal before pursuing an action against all but the clearest instances of discrimination. This was rejected both because it was viewed as overly restrictive of State Bar action and because of difficulties in defining the limitation.

(e) Eliminate State Bar original jurisdiction to address claims of discriminatory conduct by permitting it to address such claims only after a triggering determination by another tribunal, but a triggering determination less than that required by current rule 2-400(c) (which requires a finding of unlawfulness upheld and final after appeal or rendered final because the time for filing an appeal has expired or the appeal has been dismissed). The pros of this approach include that it guarantees lawyers accused of discriminatory, harassing, or retaliatory conduct the increased due process rights (particularly discovery) accorded in other tribunals, avoids creating new obligations on OCTC that it may be unable to satisfy due to lack of OCTC resources and expertise, and avoids the potential that disciplinary proceedings would be used as the testing ground for new theories of discrimination or as leverage in otherwise unrelated civil disputes between lawyers and former clients. The cons that led to this alternative's rejection are that it is too similar to the current rule's restriction, which is viewed as unduly restrictive of State Bar efforts to address discriminatory, harassing, or retaliatory conduct, and discipline, and inconsistent with the desired emphasis

that lawyers in particular must refrain from such conduct.

X. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Mr. Kehr submitted a written dissent. See attached for the full text of the dissent and the Commission's response to the dissent.

XI. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

The Commission recommends adoption of proposed Rule 8.4.1 [2-400] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 8.4.1 [2-400] in the form attached to this Report and Recommendation.

**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 Kreamer*, 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.

**Proposed Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
[ALT1] Synopsis of Public Comments**

TOTAL = 4
A = 2
D = 0
M = 1
NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-25d	Bar Association of San Francisco (Banola) (01-13-17)	Yes	A		Our Committee supports the most recent revisions to Proposed Rule 8.4.1 as written. The revisions are consistent with the meaning and purpose of the previously proposed ALT 1 version of this rule, eliminating the pre-condition, pre-litigation requirement found in current Rule 2-400(C) and the proposed ALT 2 version, for which this Committee expressed support in its September 2016 comments.	No response required.
Y-2016-31	Eisner, Paul	No	NI		<p>I would suggest a rule containing the following or similar language:</p> <p>“Every attorney and law firm shall be required to report to the State Bar, any of the following regarding allegations of discrimination in employment regarding hiring, termination, promotion, demotion, retention, assignment or any other actions or inactions:</p> <p>a. The filing of three claims, complaints, applications or other documents seeking to initiate any proceeding, or requesting a right to sue letter, whether filed in a single or</p>	

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Proposed Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
[ALT1] Synopsis of Public Comments**

TOTAL = 4 **A = 2**
D = 0
M = 1
NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>combination of one or more judicial tribunals or administrative agencies within a twelve month period, and</p> <p>b. Any judgment, settlement, award, decision or other adjudication whether or not a formal action has been initiated before any tribunal, agency or other entity."</p>	
Y-2016-6e	Los Angeles County Bar Association (Schmid) (12-14-16)	Yes	A		<p>We support revised Proposed Rule 8.4.1, which incorporates the Commission's ALT1 version of the Rule. We continue our support for the elimination of subpart (C) of current Rule 2-400, which requires that a non-disciplinary tribunal must have first fully adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred before a disciplinary investigation or proceeding may be initiated. We also fully approve the revised language that clarifies the applicability of the rule to retaliatory behavior and reinforces the scope of the Rule being limited to unlawful discrimination and harassment.</p> <p>Current Rule 2-400 has been in effect since 1994. It represents the Supreme Court's policy that</p>	No response required.

**Proposed Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
[ALT1] Synopsis of Public Comments**

TOTAL = 4 **A = 2**
D = 0
M = 1
NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>discrimination and harassment by lawyers conducted in the course of representing clients or in operating a law firm constitute ethical misconduct that is subject to discipline. The prior adjudication requirement contained in current Rule 2-400 would so delay disciplinary proceedings as to threaten the availability of witnesses and documentary evidence, so that the current rule is virtually unenforceable. As a result, the Supreme Court's public policy objectives are frustrated. The Proposed Rule would cure that defect.</p> <p>Proposed Rule 8.4.1 poses no risk that lawyers would be prosecuted on the basis of meritless claims of discrimination or harassment. The Proposed Rule expressly requires that, in order to be subject a lawyer to discipline, the alleged misconduct must be unlawful, as determined by reference to applicable state and federal statutes and decisions in employment and in offering good and services to the public. In disciplinary proceedings, the state bar would have the burden of establishing unlawfulness of the conduct as</p>	

**Proposed Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
[ALT1] Synopsis of Public Comments**

TOTAL = 4 **A = 2**
D = 0
M = 1
NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>part of its case in chief. In addition, in all proceedings before the State Bar Court the state bar must meet a clear and convincing burden of proof.</p> <p>Protection of the public mandates the adoption of Proposed Rule 8.4.1. Discrimination and harassment frequently occur as a continuing course of conduct which requires intervention. Current Rule 2-400 prevents the state bar from taking action which would interrupt ongoing lawful behavior. Again, Proposed Rule 8.4.1 would cure that defect.</p>	
Y-2016-21af	Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Yes	M		<p>1. OCTC supports subsections (a) and (d) of this rule.</p> <p>2. OCTC supports the general concepts in subsections (b) and (c), but is concerned that subsections (b)(1) and (2) and (c)(2) require “knowingly” for the same reasons expressed regarding that term in proposed rules 1.9 and 3.3 of this letter and the General Comments section of OCTC’s September 27, 2106 letter. The rules should not encourage willful blindness, gross negligence, recklessness, or a failure to investigate.</p> <p>3. OCTC supports Comments</p>	<p>1. No response required.</p> <p>2. The definition of “knowingly” in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the “knowingly” standard is appropriately used in (b) and (c).</p> <p>3. No response required.</p>

**Proposed Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
[ALT1] Synopsis of Public Comments**

TOTAL = 4 **A = 2**
D = 0
M = 1
NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>[2], [7], [8], and [9].</p> <p>4. Comments [1] and [5] are more appropriate for treatises, law review articles, and ethics opinions. They are merely a philosophical discussion of the reasons for the rule. Further, OCTC is concerned with the use of the term “knowingly” in Comment [5] for the same reasons expressed regarding that term in proposed rules 1.9 and 3.3.</p> <p>5. Comments [3] and [6] are unnecessary.</p>	<p>4. Comment [1] explains the application of the rule in relation to rule 8.4(a) and the supervision rules. Rule 8.4 and the supervision rules are new rules and the discrimination rule should facilitate compliance with these related rules. Regarding “knowingly” see the response above to point #2.</p> <p>5. Both comments provide appropriate information. Comment [3] describes the application rule 8.4.1 in limited scope representations. Comment [6] explains paragraph (d) and highlights that the rule would be subject to the usual State Bar Court abatement policies.</p>

PROPOSED RULE OF PROFESSIONAL CONDUCT 8.5
(Current Rule 1-100(D))
Disciplinary Authority; Choice of Law

EXECUTIVE SUMMARY

The Commission evaluated current rule 1-100(D) (Rules of Professional Conduct, in General – Geographic Scope of the Rules) in accordance with the Commission Charter. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 8.5 (Disciplinary Authority; Choice of Law). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed rule 8.5 (Disciplinary Authority; Choice of Law).

Rule As Issued For 90-day Public Comment

This proposal responds to multijurisdictional practice considerations that have expanded in recent years. Proposed rule 8.5 departs from the standard in current rule 1-100(D).¹ The Commission is recommending a new rule derived from Model Rule 8.5 in order to eliminate unnecessary differences with the national standard. The Commission believes this is particularly significant for the topics of choice of law and the extraterritorial application of the rules. Twenty-four states have adopted Model Rule 8.5 verbatim.² Seventeen jurisdictions have adopted a slightly modified version of Model Rule 8.5.³ Nine states have adopted a version of the rule that is substantially different to Model Rule 8.5.⁴ One state has not adopted a version of Model Rule 8.5.⁵

¹ Current rule 1-100(D) (Geographic Scope of Rules) provides that:

(1) As to members:

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

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

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

² The twenty-four states are: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Minnesota, Nebraska, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming.

³ The seventeen jurisdictions are: District of Columbia, Florida, Hawaii, Indiana, Maryland, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, Virginia, and Wisconsin.

⁴ The nine states are: California, Georgia, Kansas, Mississippi, Nevada, New Mexico, New York, North Dakota, and Texas.

⁵ The one state is: Alabama.

Paragraph (a) clarifies that a lawyer who is admitted to practice in California is subject to discipline regardless of where their conduct occurs, while a lawyer who is not admitted in California is subject to California disciplinary authority if the lawyer provides or offers legal services in California. A lawyer may be subject to discipline in California and another jurisdiction for the same conduct.

Paragraph (b) clarifies the choice of law to be applied by the disciplinary authority of California. The rules of professional conduct to be applied shall be as follows:

- (1) matters pending before a tribunal shall use rules of the jurisdiction in which the tribunal sits, unless the tribunal provides otherwise;
- (2) for any other conduct, rules of the jurisdiction in which the lawyer's conduct occurred or where the predominant effect of the conduct occurred.

The one recommended Comment to proposed rule 8.5 is derived from Comment [1] to Model Rule 8.5, but cites to relevant California statutory law. Comment [1] reaffirms that the conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. Furthermore, a lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

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

Commission Drafting Team Information

Lead Drafter: Daniel Eaton

Co-Drafters: Jeffrey Bleich, George Cardona

I. CURRENT CALIFORNIA RULE

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

* * * * *

(D) Geographic Scope of Rules.

(1) As to members:

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

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

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

* * * * *

I.A. CURRENT ABA MODEL RULE 8.5

Rule 8.5 Disciplinary Authority; Choice of Law

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

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

Comment

Disciplinary Authority

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

Choice of Law

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

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

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

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

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

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

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

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

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

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

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

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 8.5 Disciplinary Authority; Choice of Law

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

Comment

Disciplinary Authority

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

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

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

* * * * *

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

~~(1) As to members:~~

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

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

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

~~* * * * *~~

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

Comment

Disciplinary Authority

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

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

Rule 8.5 Disciplinary Authority; Choice Of Law

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

Comment

Disciplinary Authority

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

Choice of Law

~~[2] The conduct of a lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to~~

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

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

~~[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.~~

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

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

~~and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.~~

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

V. RULE HISTORY

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

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

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

Post-1989 Events.

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

¹ Rule 1-100(B)(3) provides:

(3) “Lawyer” means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof.

profession. What followed was a sea change in the regulation of lawyers engaged in cross-border practice of law.

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

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

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

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

² See Reports 201B and 201C, available at:

http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice.html [Last visited 2/22/17].

Commission Response: The Commission has not made any change to the proposed Rule. The Commission disagrees that OCTC will be unable to enforce the proposed Rule. As explained in its Report and Recommendation, the Commission believes that the citation to § 6049.1 in the Comment to the Rule appropriately recognizes that section's possible effect on the bar's disciplinary authority while at the same time allowing California to move toward the national standard of Model Rule 8.5 ("A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. See e.g., Business and Professions Code § 6049.1.")

2. OCTC supports the Comment to this rule.

Commission Response: No response required.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, three public comments were received. One comment agreed with the proposed Rule, one comment disagreed, and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Rules 9.40 [Counsel *pro hac vice*], 9.41 [Appearances by military counsel], 9.42 [Certified law students], 9.43 [Out-of-state attorney arbitration counsel], 9.44 [Registered foreign legal counsel], 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel], 9.47 [attorneys practicing temporarily in California as part of litigation], and 9.48 [non-litigating attorneys temporarily in California to provide legal services] of the California Rules of Court, or local rules of United States district courts in California concerning admission *pro hac vice*, all of which authorize out-of-state lawyers to practice in California, are relevant to a rule that identifies (i) which lawyers are subject to the disciplinary authority of California and (ii) which jurisdiction's rules will apply to determine whether discipline is warranted.

Business and Professions Code § 6049.1(b)(2). By statute, the State Bar may conduct an expedited disciplinary proceeding against a California State Bar member upon receipt of a certified copy of a final order determining that the member has been found culpable of professional misconduct in a proceeding in another jurisdiction. (See generally, *In the Matter of Freydl* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 349 [Under that § 6049.1, a final order of the United States, or of a sister state or territory of the United States, determining that a member of the California Bar has committed professional misconduct in that jurisdiction is conclusive evidence that the attorney is

culpable of professional misconduct in California. A respondent may challenge the imposition of discipline in California under § 6049.1 only by affirmatively showing that as a matter of law the culpability found in the other jurisdiction would not warrant discipline in California or that the proceeding in the other jurisdiction lacked fundamental constitutional protection.].)

Business and Professions Code § 6068(o)(6) provides that a member must report to the State Bar the “imposition of discipline against the attorney by a professional . . . disciplinary agency . . . whether in California or elsewhere.”

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for the ABA Model Rule 8.5, which is the counterpart to current rule 1-100(D), revised August 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_5.authcheckdam.pdf [Last visited 2/7/17.]
- Twenty-four jurisdictions have adopted Model Rule 8.5 verbatim.³ Seventeen jurisdictions have adopted a slightly modified version of Model Rule 8.5.⁴ Nine jurisdictions have adopted a version of the rule that is substantially different to Model Rule 8.5.⁵ One jurisdiction has not adopted a version of Model Rule 8.5.⁶

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

A. Concepts Accepted (Pros and Cons):

1. Recommend that the terms of the current rule be replaced with the standard used in jurisdictions that have adopted Model Rule 8.5 (both disciplinary authority and choice of law).
 - Pros: This area of lawyer regulation is uniquely appropriate for national uniformity and the preponderance of jurisdictions all have adopted the standard in Model Rule 8.5 or a slight variation of the Model Rule. The Commission charter includes consideration of “changes in the law.”

³ The twenty-four jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Minnesota, Nebraska, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming.

⁴ The seventeen jurisdictions are: District of Columbia, Florida, Hawaii, Indiana, Maryland, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, Virginia, and Wisconsin.

⁵ The nine jurisdictions are: California, Georgia, Kansas, Mississippi, Nevada, New Mexico, New York, North Dakota, and Texas.

⁶ The one jurisdiction is: Alabama.

Subsequent to the adoption of current rule 1-100(D), multi-jurisdictional practice became more common and became the subject of regulation in the California Rules of Court (see Rules of Court, rule 9.40 et. seq.) The Commission's recommendation to depart from the current rule and adopt the national standard facilitates predictable choice of law in lawyer disciplinary matters both in and outside of California.

- Cons: The Model Rule 8.5 approach is arguably ambiguous to the extent that the “predominant effect” test has never been used in California disciplinary proceedings. In addition, the standard in 8.5(b) includes a “reasonable belief” standard that arguably imports a negligence standard for disciplinary purposes.

2. Recommend only one Comment to the rule that cites relevant California statutory law.

- Pros: The one recommended Comment is derived from Comment [1] to Model Rule 8.5 but has been revised to cite relevant statutory law on the disciplinary authority of California. The citations include a State Bar Act section referred to in OCTC's September 29, 2015 comment: § 6049.1, which provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Including this Comment supplements the Model Rule standard with law specific to California.
- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Include all of the Model Rule 8.5 Comments.

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

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

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

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term “lawyer” for “member”.
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.

E. Alternatives Considered:

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

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

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

Proposed Resolution:

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

**Proposed Rule 8.5 [1-100(D)] Disciplinary Authority; Choice of Law
Synopsis of Public Comments**

TOTAL = 3
A = 1
D = 1
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response A = 12
X-2016-43ap	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-18-16)	Yes	A	8.5	COPRAC supports the adoption of proposed Rule 8.5.	No response required.
X-2016-104bp	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	M	8.5	OCTC agrees with the policy behind this rule, but still has concerns that the rule, as written, is in conflict with section 6049.1. Section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California, unless, as a matter of law, the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can OCTC enforce a rule that permits discipline based on another jurisdiction's rules, if those rules are in conflict with California's rules? Is rule 8.5 intended to change section 6049.1? This needs to be discussed and addressed in this rule and its Comments.	The Commission has not made any change to the proposed Rule. The Commission disagrees that OCTC will be unable to enforce the proposed Rule. As explained in its Report and Recommendation, the Commission believes that the citation to section 6049.1 in the Comment to the Rule appropriately recognizes that section's possible effect on the bar's disciplinary authority while at the same time allowing California to move toward the national standard of Model Rule 8.5 ("A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. See e.g., Business and Professions Code § 6049.1.")

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Proposed Rule 8.5 [1-100(D)] Disciplinary Authority; Choice of Law
Synopsis of Public Comments**

TOTAL = 3
A = 1
D = 1
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response A = 12
X-2016-116c	Hamilton, Thomas (10-03-16)	No	D	8.5	No explanation provided.	As the commenter did not provide an explanation for his disagreement with the proposed rule, no response is possible or necessary. However, the Commission reaffirms its belief that including Rule 8.5 in the Rules is both necessary and appropriate to explain under what circumstances and to whom the Rules will apply.