



The State Bar *of California*

OFFICE OF THE EXECUTIVE DIRECTOR

Date: November 22, 2022

To: Sarah Banola, Chair, Committee on Professional Responsibility and Conduct

From: Louisa Ayrapetyan, Board Secretary, Office of the Executive Director

Subject: Referral of ABA Model Rule 8.3 to the Committee on Professional Responsibility and Conduct

In my capacity as the Secretary for the State Bar Board of Trustees, I am referring a Rule of Professional Conduct assignment to the Committee on Professional Responsibility and Conduct (COPRAC) (see State Bar Board Book, Tab 5.1, Article 2, Section 8). As discussed in the November 17, 2022, report of Board Chair Ruben Duran, COPRAC is assigned to prepare a proposal for a new Rule of Professional Conduct addressing a lawyer's duty to report the misconduct of another lawyer. While all other United States jurisdictions have adopted a rule on this topic, California has not. Adoption of a rule will enhance public protection which is the primary mission of the State Bar. In carrying out this assignment, COPRAC should consider American Bar Association Model Rule 8.3 (Misconduct) and the adoption of that rule, and variations thereof, by other jurisdictions. COPRAC should also review the past consideration of Model Rule 8.3 by the State Bar's Commission for the Revision of the Rules of Professional Conduct. COPRAC is assigned to report back to the Board at the Board's May 18–19, 2023, meeting.



The State Bar *of California*

OFFICE OF PROFESSIONAL COMPETENCE

DATE: December 2, 2022

TO: Committee on Professional Responsibility and Conduct

FROM: Erika Doherty, Managing Attorney, Office of Professional Competence

SUBJECT: Referral of ABA Model Rule 8.3 to the Committee on Professional Responsibility and Conduct

The Chair of the State Bar Board of Trustees has requested that the Committee on Professional Responsibility and Conduct (COPRAC) prepare a proposal for a new Rule of Professional Conduct addressing a lawyer's duty to report the misconduct of another lawyer. The following background materials may be of assistance in COPRAC's evaluation of these matters:

ABA Model Rule 8.3

ABA Model Rule 8.3 State Comparison Table

Background Materials from Prior Rules Revision Commissions:

- Excerpt of Attachment K Submission to the California Supreme Court on the Proposed Amendments to the Rules of Professional Conduct – Final Report on Rules and Concepts that were Considered But are not Recommended for Adoption
- Agenda Materials for the Rules Revision Commission Meeting on June 2-3, 2016
- Agenda Materials for the Rules Revision Commission Meeting on January 22-23, 2016
- Agenda Materials for the Rules Revision Commission Meeting on May 29-30, 2015
- Background Information Provided to the Rules Revision Commission addressing Rules and Concepts that were Considered but Not Recommended for Adoption from the First Rules Revision Commission and Board of Governor's Action Regarding those Recommendations

ABA MODEL RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(current as of November 2022)

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
- (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
- (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Maintaining The Integrity of The Profession

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

	<p style="text-align: center;">American Bar Association CPR Policy Implementation Committee</p> <p style="text-align: center;">Variations of the ABA Model Rules of Professional Conduct</p> <p style="text-align: center;">RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT</p> <p style="text-align: center;">(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.</p> <p style="text-align: center;">(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.</p> <p style="text-align: center;">(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.</p> <p>Variations from ABA Model Rule are noted.</p>
Alabama	<p>(a) A lawyer possessing unprivileged knowledge of a violation of Rule 8.4 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.</p> <p>(b) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request.</p> <p>(c) A lawyer who is on the Alabama Lawyer Assistance Program Committee or who is a member of any committee or subcommittee of the Alabama Lawyer Assistance Program designed to assist lawyers with addiction and other mental-health-related disorders shall not be under any obligation to disclose any knowledge or evidence acquired from any other person (including judges and lawyers) during communications made by that other person for the purpose of seeking help of the sort the Alabama Lawyer Assistance Program Committee was intended to give. Any statement made by either party during such communications shall be privileged, and no claims or disciplinary action based on the lawyer's failure to disclose the knowledge or evidence acquired during such communications may be instituted.</p> <p>(d) Inquiries or information received by any lawyer staffing a position with the Alabama State Bar Practice Management Assistance Program shall not be disclosed to the disciplinary authority without written permission of the lawyer seeking assistance. Any statement made by either party during such communications shall be privileged, and no claims or disciplinary action based on the lawyer's failure to disclose the knowledge or evidence acquired during such communication may be instituted.</p> <p>(e) This rule does not require disclosure of information otherwise protected by Rule 1.6.</p>

	<p>Last accessed on 11/04/21</p>
Alaska	<p>(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate disciplinary authority unless the lawyer reasonably believes that the misconduct has been or will otherwise be reported.</p> <p>(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate disciplinary authority unless the lawyer reasonably believes that the misconduct has been or will otherwise be reported.</p> <p>(c) Same as MR</p> <p>Last accessed on 11/04/21</p>
Arizona	<p>(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority, except as otherwise provided in these Rules or by law.</p> <p>(b) Same as MR</p> <p>(c) A lawyer who knows that a legal paraprofessional or certified Alternative Business Structure entity has committed a violation of the applicable codes of conduct that raises a substantial question as to the person or entity's compliance with the codes shall inform the appropriate authority.</p> <p>(d) This Rule does not require disclosure of information otherwise protected by ER 1.6 or information gained by a lawyer or judge while serving as a member of an approved lawyers assistance program to the extent that such information would be confidential if it related to the representation of a client.</p> <p>Last accessed on 11/04/21</p>
Arkansas	<p>(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.</p> <p>(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.</p> <p>(c) This rule does not require disclosure of information otherwise protected by Rule 1.6.</p> <p>(d) This rule shall not apply to a member or employee of the Lawyer Assistance Committee ("the Committee") of the Arkansas Judges and Lawyers Assistance Program ("JLAP") or a volunteer serving pursuant to Rule 4 of the Rules of JLAP regarding information received in one's capacity as a Committee member, employee, or volunteer. However, the "duty to report" outlined in paragraphs (a) and (b) above is reinstated if, in good faith, the JLAP committee member, employee, or</p>

	<p>volunteer, has: reason to believe that an attorney participating in the JLAP program is failing to cooperate with said program; is engaged in criminal behavior or the threat thereof; or, is otherwise in violation of paragraphs (a) and (b) of this rule which is beyond or succeeds the behavior upon which the attorney's participation in JLAP was initially based.</p> <p>(e) This rule and its reporting requirements shall not apply to the Supreme Court Office of Ethics Counsel for information received in the course of its official duties in providing informal advice or opinion to Arkansas lawyers</p> <p>Last accessed on 11/04/21</p>
California	<p>Reserved</p> <p>Last accessed on 11/04/21</p>
Colorado	<p>(a) & (b) Same as MR</p> <p>(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of a lawyers' peer assistance program that has been approved by the Colorado Supreme Court initially or upon renewal, to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege.</p> <p>Last accessed on 11/04/21</p>
Connecticut	<p>(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority. A lawyer may not condition settlement of a civil dispute involving allegations of improprieties on the part of a lawyer on an agreement that the subject misconduct not be reported to the appropriate disciplinary authority.</p> <p>(b) Same as MR.</p> <p>(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or General Statutes § 51-81d (f) or obtained while serving as a member of a bar association ethics committee or the Judicial Branch Committee on Judicial Ethics.</p> <p>Last accessed on 11/04/21</p>
Delaware	<p>(a) & (b) Same as MR</p> <p>(c) This Rule does not require disclosure of information otherwise protected by rule 1.6.</p> <p>(d) Notwithstanding anything in this or other of the rules to the contrary, the relationship between members of either (i) the Lawyers Assistance Committee of the Delaware State Bar Association and counselors retained by the Bar Association, or (ii) the Professional Ethics Committee of the Delaware State Bar Association, or (iii) the Fee dispute Conciliation and Mediation Committee of the Delaware State Bar Association, or (iv) the Professional Guidance Committee of the Delaware State Bar Association, and a lawyer or a judge shall be the same as that of attorney and client.</p> <p>Last accessed on 11/05/21</p>

District of Columbia	<p>(a) & (b) Same as MR</p> <p>(c) This rule does not require disclosure of information otherwise protected by Rule 1.6 or other law</p> <p>Last accessed on 11/05/21</p>
Florida	<p>(a) & (b) Same as MR</p> <p>(c) Confidences Preserved. This rule does not require disclosure of information: (1) otherwise protected by rule 4-1.6; (2) gained by a lawyer while serving as a mediator or mediation participant if the information is privileged or confidential under applicable law; or (3) gained by a lawyer or judge while participating in an approved lawyers assistance program , unless the lawyer's participation in an approved lawyers assistance program is part of a disciplinary sanction, in which case a report about the lawyer who is participating as part of a disciplinary sanction shall be made to the appropriate disciplinary agency.</p> <p>(d) Limited Exception for Florida Bar Established Law Practice Management Program. A lawyer employed by or acting on behalf of the law practice management advice and education program established and supervised by the board of governors is exempt from the obligation to disclose knowledge of the conduct of another member of The Florida Bar that raises a substantial question as to the other lawyer's fitness to practice, if the lawyer employed by or acting on behalf of the program acquired the knowledge while engaged in the course of the lawyer's regular job duties as an employee of the program.</p> <p>Last accessed on 11/05/21</p>
Georgia	<p>(a) A lawyer having knowledge that another lawyer has committed a violation of the Georgia Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, should inform the appropriate professional authority.</p> <p>(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office should inform the appropriate authority.</p> <p>There is no disciplinary penalty for a violation of this Rule.</p> <p>Last accessed on 11/05/21</p>
Hawaii	<p>(a) Same as MR</p> <p>(b) A lawyer having knowledge that a judge has committed a violation of applicable Rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.</p> <p>(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 of these Rules or information gained by a lawyer or judge while participating in the Attorneys and Judges Assistance Program.</p> <p>(d) A lawyer shall not: (1) negotiate, attempt to settle, or settle any legal matter by threatening to file or retain from filing a disciplinary complaint against a lawyer; or</p>

	<p>(2) offer, agree to, attempt, negotiate, enter into, or acquiesce in the formation of any agreement limiting the ability of the lawyer or any other person to: (i) file a disciplinary complaint against any lawyer; or (ii) cooperate with a disciplinary proceeding or investigation.</p> <p>Last accessed on 11/05/21</p>
Idaho	<p>Same as MR</p> <p>Last accessed on 11/05/21</p>
Illinois	<p>(a) A lawyer who knows that another lawyer has committed a violation of Rule 8.4(b) or Rule 8.4(c) shall inform the appropriate professional authority.</p> <p>(b) Same as MR</p> <p>(c) This Rule does not require disclosure of information otherwise protected by the attorney-client privilege or by law or information gained by a lawyer or judge while participating in an approved lawyers' assistance program or an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred.</p> <p>(d) A lawyer who has been disciplined as a result of a lawyer disciplinary action brought before any body other than the Illinois Attorney Registration and Disciplinary Commission shall report that fact to the Commission.</p> <p>Last accessed on 11/05/21</p>
Indiana	<p>(a) & (b) Same as MR</p> <p>(c) This Rule does not require reporting of a violation or disclosure of information if such action would involve disclosure of information that is otherwise protected by Rule 1.6, or is gained by a lawyer while providing advisory opinions or telephone advice on legal ethics issues as a member of a bar association committee or similar entity formed for the purposes of providing such opinions or advice and designated by the Indiana Supreme Court.</p> <p>(d) The relationship between lawyers or judges acting on behalf of a judges or lawyers assistance program approved by the Supreme Court, and lawyers or judges who have agreed to seek assistance from and participate in any such programs, shall be considered one of attorney and client, with its attendant duty of confidentiality and privilege from disclosure.</p> <p>Last accessed on 11/05/21</p>
Iowa	<p>(a) (a) A lawyer who knows that another lawyer has committed a violation of the Iowa Rules of Professional Conduct shall inform the appropriate professional authority</p> <p>(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct shall inform the appropriate authority.</p> <p>(c) This rule does not require disclosure of information otherwise protected by rule 32:1.6 or Iowa Code section 622.10 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.</p>

	Last accessed 11/18/21
Kansas	<p>(a) A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.</p> <p>(b) Same as MR</p> <p>(c) This rule does not require disclosure of information otherwise protected by Rule 1.6. In addition, a lawyer is not required to disclose information concerning any such violation which is discovered through participation in a Substance Abuse Committee, Service to the Bar Committee or similar committee sponsored by a state or local bar association, or by participation in a self-help organization such as Alcoholics Anonymous, through which aid is rendered to another lawyer who may be impaired in the practice of law.</p> <p>Last accessed 11/18/21</p>
Kentucky	<p>(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Association's Bar Counsel.</p> <p>(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall report such violation to the Judicial Conduct Commission.</p> <p>(c) A lawyer is not required to report information that is protected by Rule 1.6 or by other law. Further, a lawyer or a judge does not have a duty to report or disclose information that is received in the course of participating in the Kentucky Lawyer Assistance Program or Ethics Hotline.</p> <p>(d) A lawyer acting in good faith in the discharge of the lawyer's professional responsibilities required by paragraphs (a) and (b) or when making a voluntary report of other misconduct shall be immune from any action, civil or criminal, and any disciplinary proceeding before the Bar as a result of said report, except for conduct prohibited by Rule 3.4(f).</p> <p>(e) As provided in SCR 3.435, a lawyer who is disciplined as a result of a lawyer disciplinary action brought before any authority other than the Association shall report that fact to Bar Counsel.</p> <p>(f) A lawyer prosecuting any member of the Association who has been arrested for or who has been charged by way of indictment, information, or complaint with a felony or Class A misdemeanor shall immediately notify Bar Counsel of such event.</p> <p>(g) As provided in SCR 3.166(2), a lawyer prosecuting a case against any member of the Association to a plea of guilty, conviction by judge or jury or entry of judgment, shall immediately notify Bar Counsel of such event.</p> <p>Last accessed 11/22</p>
Louisiana	(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional

	<p>Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Office of Disciplinary Counsel.</p> <p>(b) A lawyer who knows that a judge has committed a violation of the applicable rules of judicial conduct that raises a question as to the judge's honesty, trustworthiness or fitness for office shall inform the Judiciary Commission. Complaints concerning the conduct of federal judges shall be filed with the appropriate federal authorities in accordance with federal laws and rules governing federal judicial conduct and disability.</p> <p>(c) This rule does not require the disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program or while serving as a member of the Ethics Advisory Service Committee.</p> <p>Last accessed on 11/18/21</p>
Maine	<p>(a) A lawyer who knows that another lawyer has committed a violation of the Maine Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.</p> <p>(b) Same as MR</p> <p>(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in the Maine Assistance Program for Lawyers, or an equivalent peer assistance program approved by a state's highest court.</p> <p>Last accessed on 11/18/21</p>
Maryland	<p>(a) An attorney who knows that another attorney has committed a violation of the Maryland Attorneys' Rules of Professional Conduct that raises a substantial question as to that attorney's honesty, trustworthiness or fitness as an attorney in other respects, shall inform the appropriate professional authority.</p> <p>(b) An attorney who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.</p> <p>(c) This Rule does not require disclosure of information otherwise protected by Rule 19-301.6 (1.6) or information gained by an attorney or judge while participating in an attorney or judge assistance or professional guidance program.</p> <p>Last accessed on 11/18/21</p>
Massachusetts	<p>(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Bar Counsel's office of the Board of Bar Overseers.</p> <p>(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the Commission on Judicial Conduct.</p>

	<p>(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.</p> <p>Last accessed on 12/10/21</p>
Michigan	<p>(a) A lawyer having knowledge that another lawyer has committed a significant violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer shall inform the Attorney Grievance Commission.</p> <p>(b) A lawyer having knowledge that a judge has committed a significant violation of the Code of Judicial Conduct that raises a substantial question as to the judge's honesty, trustworthiness, or fitness for office shall inform the Judicial Tenure Commission.</p> <p>(c) This rule does not require disclosure of: (1) information otherwise protected by Rule 1.6; or (2) information gained by a lawyer while serving as an employee or volunteer of the substance abuse counseling program of the State Bar of Michigan, to the extent the information would be protected under Rule 1.6 from disclosure if it were a communication between lawyer and client.</p> <p>Last accessed on 12/10/21</p>
Minnesota	<p>(a) Same as MR</p> <p>(b) A lawyer who knows that a judge has committed a violation of the applicable Code of Judicial Conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.</p> <p>(c) This rule does not require disclosure of information that Rule 1.6 requires or allows a lawyer to keep confidential or information gained by a lawyer or judge while participating in a lawyers assistance program or other program providing assistance, support, or counseling to lawyers who are chemically dependent or have mental disorders.</p> <p>Last accessed on 12/10/21</p>
Mississippi	<p>(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.</p> <p>(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.</p> <p>Last accessed on 12/14/21</p>
Missouri	<p>(a) Same as MR</p> <p>(b) Same as MR</p> <p>(c) This Rule 4-8.3 does not require disclosure of information otherwise protected by Rule 4-1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.</p> <p>Last accessed on 12/14/21</p>
Montana	<p>Same as MR</p>

	Last accessed on 12/14/21
Nebraska	Same as MR Last accessed on 12/14/21
Nevada	(a) Same as MR (b) Same as MR (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program, including but not limited to the Lawyers Concerned for Lawyers program established by Supreme Court Rule 106.5. Last accessed on 12/21/21
New Hampshire	(a) Same as MR (b) Same as MR (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information received by lawyers during the course of their work on behalf of the New Hampshire Bar Association Ethics Committee or the New Hampshire Lawyers Assistance Program. Last accessed on 12/21/21
New Jersey	(a) Same as MR (b) Same as MR (c) This Rule does not require disclosure of information otherwise protected by RPC 1.6. (d) Paragraph (a) of this Rule shall not apply to knowledge obtained as a result of participation in a Lawyers Assistance Program established by the Supreme Court and administered by the New Jersey State Bar Association, except as follows: (i) if the effect of discovered ethics infractions on the practice of an impaired attorney is irreparable or poses a substantial and imminent threat to the interests of clients, then attorney volunteers, peer counselors, or program staff have a duty to disclose the infractions to the disciplinary authorities, and attorney volunteers have the obligation to apply immediately for the appointment of a conservator, who also has the obligation to report ethics infractions to disciplinary authorities; and (ii) attorney volunteers or peer counselors assisting the impaired attorney in conjunction with his or her practice have the same responsibility as any other lawyer to deal candidly with clients, but that responsibility does not include the duty to disclose voluntarily, without inquiry by the client, information of past violations or present violations that did not or do not pose a serious danger to clients. Last accessed on 12/21/21
New Mexico	A. Misconduct of other lawyers. A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty,

trustworthiness, or fitness as a lawyer in other respects shall inform the New Mexico Disciplinary Board.

B. Misconduct of judges. A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the New Mexico Judicial Standards Commission.

C. Confidential information. This rule does not require disclosure of information otherwise protected by Rule 16-106 NMRA, or information gained by a lawyer or a judge while participating in the New Mexico Lawyers and Judges Assistance Program, unless the information pertains to those communications requiring disclosure under Paragraph E.

D. Cooperation and assistance; required. A lawyer shall give full cooperation and assistance to the Supreme Court and to the New Mexico Disciplinary Board, hearing committees, and disciplinary counsel in discharging the lawyer's respective functions and duties with respect to discipline and disciplinary procedures.

E. Alcohol, drugs, addiction, or other physical or mental health-related disorders exception. The reporting requirements of Paragraphs A and B of this rule do not apply when a lawyer believes a judge or lawyer is impaired due to alcohol or substance abuse, or for mental, emotional, or psychological reasons, if such impairment is reported to the New Mexico Lawyers and Judges Assistance Program. The exception is inapplicable to

(1) information required by law to be reported, including information that must be reported under Paragraph G of this rule;

(2) threats of future criminal acts or violations of these rules; or

(3) disclosures of past criminal acts or violations of these rules that are believed to have resulted in substantial harm to a client.

Such information, threats, or disclosures shall be reported to the New Mexico Disciplinary Board or the New Mexico Judicial Standards Commission, even if the impairment is also reported to the New Mexico Lawyers and Judges Assistance Program. Paragraph (E)(3) of this rule does not apply to any communication that is made to, by, or among members or representatives of the New Mexico Lawyers and Judges Assistance Program.

F. Immunity. The duties and responsibilities of the Program Manager of the New Mexico Lawyers and Judges Assistance Program, its members of the Board, employees, agents, designees, volunteers, or reporting parties are owed to the Supreme Court and the public in general, not to any individual lawyer or another person. Nothing in this rule is to be construed as creating a civil cause of action against the aforementioned individuals, and they are immune from liability for any omission or conduct in the course of carrying out their official duties and responsibilities or failing to fulfill their duties and responsibilities under this rule. Any person who in good faith reports information in connection with the program is immune from suit for reporting the information.

G. Judicial misconduct involving unlawful drugs; reporting requirement. Notwithstanding the provisions of Paragraph E, any incumbent judge who illegally sells, purchases, possesses, or uses drugs or any substance considered unlawful under the provisions of the Controlled Substances Act, shall be subject to discipline under the Code of Judicial Conduct.

	<p>Any lawyer who has specific objective and articulable facts or reasonable inferences that can be drawn from those facts, that a judge has engaged in such misconduct, shall report those facts to the New Mexico Judicial Standards Commission. Reports of such misconduct shall include the following information:</p> <ol style="list-style-type: none"> (1) name of person filing the report; (2) address and telephone number where the person may be contacted; (3) a detailed description of the alleged misconduct; (4) dates of the alleged misconduct; and (5) any supporting evidence or material that may be available to the reporting person. <p>The Judicial Standards Commission shall review and evaluate reports of such misconduct to determine if the report warrants further review or investigation.</p> <p>Last accessed on 12/21/21</p>
New York	<p>(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.</p> <p>(b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.</p> <p>(c) This Rule does not require disclosure of: (1) information otherwise protected by Rule 1.6; or (2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.</p> <p>Last accessed on 12/21/21</p>
North Carolina	<p>(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter.</p> <p>(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the North Carolina Judicial Standards Commission or other appropriate authority.</p> <p>(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.</p> <p>(d) A lawyer who is disciplined in any state or federal court for a violation of the Rules of Professional Conduct in effect in such state or federal court shall inform the secretary of the North Carolina State Bar of such action in writing no later than 30 days after entry of the order of discipline.</p> <p>(e) A lawyer who is serving as a mediator and who is subject to the North Carolina Supreme Court Standards of Professional Conduct for Mediators (the Standards) is not required to disclose information learned during a mediation if the Standards do not allow disclosure. If disclosure is</p>

	<p>allowed by the Standards, the lawyer is required to report professional misconduct consistent with the duty to report set forth in paragraph (a).</p> <p>Last accessed on 12/21/21</p>
North Dakota	<p>(a) A lawyer who knows that another lawyer has committed a violation of these rules that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall initiate proceedings under the North Dakota Rules for Lawyer Discipline.</p> <p>(b) A lawyer who knows that a judge has committed a violation of the North Dakota Code of Judicial Conduct that raises a substantial question as to the judge's honesty, trustworthiness, or fitness for judicial office in other respects shall initiate proceedings under the Rules of the North Dakota Judicial Conduct Commission.</p> <p>(c) This rule does not require disclosure of information protected by Rule 1.6 or information gained by a lawyer or judge while participating as a committee member, peer counselor, or program staff in a lawyer assistance program established under Administrative Rule 49.</p> <p>Last accessed on 12/21/21</p>
Ohio	<p>(a) A lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct that raises a question as to any lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority empowered to investigate or act upon such a violation.</p> <p>(b) A lawyer who possesses unprivileged knowledge that a judge has committed a violation of the Ohio Rules of Professional Conduct or applicable rules of judicial conduct shall inform the appropriate authority.</p> <p>(c) Any information obtained by a member of a committee or subcommittee of a bar association, or by a member, employee, or agent of a nonprofit corporation established by a bar association, designed to assist lawyers with substance abuse or mental health problems, provided the information was obtained while the member, employee, or agent was performing duties as a member, employee, or agent of the committee, subcommittee, or nonprofit corporation, shall be privileged for all purposes under this rule.</p> <p>Last accessed on 12/21/21</p>
Oklahoma	<p>(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.</p> <p>(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.</p> <p>(c) This rule does not require disclosure of information otherwise protected by Rule 1.6.</p>

	<p>(d) The provisions of Rule 8.3(a) shall not apply to lawyers who obtain such knowledge or evidence while acting as Ethics Counsel or as a member, investigator, agent, employee, or as a designee of the Oklahoma Bar Association Lawyers Helping Lawyers Committee, Judges Helping Judges, or the Management Assistance Program in the course of assisting another lawyer or judge. Any such knowledge or evidence received by lawyers acting in such capacity shall enjoy the same confidence as information protected by the attorney-client privilege under applicable rule and Rule 1.6.</p> <p>Last accessed on 12/21/21</p>
Oregon	<p>(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Oregon State Bar Client Assistance Office.</p> <p>(b) Same as MR</p> <p>(c) This rule does not require disclosure of information otherwise protected by Rule 1.6 or ORS 9.460(3), or to lawyers who obtain such knowledge or evidence while:</p> <p>(1) acting as a member, investigator, agent, employee or as a designee of the State Lawyers Assistance Committee; or</p> <p>(2) acting as a board member, employee, investigator, agent or lawyer for or on behalf of the Professional Liability Fund or as a Board of Governors liaison to the Professional Liability Fund; or</p> <p>(3) participating in the loss prevention programs of the Professional Liability Fund, including the Oregon Attorney Assistance Program.</p> <p>(d) This rule does not require disclosure of mediation communications otherwise protected by ORS 36.220.</p> <p>Last accessed on 12/22/21</p>
Pennsylvania	<p>Same as MR</p> <p>Last accessed on 12/22/21</p>
Rhode Island	<p>(a) and (b) Same as MR</p> <p>(c) This rule does not require disclosure of information otherwise protected by Rule 1.6.</p> <p>(d) This rule shall not apply to members of the Confidential Assistance Committee ("the committee") of the Rhode Island Bar Association ("the Association") regarding information received in their capacity as Committee members, acting in good faith, unless it appears to the members that the attorney in question is failing to desist from the violation or is failing to cooperate with a program of assistance to which the attorney has agreed, or is engaged in the perpetration of fraud or embezzlement, or when disclosure is required to protect the public from substantial harm.</p> <p>(e) Except as provided by the preceding subsection (d), no information received, gathered or maintained by the Committee, or by an employee of the Association in connection with the work of the Committee, may be disclosed to any person or be subject to discovery or subpoena in any administrative or judicial proceeding, except upon the express written release of the subject attorney,</p>

	<p>or by order of a court of competent jurisdiction. However, the Committee may refer any attorney to a professional assistance entity, and may, in good faith, communicate information to the entity in connection with the referral. If information obtained by a member of the Committee or an employee of the Association gives rise to reasonable suspicion of a direct threat to the health or safety of the subject attorney or other person, then the obligation of confidentiality set forth in this subsection (e) shall not apply, and the Committee member or Association employee may make such communications as are necessary for the purpose of avoiding or preventing the threat.</p> <p>(f) Members of the Committee shall be immune from civil liability for actions taken in good faith in the course of performing their duties.</p> <p>Last accessed on 12/22/21</p>
South Carolina	<p>(a) A lawyer who is arrested for or has been charged by way of indictment, information or complaint with a serious crime shall inform the Commission on Lawyer Conduct in writing within fifteen days of being arrested or being charged by way of indictment, information or complaint.</p> <p>(b) A lawyer who is disciplined or transferred to incapacity inactive status in another jurisdiction shall inform the Commission on Lawyer Conduct in writing within fifteen days of discipline or transfer.</p> <p>(c) Same as MR 8.3(a)</p> <p>(d) Same as MR 8.3(b)</p> <p>(e) This Rule does not require disclosure of information otherwise protected by Rule 1.6.</p> <p>(f) Inquiries or information received by the South Carolina Bar Lawyers Helping Lawyers Committee or an equivalent county bar association committee regarding the need for treatment for alcohol, drug abuse or depression, or by the South Carolina Bar law office management assistance program or an equivalent county bar association program regarding a lawyer seeking the program assistance, shall not be disclosed to the disciplinary authority without written permission of the lawyer receiving assistance. Any such inquiry or information shall enjoy the same confidence as information protected by the attorney-client privilege under applicable law.</p> <p>Last accessed on 12/22/21</p>
South Dakota	<p>(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.</p> <p>(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.</p> <p>(c) Paragraphs (a) and (b) shall not apply to information obtained by a lawyer or judge as a member of a committee, organization or related group established or approved by the State Bar or the Supreme Court to assist lawyers, judges or law students with a medical condition as defined in § 16-</p>

	<p>19-29(1), including the name of any individual in contact with the member and sources of information or information obtained therefrom. Any such information shall be deemed privileged on the same basis as provided by law between attorney and client.</p> <p>(d) A member of an entity described in paragraph (c) shall not be required to treat as confidential, communications that cause him or her to believe a person intends or contemplates causing harm to himself, herself or a reasonably identifiable person and that disclosure of the communications to the potential victim or individuals or entities reasonably believed to be able to assist in preventing the harm is necessary.</p> <p>Last accessed on 12/22/21</p>
Tennessee	<p>(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the Disciplinary Counsel of the Board of Professional Responsibility.</p> <p>(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the Disciplinary Counsel of the Board of Judicial Conduct.</p> <p>(c) This Rule does not require disclosure of information otherwise protected by RPC 1.6 or information gained by a lawyer or judge while serving as a member of a lawyer assistance program approved by the Supreme Court of Tennessee or by the Board of Professional Responsibility.</p> <p>Last accessed on 12/23/21</p>
Texas	<p>(a) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.</p> <p>(b) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.</p> <p>(c) A lawyer having knowledge or suspecting that another lawyer or judge whose conduct the lawyer is required to report pursuant to paragraphs (a) or (b) of this Rule is impaired by chemical dependency on alcohol or drugs or by mental illness may report that person to an approved peer assistance program rather than to an appropriate disciplinary authority. If a lawyer elects that option, the lawyer's report to the approved peer assistance program shall disclose any disciplinary violations that the reporting lawyer would otherwise have to disclose to the authorities referred to in paragraphs (a) and (b).</p> <p>(d) This rule does not require disclosure of knowledge or information otherwise protected as confidential information: (1) by Rule 1.05 or (2) by any statutory or regulatory provisions applicable to the counseling activities of the approved peer assistance program.</p>

	<p>(e) A lawyer who has been convicted or placed on probation, with or without an adjudication of guilt, by any court for barratry, any felony, or for a misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property—including a conviction or sentence of probation for attempt, conspiracy, or solicitation—must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment.</p> <p>(f) A lawyer who has been disciplined by the attorney-regulatory agency of another jurisdiction, or by a federal court or federal agency, must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment. For purposes of this paragraph, “discipline” by a federal court or federal agency means a public reprimand, suspension, or disbarment; the term does not include a letter of “warning” or “admonishment” or a similar advisory by a federal court or federal agency.</p> <p>Last accessed on 12/23/21</p>
Utah	<p>a) A lawyer who knows that another legal professional has committed a violation of the applicable Rules of Professional Conduct that raises a substantial question as to that legal professional’s honesty, trustworthiness or fitness as a legal professional in other respects shall inform the appropriate professional authority.</p> <p>(b) A lawyer who knows that a judge has committed a violation of applicable Rules of Judicial Conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.</p> <p>(c) Same as MR</p> <p>Last accessed on 12/23/21</p>
Vermont	<p>(a) and (b) Same as MR</p> <p>(c) This rule does not require disclosure of information gained by Bar Counsel in responding to an inquiry or by a lawyer while participating in a lawyer assistance program approved by the Vermont Bar Association or as a member of the Professional Responsibility Committee of the Vermont Bar Association or of information otherwise protected by Rule 1.6.</p> <p>Last accessed on 12/23/21</p>
Virginia	<p>(a) A lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law shall inform the appropriate professional authority.</p> <p>(b) A lawyer having reliable information that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.</p> <p>(c) If a lawyer serving as a third party neutral receives reliable information during the dispute resolution process that another lawyer has engaged in misconduct which the lawyer would otherwise</p>

	<p>be required to report but for its confidential nature, the lawyer shall attempt to obtain the parties' written agreement to waive confidentiality and permit disclosure of such information to the appropriate professional authority.</p> <p>(d) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge who is a member of an approved lawyer's assistance program, or who is a trained intervenor or volunteer for such a program or committee, or who is otherwise cooperating in a particular assistance effort, when such information is obtained for the purposes of fulfilling the recognized objectives of the program.</p> <p>(e) A lawyer shall inform the Virginia State Bar if:</p> <p>(1) the lawyer has been disciplined by a state or federal disciplinary authority, agency or court in any state, U.S. territory, or the District of Columbia, for a violation of rules of professional conduct in that jurisdiction;</p> <p>(2) the lawyer has been convicted of a felony in a state, U.S. territory, District of Columbia, or federal court ;</p> <p>(3) the lawyer has been convicted of either a crime involving theft, fraud, extortion, bribery or perjury, or an attempt, solicitation or conspiracy to commit any of the foregoing offenses, in a state, U.S. territory, District of Columbia, or federal court.</p> <p>The reporting required by paragraph (e) of this Rule shall be made in writing to the Clerk of the Disciplinary System of the Virginia State Bar not later than 60 days following entry of any final order or judgment of conviction or discipline.</p> <p>Last accessed on 12/23/21</p>
Washington	<p>(a) A lawyer who knows that another lawyer or LLLT has committed a violation of the applicable Rules of Professional Conduct that raises a substantial question as to that lawyer's or LLLT's honesty, trustworthiness or fitness as a lawyer or LLLT in other respects, should inform the appropriate professional authority.</p> <p>(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office should inform the appropriate authority.</p> <p>(c) This Rule does not permit a lawyer to report the professional misconduct of another lawyer, judge, or LLLT to the appropriate authority if doing so would require the lawyer to disclose information otherwise protected by Rule 1.6.</p> <p>Last accessed on 12/23/21</p>
West Virginia	<p>(a) – (c) Same as MR.</p> <p>(d) This Rule shall not apply to members of the West Virginia Judicial and Lawyer Assistance Program (WVJLAP) or any predecessor or successor organizations to the extent that these persons are acting in their official capacities as members, intervenors, representatives or volunteers in the WVJLAP. The Rules of the Judicial and Lawyer Assistance Program shall determine the procedure for reporting an impaired lawyer who resists all efforts of assistance by the WVJLAP to the Office</p>

	of Disciplinary Counsel and the Lawyer Disciplinary Board. Last accessed on 12/23/21
Wisconsin	(a) & (b) Same as MR (c) If the information revealing misconduct under subs. (a) or (b) is confidential under SCR 20:1.6, the lawyer shall consult with the client about the matter and abide by the client's wishes to the extent required by SCR 20:1.6. (d) This rule does not require disclosure of any of the following: (1) Information gained by a lawyer while participating in a confidential lawyers' assistance program. (2) Information acquired by any person selected to mediate or arbitrate disputes between lawyers arising out of a professional or economic dispute involving law firm dissolutions, termination or departure of one or more lawyers from a law firm where such information is acquired in the course of mediating or arbitrating the dispute between lawyers. Last accessed on 12/23/21
Wyoming	Same as MR Last accessed on 12/23/21

Copyright © 2021 American Bar Association. All rights reserved. Nothing contained in this chart is to be considered the rendering of legal advice. The chart is intended for educational and informational purposes only. Information regarding variations from the ABA Model Rules should not be construed as representing policy of the American Bar Association. The chart is current as of the date shown on each. A jurisdiction may have amended its rules or proposals since the time its chart was created. If you are aware of any inaccuracies in the chart, please send your corrections or additions and the source of that information to Natalia Vera, (312) 988-5328, natalia.vera@americanbar.org

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**REQUEST THAT THE SUPREME COURT OF CALIFORNIA APPROVE
PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT
OF THE STATE BAR OF CALIFORNIA, AND MEMORANDUM AND
SUPPORTING DOCUMENTS IN EXPLANATION**



**PREPARED BY
THE STATE BAR OF CALIFORNIA**

**OFFICE OF THE GENERAL COUNSEL
Vanessa L. Holton, State Bar Number 111613
Robert G. Retana, State Bar Number 148677
Mark A. Torres-Gil, State Bar Number 91597
Carissa N. Andresen, State Bar Number 278118**

**OFFICE OF PROFESSIONAL COMPETENCE
Randall Difuntorum, State Bar Number 136009
Kevin E. Mohr, State Bar Number 139149
Andrew L. Tuft, State Bar Number 260037**

**180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2339
Facsimile: (415) 538-2321
Email: OGC@calbar.ca.gov**

ATTACHMENT K

Excerpt from Attachment K - Concepts Considered but Rejected

7. Model Rule 8.3 Reporting Professional Misconduct

Model Rule 8.3 provides:

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

Among the reasons for the Commission's decision not to recommend the adoption of Model Rule 8.3 are the following.

- (1) Despite the recognition that reporting could be overridden by the duty of confidentiality with respect to information learned in the course of representation of a client, there remains a potential for conflict with that duty to the extent lawyers might feel obligated to

seek a waiver of confidentiality to further the reporting interests of the lawyer rather than the client's own interests;

- (2) The rule would pose a potential for conflicts with a lawyer's duty of loyalty in those specific instances where making the report would be detrimental to a current or former client's interests (for example, causing animosity with opposing counsel that leads to the unwinding of a settlement that the client might otherwise have consummated); and
- (3) The rule might be construed as inconsistent with the discretionary reporting policy reflected in Canon 3D(2) of the California Code of Judicial Ethics that states: "Whenever a judge has personal knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which **may include reporting the violation to the appropriate authority.**" (Emphasis added.)

At the Commission's June 2-3, 2016 meeting, the Commission members approved a recommendation not to adopt a version of Model Rule 8.3 (10-4-0).



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

OFFICE OF PROFESSIONAL COMPETENCE

PLANNING, AND DEVELOPMENT

TELEPHONE: (415) 538-2167

MEMORANDUM

DATE: May 16, 2016

TO: Members, Commission for the Revision of the Rules of Professional Conduct

FROM: ABA Model Rule 8.3 Drafting Team (Joan Croker (L), George Cardona, and Lee Harris)

SUBJECT: Consideration of ABA Model Rule 8.3 ("Reporting Professional Misconduct")

Summary:

The drafting team assigned to study ABA Model Rule 8.3 ("MR 8.3") recommends that the Commission report to the Board of Trustees that a California version MR 8.3 was considered by the Commission but is not recommended for adoption.

Background:

The drafting team met by teleconference on May 11, 2016. Among the items considered by the team were the following: MR 8.3; RRC1's proposed rule 8.3 (see Attachment 1); the summary of the Board of Governors consideration of RRC1's proposed rule; the Restatement (Third) of the Law Governing Lawyers, §5 (Professional Discipline); an ABA State Adoption Chart for MR 8.3 (dated March 28, 2016) (see Attachment 2)¹; and the relevant parts of the Rule 1-120 drafting team's report and recommendation prepared for the Commission's May 29 – 30, 2015 meeting. At the teleconference, the drafting team discussed the policy underlying MR 8.3 and the pros and cons of adopting a California version. In particular, the drafting team weighed the experience of RRC1 in recommending a substantially modified version of MR 8.3 that ultimately was not adopted by the Board.

Discussion:

In its entirety, MR 8.3 provides that:

Rule 8.3: Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

¹ The ABA chart indicates that only six (6) jurisdictions have adopted a rule that is identical to the MR 8.3. Those states are: Idaho; Iowa; Montana; Nebraska; Utah; and Wyoming.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

As reflected above, ABA MR 8.3 mandates reporting of any violation of the rules that raises a “substantial question” as to a lawyer’s honesty, trustworthiness or fitness as a lawyer. RRC1 proposed a modified version of this rule that was partly permissive and partly mandatory. RRC1’s proposed rule set a standard of permissive reporting for general misconduct that implicates a lawyer’s fitness to practice but mandated reporting where another lawyer committed a felonious criminal act that raised a substantial question as to that lawyer’s honesty, trustworthiness or fitness. The Board of Governors rejected the RRC1’s proposed rule. The Board’s rejection appeared to reflect two concerns.

First, the Board was concerned that lawyers might find it difficult to comply with a rule that appeared to assume that every lawyer possessed expertise on the issue of whether misconduct would constitute a felony. Second, it appeared that the Board shared some of the concerns expressed by a minority of RRC1 that viewed any mandatory reporting rule as the wrong public policy for California. The minority statement observed that mandatory reporting issues often arise in the midst of representing a client and that the experience in jurisdictions with mandatory reporting is that when reporting occurs in this context, an innocent client might suffer. The minority asserted that reporting can lead to disputes among the lawyers representing clients in a matter and that this could cause a change in counsel, imposing delays and costs on innocent clients. In accordance with the Board’s determination, a California counterpart to MR 8.3 was not recommended to the Supreme Court for approval.

In connection with rule 1-120 (Assisting, Soliciting or Inducing Violations), the Second Commission has received no public comments addressing MR 8.3. OCTC has stated, however, that it plans to provide comments on whether the Second Commission should adopt a requirement that members report the misconduct of others.

On balance, the members of the drafting team agree with the Board’s prior decision not to recommend a reporting requirement. The pros of adopting a reporting requirement (whether in the mandatory form of ABA MR 8.3 or a hybrid permissive/mandatory form along the lines of RRC1’s proposed rule) include:

1. improving public protection by requiring lawyer reporting of certain known violations of the rules that raise a substantial question about a lawyer’s “honesty, trustworthiness or fitness as a lawyer”; and
2. bringing California’s rules more in line with the ABA Model Rules.

There are also significant cons to a reporting requirement; either the Model Rule or RRC1 hybrid approach would:

1. require a lawyer to determine whether a known violation raises a substantial question as to (or implicates) the lawyer’s honesty, trustworthiness or fitness as a lawyer;
2. despite the recognition that reporting could be trumped by the duty of confidentiality with respect to information learned in the course of representation of a client, pose a potential for conflict with that rule, or with the attorney-client relationship, to the extent lawyers might feel obligated to discuss waiver of confidentiality to further the reporting interests of the lawyer rather than the client’s own interests;
3. pose a potential for conflicts with a lawyer’s duty of loyalty if reporting posed a risk of adversely affecting a current or former client’s interests; and
4. potentially be viewed as inconsistent with the discretionary reporting policy reflected in Canon 3D(2) of the California Code of Judicial Ethics that states: “Whenever a judge has personal knowledge, or concludes in a judicial decision,

that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which ***may include reporting the violation to the appropriate authority.***” (Emphasis added.)

On balance, the drafting team agrees that the cons outweigh the pros, particularly given that California has never had such a reporting requirement, and that the analysis required for lawyers to determine the scope of any reporting requirement seems inconsistent with this Commission’s charge to retain the historical nature of the California Rules as a “clear and enforceable articulation of disciplinary standards.”

Conclusion:

In accordance with the foregoing, the drafting team recommends that the Commission report to the Board of Trustees that a California version MR 8.3 is not recommended for adoption.

**Rule 8.3 Reporting Professional Misconduct
(Commission's Proposed Rule – Clean Version)**

- (a) A lawyer who knows that another lawyer has committed a felonious criminal act that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall inform the appropriate disciplinary authority.
- (b) Except as required by paragraph (a), a lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act.
- (c) A lawyer who knows that a judge or other adjudicative officer has committed a violation of applicable rules of judicial conduct that raises a substantial question as to that person's fitness for office may, but is not required to, report the violation to the appropriate authority.
- (d) This Rule does not authorize a lawyer to report misconduct if the lawyer is prohibited from doing so by the lawyer's duties to a client, a former client or by law. Such prohibitions include, but are not limited to, the lawyer's duty not to disclose (i) information otherwise protected by Rule 1.6, Rule 1.9, or Business and Professions Code section 6068(e); (ii) information gained by a lawyer or judge while participating in an approved lawyers assistance program; (iii) information gained during a mediation; (iv) information subject to a confidential protective order; or (v) information otherwise protected under laws governing fiduciaries.

COMMENT

[1] In deciding whether to report another lawyer's violation of these Rules or the State Bar Act that is not required by paragraph (a), a lawyer should consider among other things whether the violation raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer.

[2] This Rule does not abrogate a lawyer's obligations to report the lawyer's own conduct as required under the State Bar Act. See, e.g., Business and Professions Code section 6068(o). In addition, a lawyer is not obligated to report a felonious criminal act under paragraph (a) committed by another lawyer if doing so would infringe on the reporting lawyer's privilege against self-incrimination.

[3] Even if a lawyer is permitted or required to report under this Rule, the lawyer must not threaten to file criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute in violation of Rule 3.10.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the lawyer-client relationship.

[5] A lawyer may not be a party to or participate in offering or making an agreement that would violate Business and Professions Code section 6090.5.

	<p style="text-align: center;">American Bar Association CPR Policy Implementation Committee</p> <p style="text-align: center;">Variations of the ABA Model Rules of Professional Conduct</p> <p style="text-align: center;">RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT</p> <p>(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.</p> <p>(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.</p> <p>(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.</p> <p>Variations from ABA Model Rule are noted. Based on reports of state committees reviewing recent changes to the model rules. For information on individual state committee reports, see: http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/ethics_2000_status_chart.authcheckdam.pdf</p> <p>Comments not included.</p> <p>*Current links to state Rules of Professional conduct can be found on the ABA website: http://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest.html</p>
<p>AL Effective 2/19/09</p>	<p>(a) is equivalent to MR (a) but with different wording: <i>A lawyer possessing unprivileged knowledge of a violation of Rule 8.4 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.</i></p> <p>(b) is equivalent to MR (b) but with different wording: <i>A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request.</i></p> <p>Adds (c): <i>A lawyer who is on the Committee on Impaired Lawyers or on the ALA-Pals Committee or who is a member of any committee or sub-committee of the Bar designed to assist lawyers with substance abuse problems shall not be under any obligation to disclose any knowledge or evidence acquired from any other person (including judges and lawyers) during communications made by that other person for the purpose of seeking help of the sort the lawyer's committee was intended to give. Any statement made by either party during such communications shall be privileged, and no claims or disciplinary action based on the lawyer's failure to disclose the knowledge or evidence acquired during such communications may be instituted;</i></p> <p>(d) is equivalent to MR (c) but deletes everything following reference to Rule 1.6.</p>

AK Effective 4/15/09	(a) Adds to end: “unless the lawyer reasonably believes that the misconduct has been or will otherwise be reported;” (b) Adds “disciplinary” before “authority” and adds: “unless the lawyer reasonably believes that the misconduct has been or will otherwise be reported.”
AZ Effective 12/1/03	(a): adds at the end: “except as otherwise provided in these Rules or by law.” (c): second half similar to old MR: “. . .while serving as a member of an approved lawyers assistance program to the extent that such information would be confidential if it related to the representation of a client.”
AR Effective 5/1/05	(a): uses “having knowledge” after “A lawyer.” (b): uses “having knowledge” after “A lawyer.” (c) ends after “1.6.” Adds: <u>(d) This rule shall not apply to a member of the Lawyer Assistance Committee ("the Committee") of the Arkansas Lawyer Assistance Program ("ALAP") or a volunteer serving pursuant to Rule 4 of the Rules of ALAP regarding information received in one's capacity as a Committee member or volunteer, acting in good faith, unless it appears to said member or volunteer that the attorney in question, after entry into the ALAP, is failing to desist from said violation, or is failing to cooperate with a program of assistance to which said attorney has agreed, or is engaged in the sale of a controlled substance or theft of property constituting a felony under Arkansas law, or the equivalent thereof if the offense is not within the State's jurisdiction.</u> <u>(e) Except as provided by the preceding subsection (d), and Rules 7 (B) and 10 of the Rules of ALAP, no information received, gathered, or maintained by the Committee, its members or volunteers, or by an employee of the ALAP in connection with the work of the Committee may be disclosed to any person nor be subject to discovery or subpoena in any administrative or judicial proceeding, except upon the express written release of the subject attorney. However, the Committee may refer any attorney to a professional assistance entity, and may, in good faith, communicate information to the entity in connection with the referral. If information obtained by a member of the Committee, a volunteer, or an employee of the ALAP gives rise to reasonable suspicion of a direct threat to the health or safety of the subject attorney or other person, then the obligation of confidentiality set forth in this subsection (e) shall not apply, and the Committee member, volunteer, or ALAP employee may make such communications as are necessary for the purpose of avoiding or preventing said threat.</u>
CA Current Rule	[California’s Rules of Professional Conduct are structured differently from the ABA Model Rules. Please see California Rules : http://calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf]
CO Effective 1/1/08	(c) Replaces language after “or judge while” with: “serving as a member of a lawyers’ peer assistance program that has been approved by the Colorado Supreme Court initially or upon renewal, to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege.”
CT Effective 1/1/07	(a): adds “A lawyer may not condition settlement of a civil dispute involving allegations of improprieties on the part of a lawyer on an agreement that the subject misconduct not be reported to the appropriate disciplinary authority.” to end (c): replaces language after “Rule 1.6” with “or General Statutes § 51-81d(f)”
DE Effective 7/1/03	do not include the 2nd half of (c) but have a separate (d) regarding lawyer who participate in lawyer assistance programs, ethics committees, fee dispute and mediation programs: the relationship between those persons and a lawyer or a judge shall be the same as that of attorney

	and client.
District of Columbia Effective 2/1/07	(c): replaces material after “1.6” with “or other law”
FL Amendments To (c) effective 7/1/12	<p>(a): adds “Reporting Misconduct of Other Lawyers.” to beginning (b): adds “Reporting Misconduct of Judges.” to beginning (c): adds: Confidences Preserved. This rule does not require disclosure of information: (1) otherwise protected by rule 4-1.6; (2) gained by a lawyer while serving as a mediator or mediation participant if the information is privileged or confidential under applicable law; or (3) gained by a lawyer or judge while participating in an approved lawyers assistance program , unless the lawyer's participation in an approved lawyers assistance program is part of a disciplinary sanction, in which case a report about the lawyer who is participating as part of a disciplinary sanction shall be made to the appropriate disciplinary agency. Adds (d): Limited Exception for LOMAS Counsel. A lawyer employed by or acting on behalf of the Law Office Management Assistance Service (LOMAS) shall not have an obligation to disclose knowledge of the conduct of another member of The Florida Bar that raises a substantial question as to the other lawyer’s fitness to practice, if the lawyer employed by or acting on behalf of LOMAS acquired the knowledge while engaged in a LOMAS review of the other lawyer’s practice. Provided further, however, that if the LOMAS review is conducted as a part of a disciplinary sanction this limitation shall not be applicable and a report shall be made to the appropriate disciplinary agency.</p>
GA* Effective 1/1/01	<p><i>*Has not amended Rule since the most recent amendments to the ABA Model Rules</i></p> <p>(a) And (b) Replaces “who knows” with “having knowledge;” Adds: “There is no disciplinary penalty for a violation of this Rule.”</p>
HI Effective 1/1/14	<p>(b): Changes “who knows” to “having knowledge” (c): Changes “an approved lawyers assistance program” to “the Attorneys and Judges Assistance Program” Adds: (d): “A lawyer shall not” (d)(1): “negotiate, attempt to settle, or settle any legal matter by threatening to file or retain from filing a disciplinary complaint against a lawyer; or” (d)(2): “offer, agree to, attempt, negotiate, enter into, or acquiesce in the formation of any agreement limiting the ability of the lawyer or any other person to” (d)(2)(i): “file a disciplinary complaint against any lawyer; or” (d)(2)(ii): “cooperate with a disciplinary proceeding or investigation.”</p>
ID Effective 7/1/04	Same as MR
IL Effective 1/1/2010	<p>(a) Replaces “the Rules of Professional Conduct...in other respects” with “Rule 8.4(b) or Rule 8.4(c);” (b) Replaces “Rules 1.6” with “the attorney-client privilege or by law;” Adds “or an</p>

	<p>intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred;”</p> <p>Adds (d): “A lawyer who has been disciplined as a result of a lawyer disciplinary action brought before any body other than the Illinois Attorney Registration and Disciplinary Commission shall report that fact to the Commission.”</p>
IN Effective 1/1/05	<p>(c) This Rule does not require reporting of a violation or disclosure of information if such action would involve disclosure of information that is otherwise protected by Rule 1.6, or is gained by a lawyer while providing advisory opinions or telephone advice on legal ethics issues as a member of a bar association committee or similar entity formed for the purposes of providing such opinions or advice and designated by the Indiana Supreme Court.</p> <p>(d) The relationship between lawyers or judges acting on behalf of a judges or lawyers assistance program approved by the Supreme Court, and lawyers or judges who have agreed to seek assistance from and participate in any such programs, shall be considered one of attorney and client, with its attendant duty of confidentiality and privilege from disclosure.</p>
IA Effective 7/1/05	Same as MR
KS Effective 7/1/07	<p>(a) Replaces language before “shall inform” with: “A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules;”</p> <p>(c) Replaces language after “Rule 1.6” with: “In addition, a lawyer is not required to disclose information concerning any such violation which is discovered through participation in a Substance Abuse Committee, Service to the Bar Committee or similar committee sponsored by a state or local bar association, or by participation in a self-help organization such as Alcoholics Anonymous, through which aid is rendered to another lawyer who may be impaired in the practice of law.”</p>
KY Effective 7/15/09	<p>(a) Replaces “the appropriate professional authority” with “the Association’s Bar Counsel;”</p> <p>(b) Replaces language after “shall” with “report such violation to the Judicial Conduct Commission;”</p> <p>Does not adopt MR (c) but adds:</p> <p><i>(c) A lawyer is not required to report information that is protected by Rule 1.6 or by other law. Further, a lawyer or a judge does not have a duty to report or disclose information that is received in the course of participating in the Kentucky Lawyer Assistance Program or Ethics Hotline.</i></p> <p><i>(d) A lawyer acting in good faith in the discharge of the lawyer’s professional responsibilities required by paragraphs (a) and (b) or when making a voluntary report of other misconduct shall be immune from any action, civil or criminal, and any disciplinary proceeding before the Bar as a result of said report, except for conduct prohibited by Rule 3.4(f).</i></p> <p><i>(e) As provided in SCR 3.435, a lawyer who is disciplined as a result of a lawyer disciplinary action brought before any authority other than the Association shall report that fact to Bar Counsel.</i></p> <p><i>(f) As provided in SCR 3.166(2), a lawyer prosecuting a case against any member of the Association to a plea of guilty, conviction by judge or jury or entry of judgment, should immediately notify the Director of such event.</i></p>
LA	(c) adds at the end: “ or while serving as a member of the Ethics Advisory Service Committee.”

Effective 3/1/04	
ME Effective 8/1/09	(a) Adds “Maine” before “Rules of Professional Conduct;” (c) Replaces language starting with “an approved” with: “the Maine Assistance Program for Lawyers, or an equivalent peer assistance program approved by a state’s highest court.”
MD Effective 7/1/05	(c): changes the end to “while participating in a lawyer or judge assistance or professional guidance program”
MA Rules effective 9/1/08	Replaces “who knows” with “having knowledge” throughout; (b) Replaces “the appropriate authority” with “the Commission on Judicial Conduct;” (c) Replaces language after “or judge while” with: “serving as a member of lawyer assistance program as defined in Rule 1.6(c), to the extent that such information would be confidential if it were communicated by a client.”
MI* Rules effective 10/1/88	<i>*Made only partial amendments effective 1/1/2011 since the most recent amendments to the ABA Model Rules (amended Rules 3.1, 3.3, 3.4, 3.5, 3.6, 5.5, and 8.5 and adopted new Rules 2.4, 5.7, and 6.6.</i> (a) <i>A lawyer having knowledge that another lawyer has committed a significant violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer shall inform the Attorney Grievance Commission.</i> (b) <i>A lawyer having knowledge that a judge has committed a significant violation of the Code of Judicial Conduct that raises a substantial question as to the judge’s honesty, trustworthiness or fitness for office shall inform the Judicial Tenure Commission.</i> (c) <i>This rule does not require disclosure of:</i> <i>(1) information otherwise protected by Rule 1.6; or</i> <i>(2) information gained by a lawyer while serving as an employee or volunteer of the substance abuse counseling program of the State Bar of Michigan, to the extent the information would be protected under Rule 1.6 from disclosure if it were a communication between lawyer and client.</i>
MN Effective 10/1/05	(c): replaces “otherwise protected by Rule 1.6” with, “that Rule 1.6 requires or allows a lawyer to keep confidential”; deletes “an approved” before lawyer assistance program; and adds at the end: or other program providing assistance, support or counseling to lawyers who are chemically dependent or have mental disorders.
MS Effective 11/3/05	Retains former MR Did not adopt (c)
MO Effective 7/1/07	Replaces “who knows” with “having knowledge” throughout; (c) Deletes language after “Rule 1.6.”
MT Effective 4/1/04	Same as MR
NE Effective 9/1/05	Same as MR

NV Effective 5/1/06	(c), adds to end: "...including but not limited to the Lawyers Concerned for Lawyers program established by Supreme Court Rule 106.5."
NH Effective 1/1/08	(c) Replaces language after "or information" with: "received by lawyers during the course of their work on behalf of the New Hampshire Bar Association Ethics or Lawyers Assistance Committees."
NJ Effective 1/1/04	(c): does not include last phrase. adds (d): "Paragraph (a) of this Rule shall not apply to knowledge obtained as a result of participation in a Lawyers Assistance Program established by the Supreme Court and administered by the New Jersey State Bar Association, except as follows: (i) if the effect of discovered ethics infractions on the practice of an impaired attorney is irremediable or poses a substantial and imminent threat to the interests of clients, then attorney volunteers, peer counselors, or program staff have a duty to disclose the infractions to the disciplinary authorities, and attorney volunteers have the obligation to apply immediately for the appointment of a conservator, who also has the obligation to report ethics infractions to disciplinary authorities; and (ii) attorney volunteers or peer counselors assisting the impaired attorney in conjunction with his or her practice have the same responsibility as any other lawyer to deal candidly with clients, but that responsibility does not include the duty to disclose voluntarily, without inquiry by the client, information of past violations or present violations that did not or do not pose a serious danger to clients."
NM Effective 11/2/09	Changed to Rule 16-803; (a) Renamed to Paragraph " A. Misconduct of other lawyers; " (b) Renamed to Paragraph " B. Misconduct of judges; " changes "appropriate authority" to "New Mexico Judicial Standards Commission;" (c) Renamed to Paragraph " C. Confidential information; " Replaces "Rule 1.6" with "Rule 16-106 of the Rules of Professional Conduct, or as set forth in Paragraph E;" Adds Paragraph " D. Cooperation and assistance required: A lawyer shall give full cooperation and assistance to the highest court of the state and to the disciplinary board, hearing committees and disciplinary counsel in discharging the lawyer's respective functions and duties with respect to discipline and disciplinary procedures;" Adds Paragraph " E. Alcohol and substance abuse exception. The reporting requirements set forth in Paragraphs A and B of this rule do not apply to any communication concerning alcohol or substance abuse by a judge or lawyer that is: (1) made for the purpose of reporting substance abuse or recommending, seeking or furthering the diagnosis, counseling or treatment of a judge or an attorney for alcohol or substance abuse; and (2) made to, by or among members or representatives of the Lawyer's Assistance Committee of the State Bar, Alcoholics Anonymous, Narcotics Anonymous or other support group recognized by the Judicial Standards Commission or the Disciplinary Board; recognition of any additional support group by the Judicial Standards Commission or the Disciplinary Board shall be published in the Bar Bulletin. This exception does not apply to information that is required by law to be reported, including information that must be reported under Paragraph F of this Rule, or to disclosures or threats of future criminal acts or violations of these rules;" Adds Paragraph " F. Judicial misconduct involving unlawful drugs; reporting requirement. Notwithstanding the provisions of Paragraph E, any incumbent judge who illegally sells,

	<p>purchases, possesses, or uses drugs or any substance considered unlawful under the provisions of the Controlled Substances Act, shall be subject to discipline under the Code of Judicial Conduct. Any lawyer who has specific objective and articulable facts or reasonable inferences that can be drawn from those facts, that a judge has engaged in such misconduct, shall report those facts to the New Mexico Judicial Standards Commission. Reports of such misconduct shall include the following information:</p> <p>(1) name of person filing the report;</p> <p>(2) address and telephone number where the person may be contacted;</p> <p>(3) a detailed description of the alleged misconduct;</p> <p>(4) dates of the alleged misconduct; and</p> <p>(5) any supporting evidence or material that may be available to the reporting person.</p> <p>The Judicial Standards Commission shall review and evaluate reports of such misconduct to determine if the report warrants further review or investigation.”</p>
NY Effective 4/1/09	<p>(a) Replaces “inform...authority” with “report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation;”</p> <p>(b) Replaces language with: “(b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct;”</p> <p>(c), (c)(1) and (c)(2) are similar to MR (c), but (c)(2) replaces “an approved...program” with “a bona fide lawyer assistance program.”</p>
NC Effective 3/1/03	<p>(c): do not include the 2nd half of (c) because confidentiality for the assistance program is covered in 1.6.</p> <p>adds as (d):</p> <p>(d) A lawyer who is disciplined in any state or federal court for a violation of the Rules of Professional Conduct in effect in such state or federal court shall inform the secretary of the North Carolina State Bar of such action in writing no later than 30 days after entry of the order of discipline.</p>
ND Effective 8/1/06	<p>(a), changes end to “...shall initiate proceedings under the North Dakota Rules for Lawyer Discipline”</p> <p>(b) A lawyer who knows that a judge has committed a violation of the North Dakota Code of Judicial Conduct that raises a substantial question as to the judge's honesty, trustworthiness, or fitness for judicial office in other respects shall initiate proceedings under the Rules of the North Dakota Judicial Conduct Commission.</p> <p>(c): deletes “otherwise,” changes end to “... participating as a committee member, peer counselor, or program staff in a lawyer assistance program established under Administrative Rule 49”</p>
OH Effective 2/1/07	<p>(a) A lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct that raises a question as to any lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority empowered to investigate or act upon such a violation.</p> <p>(b) A lawyer who possesses unprivileged knowledge that a judge has committed a violation of the Ohio Rules of Professional Conduct or applicable rules of judicial conduct shall inform the appropriate authority.</p> <p>(c) Any information obtained by a member of a committee or subcommittee of a bar association, or by a member, employee, or agent of a nonprofit corporation established by a bar association, designed to assist lawyers with substance abuse or mental health problems, provided the</p>

	information was obtained while the member, employee, or agent was performing duties as a member, employee, or agent of the committee, subcommittee, or nonprofit corporation, shall be privileged for all purposes under this rule.
OK Effective 1/1/08	<p>(b) Replaces “who knows” with “having knowledge;”</p> <p>(c) Deletes language after “Rule 1.6;”</p> <p>Adds:</p> <p><i>(d) The provisions of Rule 8.3(a) shall not apply to lawyers who obtain such knowledge or evidence while acting as Ethics Counsel or as a member, investigator, agent, employee, or as a designee of the Oklahoma Bar Association Lawyers Helping Lawyers Committee, Judges Helping Judges, or the Management Assistance Program in the course of assisting another lawyer or judge. Any such knowledge or evidence received by lawyers acting in such capacity shall enjoy the same confidence as information protected by the attorney-client privilege under applicable rule and Rule 1.6.</i></p>
OR Effective 12/1/06	<p>replaces MR (c) with this:</p> <p>(c) This rule does not require disclosure of information otherwise protected by Rule 1.6 or ORS 9.460(3), or to lawyers who obtain such knowledge or evidence while:</p> <p>(1) acting as a member, investigator, agent, employee or as a designee of the State Lawyers Assistance Committee; or</p> <p>(2) acting as a board member, employee, investigator, agent or lawyer for or on behalf of the Professional Liability Fund or as a Board of Governors liaison to the Professional Liability Fund; or</p> <p>(3) participating in the loss prevention programs of the Professional Liability Fund, including the Oregon Attorney Assistance Program.</p>
PA Effective 7/1/06	Same as MR
RI Effective 4/15/07	<p>(c) Deletes language after “Rule 1.6;”</p> <p>Adds:</p> <p><i>(d) This rule shall not apply to members of the Confidential Assistance Committee (“the Committee”) of the Rhode Island Bar Association (“the Association”) regarding information received in their capacity as Committee members, acting in good faith, unless it appears to the members that the attorney in question is failing to desist from the violation or is failing to cooperate with a program of assistance to which the attorney has agreed, or is engaged in the perpetration of fraud or embezzlement, or when disclosure is required to protect the public from substantial harm.</i></p> <p><i>(e) Except as provided by the preceding subsection (d), no information received, gathered or maintained by the Committee, or by an employee of the Association in connection with the work of the Committee, may be disclosed to any person or be subject to discovery or subpoena in any administrative or judicial proceeding, except upon the express written release of the subject attorney, or by order of a court of competent jurisdiction. However, the Committee may refer any attorney to a professional assistance entity, and may, in good faith, communicate information to the entity in connection with the referral. If information obtained by a member of the Committee or an employee of the Association gives rise to reasonable suspicion of a direct threat to the health or safety of the subject attorney or other person, then the obligation of confidentiality set forth in this</i></p>

	<p><i>subsection (e) shall not apply, and the Committee member or Association employee may make such communications as are necessary for the purpose of avoiding or preventing the threat.</i></p> <p><i>(f) Members of the Committee shall be immune from civil liability for actions taken in good faith in the course of performing their duties.</i></p>
SC Effective 10/1/05	<p>(b): adds “honesty, trustworthiness or” prior to “fitness for office”</p> <p>(c): deletes the remaining sentence after “protection by Rule 1.6”</p> <p>adds as (d): Inquiries or information received by the South Carolina Bar Lawyers Helping Lawyers Committee or an equivalent county bar association committee regarding the need for treatment for alcohol, drug abuse or depression, or by the South Carolina Bar law office management assistance program or an equivalent county bar association program regarding a lawyer seeking the program assistance, shall not be disclosed to the disciplinary authority without written permission of the lawyer receiving assistance. Any such inquiry or information shall enjoy the same confidence as information protected by the attorney-client privilege under applicable law.</p>
SD Effective 1/1/04	<p>(a) and (b): use “having knowledge” rather than “knows”</p> <p>add as (d): The names, identities, and treatment of persons seeking assistance of the South Dakota Lawyers Concerned for Lawyers, Inc., or an approved lawyers assistance program, relating to alcohol abuse or chemical dependency shall be kept confidential by members of South Dakota Lawyers Concerned for Lawyers, Inc., who are so contacted.</p>
TN Effective 1/1/2011	<p>(a) Replaces “appropriate professional authority” with “Disciplinary Counsel of the Board of Professional Responsibility;”</p> <p>(b) Replaces “appropriate authority” with “Disciplinary Counsel of the Court of the Judiciary;”</p> <p>(c) Replaces language after “or judge while” with: “serving as a member of a lawyer assistance program approved by the Supreme Court of Tennessee or by the Board of Professional Responsibility.”</p>
TX* Effective 3/1/05	<p><i>*Has not amended Rule since the most recent amendments to the ABA Model Rules</i></p> <p>(a) and (b) Adds to beginning, “Except as permitted in paragraphs (c) or (d);” changes “who knows” with “having knowledge;”</p> <p><i>(c) A lawyer having knowledge or suspecting that another lawyer or judge whose conduct the lawyer is required to report pursuant to paragraphs (a) or (b) of this Rule is impaired by chemical dependency on alcohol or drugs or by mental illness may report that person to an approved peer assistance program rather than to an appropriate disciplinary authority. If a lawyer elects that option, the lawyers report to the approved peer assistance program shall disclose any disciplinary violations that the reporting lawyer would otherwise have to disclose to the authorities referred to in paragraphs (a) and (b).</i></p> <p>(d) Adds “or information” after “knowledge;” replaces language after “protected” with “as confidential information:</p> <p style="padding-left: 40px;"><i>(1) by Rule 1.05 or</i></p> <p style="padding-left: 40px;"><i>(2) by any statutory or regulatory provisions applicable to the counseling activities of the approved peer assistance program.”</i></p>
UT Effective 11/1/05	Same as MR
VT	(c) Adds “Bar Counsel in responding to an inquiry or by” after “gained by” Moves “otherwise

Amendm ent Effective 5/9/16	protected by Rule 1.6” to end of paragraph; Changes “an approved lawyer assistance program” to: “lawyer assistance program approved by the Vermont Bar Association or as a member of the Professional Responsibility Committee of the Vermont Bar Association.”
VA Effective 2/1/16	<p>Title: deletes “Professional”</p> <p>(a): replaces “who knows” with “having reliable information” and “as a lawyer in other respects” with “to practice law”</p> <p>(b): replaces “who knows” with “having reliable information”</p> <p>Adds (c) If a lawyer serving as a third party neutral receives reliable information during the dispute resolution process that another lawyer has engaged in misconduct which the lawyer would otherwise be required to report but for its confidential nature, the lawyer shall attempt to obtain the parties’ written agreement to waive confidentiality and permit disclosure of such information to the appropriate professional authority.</p> <p>(d): same as MR (c) but replaces “while participating in” with “who is a member of” and adds “or who is a trained intervenor or volunteer for such a program or committee, or who is otherwise cooperating in a particular assistance effort, when such information is obtained for the purposes of fulfilling the recognized objectives of the program”</p> <p>adds (e) A lawyer shall inform the Virginia State Bar if:</p> <p>(1) the lawyer has been disciplined by a state or federal disciplinary authority, agency or court in any state, U.S. territory, or the District of Columbia, for a violation of rules of professional conduct in that jurisdiction;</p> <p>(2) the lawyer has been convicted of a felony in a state, U.S. territory, District of Columbia, or federal court;</p> <p>(3) the lawyer has been convicted of either a crime involving theft, fraud, extortion, bribery or perjury, or an attempt, solicitation or conspiracy to commit any of the foregoing offenses, in a state, U.S. territory, District of Columbia, or federal court.</p> <p>Adds (e): A lawyer shall inform the Virginia State Bar if: (1) the lawyer has been disciplined by a state or federal disciplinary authority, agency or court in any state, U.S. territory, or the District of Columbia, for a violation of rules of professional conduct in that jurisdiction; (2) the lawyer has been convicted of a felony in a state, U.S. territory, District of Columbia, or federal court; (3) the lawyer has been convicted of either a crime involving theft, fraud, extortion, bribery or perjury, or an attempt, solicitation or conspiracy to commit any of the foregoing offenses, in a state, U.S. territory, District of Columbia, or federal court. The reporting required by paragraph (e) of this Rule shall be made in writing to the Clerk of the Disciplinary System of the Virginia State Bar not later than 60 days following entry of any final order or judgment of conviction or discipline.</p>
WA Amendm ent Effective April 14, 2015	<p>(a) and (b): replaces “shall” with “should”</p> <p>(a) adds “or LLLT” after “lawyer”; adds “applicable” before “Rules of Professional Conduct”; adds “or LLLT’s” before “honesty, trustworthiness, or fitness as a lawyer” and adds “or LLLT’s” after this phrase.</p> <p>(c) This Rule does not permit a lawyer to report the professional misconduct of another lawyer or a judge to the appropriate authority if doing so would require the lawyer to disclose information otherwise protected by Rule 1.6. Adds “judge, or LLLT” after “misconduct of another lawyer”</p>
WV *Amend	Adds (d): This Rule shall not apply to members of the West Virginia Lawyer Assistance Program or any predecessor or successor organizations to the extent that these persons are acting in their official capacities as members, intervenors, representatives or volunteers in the West

ment effective 1/1/2015	Virginia Lawyer Assistance Program. The Rules of the Lawyer Assistance Program shall determine the procedure for reporting an impaired lawyer who resists all efforts of assistance by the WVLAP to the Office of Disciplinary Conduct.
WI Effective 7/1/07	(c) If the information revealing misconduct under subs. (a) or (b) is confidential under SCR 20:1.6, the lawyer shall consult with the client about the matter and abide by the client's wishes to the extent required by SCR 20:1.6. Adds (d) This rule does not require disclosure of any of the following: (1) Information gained by a lawyer while participating in a confidential lawyers' assistance program. (2) Information acquired by any person selected to mediate or arbitrate disputes between lawyers arising out of a professional or economic dispute involving law firm dissolutions, termination or departure of one or more lawyers from a law firm where such information is acquired in the course of mediating or arbitrating the dispute between lawyers.
WY Effective 7/1/06	Same as MR

Copyright © 2016 American Bar Association. All rights reserved. Nothing contained in this chart is to be considered the rendering of legal advice. The chart is intended for educational and informational purposes only. Information regarding variations from the ABA Model Rules should not be construed as representing policy of the American Bar Association. The chart is current as of the date shown. A jurisdiction may have amended its rules or proposals since the time its chart was created. If you are aware of any inaccuracies in the chart, please send your corrections or additions and the source of that information to John Holtaway, (312) 988-5298, john.holtaway@americanbar.org.

AGENDA MATERIALS FOR

III.F. Rule 1-120 [8.4] (Assisting, Soliciting, or Inducing Violations)

- Drafting Team's Report & Recommendation on Rule 1-120 [8.4]
DFT1.2 (01-05-16)
- Assignment Document
- 1st Commission's Proposed Rule 8.4

III.F. Rule 2-400 [8.4.1] (Prohibited Discriminatory Conduct in a Law Practice)

- Drafting Team's Report & Recommendation on Rule 2-400 [8.4.1]
DFT4.3 (01-05-16)
- Assignment Document
- Proposed Amended ABA Model Rule 8.4 (12-22-15) Compared to
Current ABA Model Rule 8.4
- ABA Committee on Ethics & Professional Responsibility
Proposal to Amend Model Rule 8.4 Memorandum(12-22-15)
- 1st Commission's Proposed Rule 8.4
- 1st Commission's Proposed Rule 8.4.1

<p><u>Note</u>: This item was carried over for further consideration from the November 13-14, 2015 meeting.</p>

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

I. CURRENT CALIFORNIA RULE 1-120

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. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

III. PROPOSED RULE 8.4 (CLEAN)

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate these Rules or the State Bar Act, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that involves moral turpitude or 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 a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

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] Although a lawyer is personally answerable to the entire criminal law, a lawyer is

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

professionally answerable under paragraph (b) only for offenses that indicate lack of those characteristics relevant to the lawyer's ability or fitness to practice law. Examples of such offenses include those involving violence, dishonesty, or breach of trust. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligations.

[4] 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]. A lawyer may be disciplined under Business and Professions Code § 6106 for acts of moral turpitude that constitute gross negligence.

[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. But see Rule 1.2(d) [3-210]. "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.

[6] Paragraph (d) does not prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

[7] Paragraph (d) does not apply to a lawyer who refuses to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. Testing the validity of any law, rule, or ruling of a tribunal is governed by Rule 1.2(d) [3-210], which also applies to challenges of legal regulation of the practice of law.

[8] Paragraph (d) may apply to a lawyer's abuse of public office that demonstrates an inability to fulfill the professional role of lawyers. The same is true of a lawyer's abuse of a position of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

IV. PROPOSED RULE 8.4 (REDLINE TO CURRENT CALIFORNIA RULE 1-120)

Rule ~~8.41-120~~ Misconduct~~Assisting, Soliciting, or Inducing Violations~~

It is professional misconduct for a lawyer to:

- (a) violate ~~A member shall not knowingly assist in, solicit, or induce any violation of~~ these Rules or the State Bar Act, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that involves moral turpitude or 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 a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

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] Although a lawyer is personally answerable to the entire criminal law, a lawyer is professionally answerable under paragraph (b) only for offenses that indicate lack of those characteristics relevant to the lawyer's ability or fitness to practice law. Examples of such offenses include those involving violence, dishonesty, or breach of trust. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligations.

[4] 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]. A lawyer may be disciplined under Business and Professions Code § 6106 for acts of moral turpitude that constitute gross negligence.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises,

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

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. But see Rule 1.2(d) [3-210]. "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.

[6] Paragraph (d) does not prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

[7] Paragraph (d) does not apply to a lawyer who refuses to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. Testing the validity of any law, rule, or ruling of a tribunal is governed by Rule 1.2(d) [3-210], which also applies to challenges of legal regulation of the practice of law.

[8] Paragraph (d) may apply to a lawyer's abuse of public office that demonstrates an inability to fulfill the professional role of lawyers. The same is true of a lawyer's abuse of a position of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

V. PROPOSED RULE (REDLINE TO MODEL RULE 8.4)

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate ~~or attempt to violate the Rules of Professional Conduct~~ these Rules or the State Bar Act, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that involves moral turpitude or that reflects adversely on the ~~lawyer's~~ 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 ~~the these~~ Rules of Professional Conduct, the State Bar Act, or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

judicial conduct or other law.

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][1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however,~~ does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

~~[3][2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be is professionally answerable under paragraph (b) only for offenses that indicate lack of those characteristics relevant to law practice the lawyer's ability and fitness to practice law. Examples of such Offenses offenses include those involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.~~

~~[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.~~

[4] 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]. A lawyer may be disciplined under Business and Professions Code § 6106 for acts of moral turpitude that constitute gross negligence.

[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. But see Rule 1.2(d) [3-210]. "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

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

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.

[6] Paragraph (d) does not prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

[47] Paragraph (d) does not apply to a lawyer ~~may refuse who refuses~~ to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. ~~The provisions of Testing the validity of any law, rule, or ruling of a tribunal is governed by~~ Rule 1.2(d) ~~concerning a good faith challenge to the validity, scope, meaning or application of the law apply~~[3-210], which also applies to challenges of legal regulation of the practice of law.

~~[58] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's~~ Paragraph (d) may apply to a lawyer's abuse of public office ~~can suggest that demonstrates~~ an inability to fulfill the professional role of lawyers. The same is true of a lawyer's abuse of ~~positions a position~~ of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

VI. PUBLIC COMMENTS SUMMARY

None.

VII. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, 4/20/2015:**

OCTC does not recommend any revisions to Rule 1-120.¹

- **RUSSELL WEINER, OCTC, 6/15/2010:**

1. OCTC supports this rule. However, OCTC believes that the Model Rules version of subparagraph (a) is clearer and better. The Model Rules also prohibit an attorney from violating or attempting to violate the Rules of Professional Conduct. There is no sound reason to exclude this language.
2. OCTC believes that subparagraph (f) should include solicit or induce a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. This would be the same as in subparagraph (a) for violations of these rules or the State Bar Act. While this is not in the Model Rules, there is no reason for the differences

¹ However, as the Commission's work progresses, OCTC will offer comment on related issues such as whether it would be appropriate to promulgate a new rule addressing attempts to violate rules and a requirement that members report the misconduct of others.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

between (a) and (f).

3. Some of the Comments are more appropriate for treatises, law review articles, and ethics opinions. OCTC supports Comments 2A, 2B and 6.
4. OCTC has concerns about Comment 3. It seems overly broad and the last sentence is confusing. It appears to venture into an area of evidence and may incorrectly state the law. If the finding is made by clear and convincing evidence or beyond a reasonable doubt, collateral estoppel would appear to apply. If the finding is not by those standards, then the decision is given great weight but is rebuttable. (See *Rosenthal v. State Bar* (1987) 43 Cal.3d 612, 634; *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112.) OCTC recommends that this Comment be stricken or clarified.
5. OCTC is very concerned about the last sentence of Comment 6, which states “This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act.” This is beyond the scope of the Rules and Comments. This Comment invades the prosecutory discretion of OCTC and the independence of the Chief Trial Counsel. There are often very valid reasons for duplicative charging, if for no other reason than the elements of the various charges may be different and the State Bar Court is very reluctant to find a lesser included offense. In fact, the Supreme Court rejected the notion that it objected to duplicative charging. (See *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1307 fn. 2 [“We do not wish to intimate that we object to the bringing of potentially overlapping charges; obviously, the Commission may make any charges justified by the evidence.”]) Further, in disciplinary cases, the State Bar Court sometimes dismisses duplicative charges, but other times it does not, although it gives them no additional weight. (See *In the Matter of Wolf* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 10-11; *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 919, fn. 11; *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 175.) OCTC asks that this sentence be stricken.

- **MIKE NISPEROS, OCTC, 9/27/2001:**

OCTC recommends expanding rule 1-120 to include additional conduct: Remove:

~~A member shall not knowingly assist in solicit or induce any violation of these rules or the State Bar Act~~

and replace with:

A member shall not:

(a) violate or attempt to violate the Rules of Professional Conduct or the State Bar Act or other rules regulating the practice of law, knowingly assist or induce another to violate or attempt to violate the Rules of Professional Conduct or the State Bar Act or other rules regulating the practice of law, or do so

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

through the acts of another;

(b) commit a criminal act;

(c) engage in conduct involving moral turpitude, dishonesty, corruption, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply that the member has an ability to influence a governmental agency or official or to achieve a result on behalf of a client by means that violate the Rules of Professional Conduct, the State Bar Act, or other law;

(f) knowingly assist, solicit, or induce a judge or judicial officer in conduct that is a violation of the applicable rules of judicial conduct or other law;

(g) engage in conduct that is unbecoming a member of the bar.

OCTC COMMENTS:

OCTC is suggesting that this rule be broadened and made more like ABA Model Rule 8.4.

Section (a) is similar to current rule 1-120, but makes clear that an attorney shall not himself or herself violate the Rules of Professional Conduct or the State Bar Act, induce another to do so, or use another to either violate the rules or induce another to violate the rules.

This proposal, thus, does not change the purpose of the rule; it only provides greater detail and specificity. It will also prohibit suspended, resigned, inactive, or disbarred attorneys from attempting to use other entities such as law corporations to get around their suspensions or disbarments. As written, the current law corporation rules could be used by unscrupulous attorneys to avoid the consequences of their suspension by keeping their practice running with another attorney until the suspended attorney can return to practicing law. The new proposal would make such assistance more problematic.

Section (b) would codify two principles established by the Supreme Court case law, but which is not always evident from the language of Business and Professions Code Sections 6068(a), 6101, and 6102. Under existing case law, an attorney can be disciplined when the attorney is convicted of a felony or misdemeanor which involves moral turpitude or other misconduct warranting discipline. (See e.g. *In re Larkin* (1989) 48 Cal.3d 236, 245.) However, the statute only speaks of moral turpitude. This change would clarify the rules so it is clear that any conviction may be the basis for disciplinary action. (See e.g. Business and Professions Code Sections 6101(a).) This section would also make clear that even if an attorney is not convicted of a crime the State Bar can prosecute him for committing the act. (See *Emslie v. State Bar* (1974) 11 Cal.3d 210, 224.) Again, this section is not changing

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

existing law, but only codifying it.

Section (c) already exists. See Business & Professions Code section 6106. It is only provided here so that major bases for discipline are set forth in one place.

Section (d) also codifies existing law. The ABA also uses the section to prevent bias, which is prejudicial to the administration of justice.

Section (e) prohibits using or asserting undue influence in proceedings or in connection with public officials and prohibits using means that violate the Rules of Professional Conduct or the State Bar Act.

Section (f) should be added to this rule. Current rule 1-700 of the Rules of Professional Conduct prohibits a member, who is a candidate for judicial office, from violating the Code of Judicial Conduct. In addition, current rule 1-710 of the Rules of Professional Conduct prohibits an attorney acting as temporary judge, referee, or court-appointed arbitrator from violating Canon 6D of the Code of Judicial Conduct. However, no rule prohibits an attorney from assisting someone in violating the judicial canons. Yet, current rule 1-120 prohibits a member from assisting in a violation of the Rules of Professional Conduct or the State Bar Act. Hence, proposed section (f) fills in the gap between rule 1-120 and 1-700 and prohibits an attorney from assisting, soliciting, or inducing a judge to violate the canons.

Section (g) provides a basis for disciplining a member who engages in conduct that is unbecoming a member of the bar. In *Quinn-Tamm v. ABA*, 649 F.2d 1110 (9th Cir. 1996) 84 Fed.3d 1110 the Ninth Circuit declared the provision prohibiting offensive personality by members of the bar as codified in Business & Professions Code Section 6068(f) unconstitutionally vague. The *Y* decision has meant that certain conduct that many lawyers and the bar believe is improper could not be prosecuted. The language “conduct unbecoming a member of the bar” has been approved by the Ninth Circuit and it has been found to meet constitutional requirements. (See *United States v. Hearst* (9th Cir. 1981) 638 Fed.2d 1190, 1197.)

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

VIII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **West Virginia Rule 8.4** is identical to Model Rule 8.4:

West Virginia Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

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 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 the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

- **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
 - Thirteen states have adopted Model Rule 8.4 verbatim.² Thirty-one jurisdictions have adopted a slightly modified version of Model Rule 8.4.³ Seven states have adopted a version of the rule that is substantially different to 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.

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 seven jurisdictions are: California, Florida, Georgia, Illinois, Maine, New York, Texas, Washington.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

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, 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

The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 8.4: Misconduct, Comment [3],” revised June 15, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4_cmt_3.authcheckdam.pdf

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

A. Concepts Accepted (Pros and Cons):

General Concepts. The drafting team recommends that the Commission agree to the following general concepts reflected in proposed Rule 8.4, which 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 & 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

⁵ The twelve jurisdictions are: Delaware, Idaho, Illinois, Nebraska, New Hampshire, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wisconsin.

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.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

- 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 RRC1, the drafting team believes¹² that the Commission should

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.

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.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

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 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" and without the term "solicit," which is in current rule 1-120.
 - Pros: Paragraph (a) largely carries forward current rule 1-120, except that the term "solicit" has been deleted because that concept is covered by the Model Rule term "induce," which is already present in rule 1-120. Concerning the concept of "attempt," see paragraph 3, above.
 - Cons: Proposed paragraph (a) does not go far enough in modifying MR 8.4(a). RRC1 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 RRC1 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, however, the proposed rule circulated by the Board of

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

Governors included the concept that it was professional misconduct to violate the Rules or the State Bar Act.¹³

5. Recommend adoption of paragraph (b) of Model Rule 8.4 but add a reference to “moral turpitude” to the paragraph.
 - Pros: As explained more fully in proposed Comment [3] (based on MR 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 & 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 drafting team 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.
 - Cons: “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.
6. 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.

¹³ Attached for reference is proposed Rule 8.4 and its accompanying comments from the version of the rules resulting from the work of RRC1 that was approved by the Board of Governors in July and September 2010. (See page 29 of this agenda item.)

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

State Bar Act, or doing so through the acts of another, does 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 MR 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.

12. Recommend adoption of Comment [3], derived from the last three sentences of Model Rule 8.4, cmt. [2], which have been revised for clarity.

- Pros: This comment provides interpretative guidance in the sense of providing the underlying rationale for the focus of paragraph (b) on crimes involving dishonesty or other characteristics indicative of a lawyer's ability or fitness to practice law. (See discussion at paragraph 5, above.)
- Cons: Question whether the last sentence, which RRC1 deleted, should be included. The proposition stated is unclear in the absence of a definition of what is considered an offense of "minor significance." This ambiguity could give rise to interpretations that grant less public protection than the existing protection afforded by California's standards of moral turpitude, discipline under Business and Professions Code § 6068(a), and conviction referrals under Business and Professions Code § 6101. For example, a lawyer's conviction for a single misdemeanor charge could be construed as a conviction for an offense of "minor significance" offense under the Model Rule language. Under existing California standards, however, a pattern of such offenses might not be necessary for discipline, which would be contradicted by an interpretation of the comment language as requiring such a pattern before discipline is appropriate.

13. Recommend adoption of Comment [4], which is derived from RRC1's proposed Comment [2A].

- Pros: Comment [4] 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.

14. Recommend adoption of Comment [5], which is derived from RRC1's proposed Comment [2C].

- Pros: RRC1 drafted this comment in response to a public comment from the Department of Justice. Given RRC1's decision not to recommend a version of Model Rule 4.1 [Truthfulness in Statements To Others], the language addressing covert activity that RRC1 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.
- Cons: None identified as to substance. However, should this Commission

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

decide to recommend a version of Model Rule 4.1, then this comment might more appropriately be placed in that rule.

15. 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* (Rev. Dept 1997) 3 State Bar Court 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.

16. Recommend adoption of Comment [7], which is derived from Model Rule 8.4, cmt. [4], revised to make it more concise.

- Pros: This comment provides important guidance on the scope of paragraph (d)'s prohibition of conduct prejudicial to the administration of justice by clarifying that it does not apply to a lawyer's refusal to comply with an obligation imposed by law or court order when there is a good faith belief no valid obligation exists.
- Cons: In addition to the cross-reference to Rule 1.2(d) [3-120], a cross-reference should also be added to Rule 3.1 [3-100], which similarly does not impose an obligation when there exists "a good faith argument for an extension, modification or reversal of such existing law."

17. Recommend adoption of Comment [8], which is derived from Model Rule 8.4, cmt. [5], revised to shorten it and remove the Model Rule's vague language.

- Pros: This comment clarifies that conduct as a nonlawyer government official can be subject to discipline under this Rule. The substituted clause – "can involve conduct prohibited by this Rule" – does not suffer the same vagueness of the Model Rule clause ("can suggest an inability to fulfill the professional role of lawyers.")
- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Include in the Rule the concept of "attempt" to violate a rule.

- Pros: See Section A.3, above.
- Cons: See Section A.3, above.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

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

1. The drafting team 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 A.1, above).

D. Non-Substantive Changes to the Current Rule:

1. 1. The drafting team believes that all of the proposed revisions of current rule 1-120 are non-substantive changes.

E. Alternatives Considered:

1. No alternatives to the proposed rule were considered.

X. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

- (1) The drafting team has neither had an opportunity to study nor made a substantive recommendation in this Report regarding Model Rule 8.3 (Reporting Professional Misconduct). The drafting team is unanimous that Model Rule 8.3 should be the subject of separate consideration and discussion by the Commission.

ABA Model Rule 8.3 reads as follows:

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Seven jurisdictions have adopted Model Rule 8.3 verbatim. Twenty-nine jurisdictions have adopted a slightly modified version of Model Rule 8.3. Fifteen jurisdictions have

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

adopted a version of the rule that is substantially different from Model Rule 8.3.”

The ABA State Adoption Chart for Model Rule 8.3 is posted at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_3.authcheckdam.pdf

XI. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Cardona

- [Date]: Email Comment
- [Date]: Email Comment

Langford

- [Date]: Email Comment
- [Date]: Email Comment

Zipser

- [Date]: Email Comment
- [Date]: Email Comment

XII. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 1-120 [8.4] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 1-120 [8.4] in the form attached to this Report and Recommendation.

XIII. DISSENTING POSITION(S)

None.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

XIV. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)

CURRENT CALIFORNIA RULE 1-120
“Assisting, Soliciting, or Inducing Violations”

I. Text of Current 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.

(There is no Discussion section to this rule.)

II. Background/Purpose:

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.)

III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):

A. In a 2001 Letter to the First Commission, OCTC Provided the Following Comment on Rule 1-120:

OCTC recommends expanding rule 1-120 to include additional conduct:
Remove:

~~A member shall not knowingly assist in solicit or induce any violation of these rules or the State Bar Act~~

and replace with:

A member shall not:

(a) violate or attempt to violate the Rules of Professional Conduct or the State Bar Act or other rules regulating the practice of law, knowingly assist or induce another to violate or attempt to violate the Rules of Professional Conduct or the State Bar Act or other rules regulating the practice of law, or do so through the acts of another;

(b) commit a criminal act;

(c) engage in conduct involving moral turpitude, dishonesty, corruption, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply that the member has an ability to influence a governmental agency or official or to achieve a result on behalf of a client by means that violate the Rules of Professional Conduct, the State Bar Act, or other law;

(f) knowingly assist, solicit, or induce a judge or judicial officer in conduct that is a violation of the applicable rules of judicial conduct or other law;

(g) engage in conduct that is unbecoming a member of the bar.

OCTC COMMENTS:

OCTC is suggesting that this rule be broadened and made more like ABA Model Rule 8.4.

Section (a) is similar to current rule 1-120, but makes clear that an attorney shall not himself or herself violate the Rules of Professional Conduct or the State Bar

Act, induce another to do so, or use another to either violate the rules or induce another to violate the rules.

This proposal, thus, does not change the purpose of the rule; it only provides greater detail and specificity. It will also prohibit suspended, resigned, inactive, or disbarred attorneys from attempting to use other entities such as law corporations to get around their suspensions or disbarments. As written, the current law corporation rules could be used by unscrupulous attorneys to avoid the consequences of their suspension by keeping their practice running with another attorney until the suspended attorney can return to practicing law. The new proposal would make such assistance more problematic.

Section (b) would codify two principles established by the Supreme Court case law, but which is not always evident from the language of Business and Professions Code Sections 6068(a), 6101, and 6102. Under existing case law, an attorney can be disciplined when the attorney is convicted of a felony or misdemeanor which involves moral turpitude or other misconduct warranting discipline. (See e.g. *In re Larkin* (1989) 48 Cal.3d 236, 245.) However, the statute only speaks of moral turpitude. This change would clarify the rules so it is clear that any conviction may be the basis for disciplinary action. (See e.g. Business and Professions Code Sections 6101(a).) This section would also make clear that even if an attorney is not convicted of a crime the State Bar can prosecute him for committing the act. (See *Emslie v. State Bar* (1974) 11 Cal.3d 210, 224.) Again, this section is not changing existing law, but only codifying it.

Section (c) already exists. See Business & Professions Code section 6106. It is only provided here so that major bases for discipline are set forth in one place.

Section (d) also codifies existing law. The ABA also uses the section to prevent bias, which is prejudicial to the administration of justice.

Section (e) prohibits using or asserting undue influence in proceedings or in connection with public officials and prohibits using means that violate the Rules of Professional Conduct or the State Bar Act.

Section (f) should be added to this rule. Current rule 1-700 of the Rules of Professional Conduct prohibits a member, who is a candidate for judicial office, from violating the Code of Judicial Conduct. In addition, current rule 1-710 of the Rules of Professional Conduct prohibits an attorney acting as temporary judge, referee, or court-appointed arbitrator from violating Canon 6D of the Code of Judicial Conduct. However, no rule prohibits an attorney from assisting someone in violating the judicial canons. Yet, current rule 1-120 prohibits a member from assisting in a violation of the Rules of Professional Conduct or the State Bar Act. Hence, proposed section (f) fills in the gap between rule 1-120 and 1-700 and prohibits an attorney from assisting, soliciting, or inducing a judge to violate the canons.

Section (g) provides a basis for disciplining a member who engages in conduct that is unbecoming a member of the bar. In *In the Matter of Wensch* (9th Cir. 1996) 84 Fed.3d 1110 the Ninth Circuit declared the provision prohibiting offensive personality by members of the bar as codified in Business & Professions Code Section 6068(f) unconstitutionally vague. The Wensch decision has meant that certain conduct that many lawyers and the bar believe is improper could not be prosecuted. The language “conduct unbecoming a member of the bar” has been approved by the Ninth Circuit and it has been found to meet constitutional requirements. (See *United States v. Hearst* (9th Cir. 1981) 638 Fed.2d 1190, 1197.)

B. New Comments from OCTC:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

IV. *Potential Deficiencies in the Current Rule:*

A. See Section III above for OCTC’s recommendation to expand the scope of rule 1-120 to include new standards that are derived from ABA Model Rule 8.4.

B. Professional Competence staff observes that rule 1-120 does not impose a duty on a lawyer to report any unprivileged knowledge of another attorney’s misconduct that raises a substantial question as to that attorney’s honesty, trustworthiness or fitness as a lawyer. (See San Diego County Bar Association Ethics Opinion No. 1992-2 in which the San Diego Bar Association’s Ethics Committee opines that: “there is no ethical duty imposed by the California Rules of Professional Conduct upon California attorneys to report the misconduct of other attorneys. This is true regardless of the nature or magnitude of such misconduct.”). Attached is an excerpt from the first Commission’s report on “Rules and Concepts that were Considered but are Not Recommended for Adoption.” This report summarizes the State Bar’s consideration of ABA Model Rule 8.3 (“Reporting Professional Misconduct”) in connection with the work of the first Commission. Regardless of the prior consideration, the drafting team may want to take a fresh look at whether Rule 1-120 should be expanded to impose a permissive or mandatory duty to report another lawyer’s misconduct. This possible change could be viewed as an enhancement that promotes greater confidence in the legal profession and administration of justice in furtherance of the self-regulation responsibilities of a mandatory State Bar.

V. *California Context:*

A. 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 section 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 section 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)).

VI. *Approach In Other Jurisdictions (National Backdrop):*

A. See Section III above for OCTC's recommendation to expand the scope of rule 1-120 to include new standards that are derived from ABA 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

The ABA provides a separate chart for Model Rule 8.4, Comment [3]:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4_cmt_3.authcheckdam.pdf

B. See Section IV.B above for Professional Competence staff's discussion of a lawyer's duty to report the misconduct of another attorney. The ABA State Adoption Chart for Model Rule 8.3 is posted at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_3.authcheckdam.pdf

VII. *Public Comment Received by the First Commission:*

A. The clean text of a proposed new rule 8.4 (including paragraph (a) which is the direct counterpart to rule 1-120) drafted by the first Commission and adopted by the Board to replace the provisions of rule 1-120 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although this proposed rule is much broader than rule 1-120, the drafting team may consider to what extent, if any, the public comments received might offer helpful information in analyzing the current rule and/or the OCTC recommendations.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 1-120 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple references in this assignment document to a particular issue do not necessarily warrant the drafting team taking action on an issue and recommending a rule change.)

(1) Whether the concept of prohibited "attempts" to violate the rules should be considered in connection with rule 1-120.

(2) Whether a duty to report known violations of the rules should be considered in connection with rule 1-120.

IX. Research Resources:

Cases that Might be Helpful in Considering Rule 1-120:

- [*McIntosh v. Mills*](#) (2004) 121 Cal.App.4th 333, 350 [17 Cal.Rptr.3d 66]
- [*Kitsis v. State Bar*](#) (1979) 23 Cal.3d 857, 866 [153 Cal.Rptr. 836]
- [*In re Arnoff*](#) (1978) 22 Cal.3d 740, 744-745 [150 Cal.Rptr. 479]

Cases that Might be Helpful in Considering the Issue of an Attempted Violation of a Rule.

- [Walker v. State Bar](#) (1989) 49 Cal.3d 1107 [264 Cal.Rptr. 825]
- *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752
- *In the Matter of Scapa* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr.
- *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838
- *In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47
- [Davis v. State Bar](#) (1983) 33 Cal.3d 231 [188 Cal.Rptr. 441]

Ethics Opinions that Might be Helpful in Considering the Issue of a Duty to Report Another Lawyer's Misconduct:

- [San Diego County Bar Association Ethics Opinion No. 1992-2](#)
- Los Angeles County Bar Association Formal Opinion No. 440 (not available on the LACBA website, contact staff for a copy)
- [Bar Association of San Francisco Ethics Opinion No. 1977-1](#)

Cases Referenced in the First Commission's Proposed Rule 8.4:

- [In re Kelley](#) (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]
- [In re Rohan](#) (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] (wilful failure to file a federal income tax return)
- [In re Morales](#) (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] (twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer)
- [Gassman v. State Bar](#) (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]
- [Jackson v. State Bar](#) (1979) 23 Cal.3d 509 [153 Cal.Rptr. 24]
- *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363 (habitual disregard of clients' interests)
- [Grove v. State Bar](#) (1967) 66 Cal.2d 680 [58 Cal.Rptr. 564]
- [Martin v. State Bar](#) (1978) 20 Cal.3d 717 [144 Cal.Rptr. 214]
- [Selznick v. State Bar](#) (1976) 16 Cal.3d 704 [129 Cal.Rptr. 108]
- *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179 (pattern of misconduct)
- [In re Calaway](#) (1977) 20 Cal.3d 165 [141 Cal.Rptr. 805] (act of baseness, vileness or depravity in the private and social duties which a man or woman owes to fellow human beings or to society in general, contrary to the accepted and customary rule of right and duty between human beings)
- [In re Craig](#) (1938) 12 Cal.2d 93 [82 P.2d 442]
- [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)

- *In the 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)

Selected State Bar Act Sections:

1. [Business and Professions Code § 6068\(a\)](#)
2. [Business and Professions Code § 6103](#)
3. [Business and Professions Code § 6106](#)

Proposed Rules of Professional Conduct (v.24, 7-21-14) (resulting from First Commission)

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act;
- (b) commit a criminal act that involves moral turpitude or that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
- (c) engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation;
- (d) engage in conduct in connection with the practice of law, including when acting in propria persona, 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 or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

Paragraph (a)

[1] A lawyer is subject to discipline for knowingly assisting or inducing another to violate these Rules or the State Bar Act, or to do so through the acts of another, as when a lawyer requests or instructs an agent to do so on the lawyer's behalf.

Paragraph (b)

[2] A lawyer may be disciplined under paragraph (b) for a criminal act that reflects adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some offenses carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses

involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.

[2A] A lawyer may be disciplined for criminal acts as set forth in Article 6 of the State Bar Act, (Business and Professions Code sections 6101 et seq.), or if the criminal act constitutes “other misconduct warranting discipline” as defined by California Supreme Court case law. See e.g., *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]; *In re Rohan* (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] [wilful failure to file a federal income tax return]; *In re Morales* (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] [twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer].

[2B] In addition to being subject to discipline under paragraph (b), a lawyer may be disciplined under Business and Professions Code section 6106 for acts of moral turpitude that constitute gross negligence. (*Gassman v. State Bar* (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]; *Jackson v. State Bar* (1979) 23 Cal.3d 509 [153 Cal.Rptr. 24]; *In the Matter of Myrdall* (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363 [habitual disregard of clients’ interests]; *Grove v. State Bar* (1967) 66 Cal.2d 680 [58 Cal.Rptr. 564]. See also *Martin v. State Bar* (1978) 20 Cal.3d 717 [144 Cal.Rptr. 214]; *Selznick v. State Bar* (1976) 16 Cal.3d 704 [129 Cal.Rptr. 108]; *In the Matter of Varakin* (Rev. Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179 [pattern of misconduct]; *In re Calloway* (1977) 20 Cal.3d 165 [141 Cal.Rptr. 805] [act of baseness, vileness or depravity in the private and social duties which a man or woman owes to fellow human beings or to society in general, contrary to the accepted and customary rule of right and duty between human beings]; *In re Craig* (1938) 12 Cal.2d 93 [82 P.2d 442].)

Paragraph (c)

[2C] 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. But see Rule 1.2(d). “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.

Paragraph (d)

[2D] Paragraph (d) is not intended to prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution. 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); *In the Matter of Anderson* (Rev. 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).

[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 or sexual orientation, 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 paragraph (d).

[4] Testing the validity of any law, rule, or ruling of a tribunal is governed by Rule 1.2(d). Rule 1.2(d) is also intended to apply to challenges regarding the regulation of the practice of law.

[5] A lawyer's abuse of public office held by the lawyer or abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization, can involve conduct prohibited by this Rule.

[6] Alternative bases for professional discipline may be found in Article 6 of the State Bar Act, (Business and Professions Code sections 6100 et seq.), and published California decisions interpreting the relevant sections of the State Bar Act. This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act.

Table of Contents

January 12, 2016 McCurdy Email to Commission, Advisors, Liaisons & Staff:	1
January 12, 2016 OCTC Memo to RRC2:	1
January 12, 2016 Cardona Email to McCurdy, cc Difuntorum & Mohr:	1
January 13, 2016 McCurdy Email to Commission, Advisors, Liaisons & Staff:.....	1
January 14, 2016 Difuntorum Email re 8.4 & 8.4.1 to Drafting Team, cc Mohr, A. Tuft, C. Andresen, McCurdy & Lee:	2
January 19, 2016 Tuft Email re 8.4 to Drafting Team, cc Difuntorum, Mohr & A. Tuft:	3

<p>Editor's Note: The post-agenda email compilations for rules 8.4 [1-120] and 8.4.1 [2-400] are identical, so only one is provided.</p>

January 12, 2016 McCurdy Email to Commission, Advisors, Liaisons & Staff:

The Office of Chief Trial Counsel's comments on the rules under consideration at the January meeting are attached. Please review them in preparation for the discussion at the January meeting.

Attached:

RRC2 - [1-100(B)][1-120][1-400][2-300][2-400][3-120][3-200][1.14] - 01-12-16 OCTC Memo to RRC2.docx

RRC2 - [1-100(B)][1-120][1-400][2-300][2-400][3-120][3-200][1.14] - 01-12-16 OCTC Memo to RRC2.pdf

January 12, 2016 OCTC Memo to RRC2:

* * *

B. Rule 1-120: Assisting, Soliciting, Or Inducing Violations

OCTC's April 2015 comment stated that it did not recommend any revisions to this rule and reserved comment on the related issues of attempts to violate the rules and reporting violations.

OCTC agrees that revised Rules of Professional Conduct should expressly prohibit attempts to violate the rules. Separately, a rule requiring members to report serious misconduct would enhance public protection and confidence in the profession. (OCTC notes that California judges have reporting duties regarding judge and attorney misconduct. See Canon 3D of the Code of Judicial Ethics; Business and Professions Code, sections 6086.7 and 6086.8; Rothman, "California Judicial Conduct Handbook," sections 5.65-5.68; and *Dodds v. Comm. on Judicial Performance* (1995) 12 Cal.4th 163.)

January 12, 2016 Cardona Email to McCurdy, cc Difuntorum & Mohr:

For my team (1-120/8.4 and 2-400/8.4.1), I do not believe we need a conference call. The current OCTC comments appear to be consistent with prior comments that I believe we have already considered and addressed in arriving at our report and recommendation.

January 13, 2016 McCurdy Email to Commission, Advisors, Liaisons & Staff:

This provides the current complete set of materials for agenda item III.F. re Rule 1-120 [8.4] and 2-400 [8.4.1], including the following additional materials, previously omitted from the combined agenda materials circulated by way of my message below, and those materials posted online:

1. Rule 1-120
 - a. 1st Commission's Proposed Rule 8.4
2. Rule 2-400
 - a. Proposed Amended ABA Model Rule 8.4 (12-22-15) Compared to Current ABA Model Rule 8.4
 - b. ABA Committee on Ethics & Professional Responsibility Proposal to Amend Model Rule 8.4 (12-22-15)
 - c. 1st Commission's Proposed Rule 8.4
 - d. 1st Commission's Proposed Rule 8.4.1

Please review these materials in preparation for your upcoming meeting.

Attached:

RRC2 - [1-120] & [2-400] - 01-22 & 01-23-16 Meeting Materials - COMBO - REV2 (01-13-16)

January 14, 2016 Difuntorum Email re 8.4 & 8.4.1 to Drafting Team, cc Mohr, A. Tuft, C. Andresen, McCurdy & Lee:

FYI, see article below. The order and ABA report are attached. –Randy D.

Judge Sanctions Lawyer for Sexist Comment

[Ross Todd](#), The Recorder

January 13, 2016 | [1 Comments](#)

SAN FRANCISCO — A federal judge in San Jose has ordered a Southern California attorney to pay up for making a sexist remark to a female attorney during a deposition.

Peter Bertling of Santa Barbara's Bertling & Clausen told opposing counsel that it wasn't "becoming of a woman" to raise her voice at him during a contentious expert deposition in October in a wrongful death suit.

The utterance didn't sit well with U.S. Magistrate Judge Paul Grewal, who sanctioned Bertling and ordered him to donate \$250 to the Women Lawyers Association of Los Angeles Foundation.

"A sexist remark is not just a professional discourtesy, although that in itself is regrettable and all too common," Grewal [wrote in an order](#) issued Tuesday. "The bigger issue is that comments like Bertling's reflect and reinforce the male-dominated attitude of our profession."

Grewal also forced Bertling's clients to pay the plaintiffs' costs for the deposition, finding that Bertling had "repeatedly and unapologetically flout[ed] guideline after guideline" during discovery.

Bertling didn't respond to an email and voice message seeking comment.

Oakland solo Lori Rifkin, who sought the sanctions against Bertling, said that based on conversations she's had with lawyers across the country "this is something that almost every woman attorney has experienced again and again over their careers." Rifkin, who was a lawyer in the Department of Justice's Civil Rights Division from 2010 to 2013 before going into private practice, said that many women don't make an issue of comments like Bertling's for fear of being labelled "whiners."

"This is reflective of the usual course of business which needs to change," she said.

The discovery sanctions spring from a wrongful death lawsuit filed after the jailhouse suicide of Joshua Claypole. The 20-year-old stabbed and killed a taxi

driver in Monterey in May 2013, then hanged himself with a bed sheet three days later at the Monterey County Jail. Lawyers for his mother, including Rifkin, sued California municipalities, law enforcement agencies, hospitals and doctors that interacted with Claypole claiming that if standard protocols had been followed "they would have identified Claypole's acute mental health crisis and risk factors, and intervened to protect him and the public."

Bertling, who according to [his firm's website](#) regularly defends health care providers from malpractice claims, is representing California Forensic Medical Group, the private company that provides medical services to the Monterey County Jail, and its founder, Dr. Taylor Fithian, a psychiatrist who evaluated Claypole.

Grewal's sanction order detailed a string of problems with Bertling's conduct in discovery, including a propensity toward coaching witnesses, cutting them off and answering for them in depositions. Grewal found that Bertling repeatedly failed to hand over relevant documents, including a medical expert's notes from jail visits which were delivered to plaintiffs' counsel the day after an important brief was due.

"Discovery is hard enough, even without conduct like that," Grewal wrote. Beyond awarding plaintiffs their costs for three depositions and for briefing on the sanctions order, the judge ordered that the expert hired by Bertling's client be made available for another four-hour deposition to be paid for by the defense.

It was during the expert's earlier deposition that Bertling asked Rifkin to lower her voice. When Rifkin asked him to stop interrupting her, Bertling said, "[D]on't raise your voice at me. It's not becoming of a woman or an attorney."

In a brief declaration filed in response to the motion for sanctions, Bertling wrote, "In retrospect, the proper term for me to have used in this context would have been 'attorney.' I apologize to Ms. Rifkin if I offended her by referring to her as a 'woman' instead of as an 'attorney.'" Bertling wrote that his remarks were made "in the context of Ms. Rifkin literally yelling at my client and creating a hostile environment during the deposition."

Attached:

RRC2 - [1-210][8.4] - ABA Report on Litigation Diversity (2015).pdf

RRC2 - [1-210][8.4] - Claypole v. County of Monterey - ORDER (Sexist Sanction).pdf

January 19, 2016 Tuft Email re 8.4 to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

I just noticed there is an error in section IX.A.7 on page 15 of the drafting team's Report and Recommendation. The 9th Circuit in *U.S. v. Wunsch*, a case in which I was co-counsel for the State Bar, held that the first clause in California State Bar §6068(f) – not Washington State's lawyer oath – was void on vagueness grounds. The court reversed the sanctions order under the Central District Court Local Rule 2.5.2 prohibiting interference with the administration of justice not on vagueness grounds but, instead, on the ground that there has been no showing that Swan's action adversely affected the administration of justice within the meaning of the rule.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120

Lead Drafter: Cardona
Co-Drafters: Langford
Meeting Date: May 29 – 30, 2015

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. DRAFTING TEAM VOTE

There was a consensus among the drafting team members to recommend a proposed amended rule as set forth below.

III. PROPOSED RULE(S) (CLEAN)

We provide two different options below. The first option, which is our preference, incorporates into this rule responsibility concepts from ABA Model Rules 8.4(a), 8.4(e), 5.1, 5.2, and 5.3 that we believe (for reasons discussed in detail in the attached Drafting Team Comments & Discussion) are most appropriately included in a single rule defining members' responsibility for violations of the rules. This approach is also consistent with including the remaining unincorporated provisions from ABA Model Rules 5.1 and 5.3 (which define the independent duties to supervise, respectively, subordinate attorneys and non-attorney employees or agents) in a revised California Rule 3-110 (the accompanying discussion to this rule in its current form defines the duty of competence as including these duties to supervise). The second option would incorporate none of the responsibility concepts from ABA Model Rules 5.1, 5.2, and 5.3, leaving these responsibility concepts (which we believe should be included in the rules and were included in the rules proposed by the First Commission) for inclusion in a separate series of rules. We have annotated both options to show the ABA Model Rules from which particular language is derived.

Option 1 (preferred):

Rule 1-120 Responsibility For Violations

(a) A member shall not, directly or through the acts of another:

["acts of another" from ABA MR 8.4(a)]

(i) violate or attempt to violate these Rules or the State Bar Act;

["attempt" from ABA MR 8.4(a) – contingent on defining "attempt" as discussed in attached Drafting Team Comments]

(ii) knowingly order, assist in, solicit, or induce any violation of these Rules or the State Bar Act;

[current Rule 1-120 with addition of "order" from ABA MR 5.1(c)(1), 5.3(c)(1)]

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120

Lead Drafter: Cardona
Co-Drafters: Langford
Meeting Date: May 29 – 30, 2015

(iii) with knowledge of the specific conduct, ratify conduct constituting a violation of these Rules or the State Bar Act; or

[from ABA MR 5.1(c)(1), 5.3(c)(1)]

(iv) state or imply that the member has an ability to achieve a result on behalf of a client by means that violate these Rules or the State Bar Act.

[from ABA MR 8.4(e)]

(b) A member shall comply with these Rules and the State Bar Act notwithstanding that the member acts at the direction of another lawyer or other person.

[from ABA MR 5.2(a)]

(c) A member acting as a subordinate to another lawyer does not violate these Rules or the State Bar Act if that member acts in accordance with the supervisory lawyer's reasonable resolution of an arguable question of professional duty.

[from ABA MR 5.2(b)]

(d) A member who is a partner, or individually or together with other lawyers has comparable managerial authority, in the law firm in which another lawyer practices, or has direct supervisory authority over the other lawyer, shall be responsible for the other lawyer's violation of these Rules of the State Bar Act if the member knows of the other lawyer's conduct constituting the violation at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[from ABA MR 5.1(c)(2)]

(e) A member who is a partner, or individually or together with other lawyers has comparable managerial authority, in the law firm in which a nonlawyer is employed, or has direct supervisory authority over a nonlawyer employed or retained by or associated with the member, shall be responsible for conduct of the nonlawyer that would be a violation of these Rules or the State Bar Act if engaged in by a member if the member knows of the nonlawyer's conduct constituting the violation at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[from ABA MR 5.3(c)(2)]

Discussion:

[1] Paragraph (b) addresses the responsibility of subordinate lawyers. Although a member is not relieved of responsibility for a violation by the fact that the member acted at the direction of a supervisor, that fact may be relevant in determining whether a member has violated these rules or the State Bar Act.

[from Comment 1 to ABA MR 5.2]

[2] Paragraph (c) vests responsibility for professional judgments as to compliance with these rules or the State Bar Act in the supervisory lawyer. If a question regarding compliance can reasonably be answered only one way, the duty of both lawyers is clear and they are equally

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120

Lead Drafter: Cardona
Co-Drafters: Langford
Meeting Date: May 29 – 30, 2015

responsible for fulfilling it. However, if the question is reasonably arguable, and if the supervisor and subordinate have taken reasonable steps to ensure that the supervisor has all the relevant facts, a subordinate may be guided by the supervisor's resolution of the question, which should protect the subordinate professionally if that resolution is subsequently challenged.

[from Comment 2 to ABA MR 5.2]

[3] Beyond the circumstances defined in paragraph (a) under which a member will generally be responsible for conduct of both lawyers and nonlawyers constituting a violation of these rules or the State Bar Act, paragraphs (d) and (e) define additional the circumstances under which: (1) a member who is a partner or has comparable managerial authority in a law firm will be responsible for violations committed by lawyers and nonlawyers practicing in or employed by the firm; and (2) a member who has direct supervisory authority over the performance of specific legal work by another lawyer or nonlawyer will be responsible for violations committed by that lawyer or nonlawyer, whether or not that lawyer or nonlawyer practices in or is employed by the member's firm. Whether a member has direct 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 direct supervisory responsibility for the work of other lawyers engaged in the matter, whether or not members of the firm. 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, consistent with the member's duty not to disclose confidential information under Business and Professions Code Section 6068(e).

[from Comment 5 to ABA MR 5.1]

[4] This rule does not prohibit a member from advising a client concerning action the client is legally entitled to take even if that action, if taken by a member, would constitute a violation of these rules or the State Bar Act.

[from Comment 1 to ABA MR 8.4]

[5] Apart from this Rule, a member does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a member may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[from Comment 7 to ABA MR 5.1]

[6] This Rule does not alter the personal duty of each lawyer in a law firm to comply with the Rules of Professional Conduct.

[from Comment 8 to ABA MR 5.1]

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120

Lead Drafter: Cardona
Co-Drafters: Langford
Meeting Date: May 29 – 30, 2015

Option 2 (not preferred):

Rule 1-120 Responsibility For Violations

- (a) A member shall not, directly or through the acts of another:
 ["acts of another" from ABA MR 8.4(a)]
- (i) violate or attempt to violate these Rules or the State Bar Act;
 ["attempt" from ABA MR 8.4(a) – contingent on defining "attempt" as discussed in attached Drafting Team Comments]
- (ii) knowingly order, assist in, solicit, or induce any violation of these Rules or the State Bar Act;
 [current Rule 1-120]
- (iii) state or imply that the member has an ability to achieve a result on behalf of a client by means that violate these Rules or the State Bar Act.
 [from ABA MR 8.4(e)]

Discussion:

This rule does not prohibit a member from advising a client concerning action the client is legally entitled to take even if that action, if taken by a member, would constitute a violation of these rules or the State Bar Act.
 [from Comment 1 to ABA MR 8.4]

IV. PROPOSED RULE(S) (REDLINE TO CURRENT CALIFORNIA RULE 1-120)

Option 1 (preferred):

Rule 1-120 ~~Assisting, Soliciting, or Inducing~~ Responsibility For Violations

- (a) A member shall not, directly or through the acts of another:
- (i) violate or attempt to violate these Rules or the State Bar Act;
- (ii) knowingly order, assist in, solicit, or induce any violation of these Rules or the State Bar Act;
- (iii) with knowledge of the specific conduct, ratify conduct constituting a violation of these Rules or the State Bar Act; or
- (iv) state or imply that the member has an ability to achieve a result on behalf of a client by means that violate these Rules or the State Bar Act.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120

Lead Drafter: Cardona
Co-Drafters: Langford
Meeting Date: May 29 – 30, 2015

(b) A member shall comply with these Rules and the State Bar Act notwithstanding that the member acts at the direction of another lawyer or other person.

(c) A member acting as a subordinate to another lawyer does not violate these Rules or the State Bar Act if that member acts in accordance with the supervisory lawyer's reasonable resolution of an arguable question of professional duty.

(d) A member who is a partner, or individually or together with other lawyers has comparable managerial authority, in the law firm in which another lawyer practices, or has direct supervisory authority over the other lawyer, shall be responsible for the other lawyer's violation of these Rules of the State Bar Act if the member knows of the other lawyer's conduct constituting the violation at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(e) A member who is a partner, or individually or together with other lawyers has comparable managerial authority, in the law firm in which a nonlawyer is employed, or has direct supervisory authority over a nonlawyer employed or retained by or associated with the member, shall be responsible for conduct of the nonlawyer that would be a violation of these Rules or the State Bar Act if engaged in by a member if the member knows of the nonlawyer's conduct constituting the violation at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Discussion:

[1] Paragraph (b) addresses the responsibility of subordinate lawyers. Although a member is not relieved of responsibility for a violation by the fact that the member acted at the direction of a supervisor, that fact may be relevant in determining whether a member has violated these rules or the State Bar Act.

[2] Paragraph (c) vests responsibility for professional judgments as to compliance with these rules or the State Bar Act in the supervisory lawyer. If a question regarding compliance 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, and if the supervisor and subordinate have taken reasonable steps to ensure that the supervisor has all the relevant facts, a subordinate may be guided by the supervisor's resolution of the question, which should protect the subordinate professionally if that resolution is subsequently challenged.

[3] Beyond the circumstances defined in paragraph (a) under which a member will generally be responsible for conduct of both lawyers and nonlawyers constituting a violation of these rules or the State Bar Act, paragraphs (d) and (e) define additional the circumstances under which: (1) a member who is a partner or has comparable managerial authority in a law firm will be responsible for violations committed by lawyers and nonlawyers practicing in or employed by the firm; and (2) a member who has direct supervisory authority over the performance of specific legal work by another lawyer or nonlawyer will be responsible for violations committed by that lawyer or nonlawyer, whether or not that lawyer or nonlawyer practices in or is employed

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120

Lead Drafter: Cardona
Co-Drafters: Langford
Meeting Date: May 29 – 30, 2015

by the member's firm. Whether a member has direct 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 direct supervisory responsibility for the work of other lawyers engaged in the matter, whether or not members of the firm. 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, consistent with the member's duty not to disclose confidential information under Business and Professions Code Section 6068(e).

[4] This rule does not prohibit a member from advising a client concerning action the client is legally entitled to take even if that action, if taken by a member, would constitute a violation of these rules or the State Bar Act.

[5] Apart from this Rule, a member does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a member may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[6] This Rule does not alter the personal duty of each lawyer in a law firm to comply with the Rules of Professional Conduct.

Option 2 (not preferred):

Rule 1-120 ~~Assisting, Soliciting, or Inducing~~ Responsibility For Violations

(a) A member shall not, directly or through the acts of another:

(i) violate or attempt to violate these Rules or the State Bar Act;

(ii) knowingly order, assist in, solicit, or induce any violation of these Rules or the State Bar Act;

(iii) state or imply that the member has an ability to achieve a result on behalf of a client by means that violate these Rules or the State Bar Act.

Discussion:

This rule does not prohibit a member from advising a client concerning action the client is legally entitled to take even if that action, if taken by a member, would constitute a violation of these rules or the State Bar Act.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120

Lead Drafter: Cardona
Co-Drafters: Langford
Meeting Date: May 29 – 30, 2015

V. PUBLIC COMMENTS SUMMARY

- To date, no public comments have been received except from OCTC, as specified below.

VI. OCTC / STATE BAR COURT COMMENTS

- Mike Nisperos, OCTC, 2001: OCTC's recommendation is to expand the scope of rule 1-120 to include new standards that are derived from ABA model rule 8.4
- Jayne Kim, OCTC, April 20, 2015: OCTC does not recommend any revisions to Rule 1-120.⁵ (Footnote 5 from April 20, 2015 memo: However, as the Commission's work progresses, OCTC will offer comment on related issues such as whether it would be appropriate to promulgate a new rule addressing attempts to violate rules and a requirement that members report the misconduct of others.)
- To date, no comments have been received from the State Bar Court.

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

New York Rule 5.1 Responsibilities of Law Firms, Partners, Managers, and Supervisory Lawyers

(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

(b)(1) A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.

(b)(2) A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.

(c) A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate. A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

(d) A lawyer shall be responsible for a violation of these Rules by another lawyer if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120

Lead Drafter: Cardona
Co-Drafters: Langford
Meeting Date: May 29 – 30, 2015

other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

Illinois 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.

New York Rule 5.3 Lawyer's Responsibility For Conduct Of Nonlawyers

(a) A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

(b) A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120

Lead Drafter: Cardona
Co-Drafters: Langford
Meeting Date: May 29 – 30, 2015

Pennsylvania Rule 8.3 Reporting Professional Misconduct

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
- (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
- (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Pennsylvania Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist 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 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 the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

The ABA State Adoption Chart for Model Rule 5.1 is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_1.authcheckdam.pdf
- 28 states have adopted 5.1 verbatim (AZ, AR, CT, DE, HI, ID, IL, IN, IA, KS, KY, LA, MD, MA, MO, NE, NV, OK, PA, RI, SC, SD, TN, UT, WA, WV, WI, WY); 19 jurisdictions have adopted a variation of model rule 5.1 (AL, AK, DC, FL, ME, MN, MS, MT, NC, ND, NH, NJ, NM, NY, OH, OR, TX, VT, VA); and 4 states have not adopted a variation of model rule 5.1 (CA, CO, GA, MI).

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120

Lead Drafter: Cardona
Co-Drafters: Langford
Meeting Date: May 29 – 30, 2015

The ABA State Adoption Chart for Model Rule 5.2 is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_2.authcheckdam.pdf
- 41 states have adopted 5.2 verbatim (AL, AK, AZ, AR, CO, DE, HI, ID, IL, IN, IA, KS, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NY, NC, ND, OK, OR, PA, RI, SC, SD, TN, UT, VT, WA, WV, WI, WY); 7 jurisdictions have adopted a variation of model rule 5.2 (CT, DC, FL, GA, NM, OH, TX); and 3 states have not adopted a variation of model rule 5.2 (CA, KY, VA).

The ABA State Adoption Chart for Model Rule 5.3 is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_3.authcheckdam.pdf
- 10 states have adopted 5.3 verbatim (AR, CT, DE, ID, IN, LA, MA, PA, WV, WY); 40 jurisdictions have adopted a variation of model rule 5.3 (AL, AK, AZ, CO, DC, FL, GA, HI, IL, IA, KS, KY, ME, MD, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, RI, SC, SD, TN, TX, UT, VT, VA, WA, WI); and 1 state has not adopted a variation of model rule 5.3 (CA).

The ABA State Adoption Chart for Model Rule 8.3 is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_3.authcheckdam.pdf
- 7 states have adopted 8.3 verbatim (ID, IA, MT, NE, PA, UT, WY); 43 jurisdictions have adopted a variation of model rule 8.3 (AL, AK, AR, AZ, CO, CT, DC, DE, FL, GA, HI, IL, IN, KS, KY, LA, MA, MD, ME, MI, MN, MO, MS, NH, NJ, NM, NV, NY, NC, ND, OH, OK, OR, RI, SC, SD, TN, TX, VT, VA, WA, WI, WV); and 1 state has not adopted a variation of model rule 8.3 (CA).

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. The chart is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4.authcheckdam.pdf
- 14 states have adopted 8.4 verbatim (AZ, AR, CT, DE, ID, MS, MT, NV, NM, OK, PA, SD, UT, WV); 33 jurisdictions have adopted something substantially similar to model rule 8.4 (AL, AK, CO, DC, HI, IA, IL, IN, KS, KY, LA, MA, MD, ME, MI, MN, MO, NE, NH, NJ, NY, NC, ND, OH, OR, RI, SC, TN, VT, VA, WA, WI, WY); and 4 states have adopted something substantially different to model rule 8.4 (CA, FL, GA, TX).

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120

Lead Drafter: Cardona
Co-Drafters: Langford
Meeting Date: May 29 – 30, 2015

The ABA provides a separate chart for Model Rule 8.4, Comment [3]:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4_cmt_3.authcheckdam.pdf

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

Concepts Accepted (Pros and Cons):

- Implement change to govern “attempts” to violate the rules. (Options 1 & 2)
 - Pros: Comports with ABA MR 8.4(a)’s definition of professional misconduct as including attempts; increases public protection by explicitly holding members responsible for attempts to violate rules or the State Bar Act; assuming adoption of a provision defining “attempt” provides members with clear guidance regarding disciplinary standards; consistent with certain decisions applying rules or State Bar Act to attempts, *see, e.g., Walker v. State Bar* (1989) 49 Cal. 3d 1107, 1113 (“violated [6106] by willfully misappropriating or attempting to misappropriate funds from his client trust account”); *Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838 (violation of Rule 4-200(B) to “attempt” to collect unconscionable fee); *Matter of Scapa* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635 (same).
 - Cons: There are no known cons to this proposed change.
 - See: More detailed discussion in attached drafting team comments.
- Implement change to incorporate provisions from ABA MR 5.2 making clear the responsibilities of subordinate lawyers (Option 1 only)
 - Pros: Comports with ABA MR 5.2; clarifies when subordinate lawyers may rely on directions from a supervisory attorney; increases public protection by making clear that, except in limited circumstances, subordinate lawyers remain responsible for violations of the rules even when acting at the direction of a supervising lawyer.
 - Cons: There are no known cons to the proposed change.
 - See: More detailed discussion in attached drafting team comments.
- Implement change to incorporate additional provisions from ABA MR 5.1(c), 5.3(c) defining responsibility for violations by other lawyers/nonlawyers (Option 1 only)
 - Pros: Comports with ABA MR 5.1(c) and 5.3(c); consistent with ABA MR 5.1(a), (b) and 5.3(a), (b) and current comment to California Rule RPC 3-110, which all recognize a duty to supervise; increases public protection by making explicit a member’s responsibility for violations by other lawyers/nonlawyers; clarifies when a member is responsible for violations by other lawyers/nonlawyers.
 - Cons: There are no known cons to the proposed change.
 - See: More detailed discussion in attached drafting team comments.

Concepts Rejected (Pros and Cons):

- Implement change to incorporate provisions governing a lawyer’s permissive or mandatory duty to report specified subsets of known violations of the rules.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120

Lead Drafter: Cardona

Co-Drafters: Langford

Meeting Date: May 29 – 30, 2015

- Pros: Comports with ABA MR 8.3; improves public protection by requiring lawyer reporting of certain known violations of the rules.
- Cons: Requires interpretation of whether a known violation raises a substantial question as to (or implicates) the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; poses potential conflict with duty of confidentiality with respect to information learned in the course of representation of a client; poses potential conflict with duty of loyalty if reporting would adversely affect client's interests; creates new duty (akin to duty to supervise) that is more appropriately the subject of a separate independent rule rather than inclusion in a rule that addresses responsibility for violations of other rules.
- See: More detailed discussion in attached drafting team comments. Discussion of ABA MR 8.3 in open issues/concepts below.

Changes in Duties/Substantive Changes to the Current Rule:

The current rule applies to assisting, soliciting, or inducing violations. Consistent with ABA MR 8.4(a), both Options 1 and 2 for the proposed rule would add a provision holding members responsible for attempted violations of the rules. Consistent with ABA MR 8.4(e), both Options 1 and 2 for the proposed rule would add a provision holding members responsible for statements indicating an ability to achieve results through means that violate the rules. Option 1 for the proposed rule would incorporate additional provisions from ABA MR 5.1(c) and 5.3(c) defining when members are responsible for violations by other lawyers/nonlawyers. Finally, Option 1 for the proposed rule would incorporate provisions from ABA MR 5.2 to define the limited circumstances under which subordinate lawyers may rely on supervisory direction and to make explicit that absent these limited circumstances subordinate lawyers remain responsible for violations of the rules.

Non-Substantive Changes to the Current Rule:

All of the proposed changes are substantive.

Alternatives Considered:

- Keep current rule without changes (rejected).
- Keep current rule while adding only language to encompass attempts (rejected).
- Consistent with ABA MR 8.3(c), incorporate into rule or add stand-alone rule mandating reporting of all violations that "raise a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." (rejected pending further public comment – see more detailed discussion in attached drafting team comments and open issues/concepts below)
- Consistent with the modified version of ABA MR 8.3(c) proposed by the original Commission, incorporate into rule or add stand-alone rule requiring mandatory reporting of any violation that constitutes a felonious criminal act that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness, with permissive reporting of other violations that implicate the lawyer's fitness to practice. (rejected pending further public comment – see more detailed discussion in attached drafting team comments and open

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120

Lead Drafter: Cardona
Co-Drafters: Langford
Meeting Date: May 29 – 30, 2015

issues/concepts below)

- Leave the principles of responsibility for the conduct of other lawyers and nonlawyers set forth in ABA MR 5.1, 5.2, and 5.3 and suggested by the commentary to California Rule 3-110 for one or more separate new rules. (Option 2 for the rule)
- Incorporate into the modified rule additional provisions included in ABA MR 5.1(a), (b) and 5.3(a), (b), imposing independent duties to supervise, that is, to engage in reasonable efforts to ensure compliance with the rules by other lawyers/nonlawyers. (rejected – see open issues/concepts below)
- Incorporate into the modified rule additional provisions from ABA MR 8.4 (b)-(g) that define additional acts (beyond violations of the other ABA MR) constituting “professional misconduct” (rejected – see open issues/concepts below)

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

(1) If a Terminology Rule is recommended by the Commission, whether any of the following terms in proposed rule 1-120 should be defined in the Terminology Rule: “knowingly,” “attempt,” “ratifies,” “reasonable remedial action.” In this regard, the recommendation to include “attempts” within the proposed rule is contingent on adoption of a proposed definition of “attempt” that is discussed in detail in the attached drafting team comments.

(2) If the proposal to include “attempts” within proposed rule 1-120 is accepted, whether to drop specific attempt language from other rules.

(3) ABA MR 5.1 (other lawyers) and 5.3 (nonlawyers) each addresses two different concepts. Subsections (a) and (b) of each of the rules define duties to supervise other lawyers and nonlawyers, while subsection (c) of each of the rules defines responsibility for violations committed by other lawyers and nonlawyers. The second concept (from subsection (c)) is incorporated into Option 1 for proposed amended rule 1-120, which would serve as a single rule defining responsibility for violations and attempted violations of the rules, both as a result of the member’s own conduct and as a result of conduct engaged in by other lawyers and nonlawyers. The first concept (subsections (a) and (b)), which is currently referenced in the commentary to California Rule 3-110, does not appear to fit within such a rule, and is left for consideration as to whether it should be retained as a concept subsumed within competence or be the subject of one or more new stand-alone rules.

(4) ABA MR 8.4 similarly addresses (in broad terms) two different concepts. Subsections (a) and (e) define professional misconduct in relation to violations or attempted violations of the other ABA Model Rules. Subsections (b) through (g) define professional misconduct in relation to other duties and laws independent of the other ABA Model Rules. The first concept (from subsections (a) and (e)) is incorporated into proposed amended rule 1-120, which would serve as a single rule defining responsibility for violations and attempted violations of the rules, both as a result of the member’s own conduct and as a result of conduct engaged in by other lawyers and nonlawyers. The second concept (subsections (b) through (g)) does not appear to fit within such a rule, and is left for consideration as to whether similar provisions should be included in rule 1-100 (as additional grounds other than violations of the rules or the State Bar Act for the

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120

Lead Drafter: Cardona
Co-Drafters: Langford
Meeting Date: May 29 – 30, 2015

imposition of discipline) or in one or more new stand-alone rules.

(5) ABA MR 8.3 mandates reporting of all violations that “raise a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” As discussed in more detail in the attached drafting team comments, consideration of this or a modified reporting requirement does not appear to fit with Rule 1-120 and is left for consideration as a stand-alone requirement after the solicitation of additional public comment.

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

See attached Drafting Team Comments & Discussion.

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation (preferred):

Adopt Option 1 for proposed amended rule 1-120.

Alternative Recommendation:

Adopt Option 2 for proposed amended rule 1-120.

Proposed Resolution (preferred):

RESOLVED: That the Commission adopts proposed amended rule 1-120 as set forth in this report as Option 1.

Alternative Proposed Recommendation:

RESOLVED: That the Commission adopts proposed amended rule 1-120 as set forth in this report as Option 2.

XII. DISSENTING POSITION(S)

None.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120

Lead Drafter: Cardona

Co-Drafters: Langford

Meeting Date: May 29 – 30, 2015

XIII. FINAL COMMISSION VOTE/ACTION

[Date of Vote]

[Action: Proposed amended rule adopted or not adopted]

[Record of Roll Call Vote]

Introduction

California Rule of Professional Responsibility 1-120 is the only current rule that holds members responsible for violations of the rules committed by others, prohibiting members from assisting in, soliciting, or inducing any violation of the rules. The only other provision of the current rules that arguably suggests additional responsibility for violations of the rules by others is the commentary to Rule 3-110, which notes that the duty of competency defined by that rule includes “the duty to supervise the work of subordinate attorney and non-attorney employees or agents.”

The ABA Model Rules include a variety of provisions that expand the responsibility of members beyond actual violations committed by those members. Model Rule 8.4(a) states that it is professional misconduct to “violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” Model Rule 8.4(e) states that it is professional misconduct to “state or imply an ability . . . to achieve results by means that violate the Rules of Professional Conduct or other law.” Model Rule 5.1(c) defines additional circumstances (beyond assisting or inducing a violation) under which a lawyer “shall be responsible for another lawyer’s violation of the Rules of Professional Conduct.” Model Rule 5.3(c) similarly defines additional circumstances under which a lawyer “shall be responsible for conduct of” a “nonlawyer employed or retained by or associated with a lawyer” that “would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.” And, Model Rule 5.2 makes clear that, except in limited circumstances, a subordinate lawyer remains responsible for violations of the rules committed under the direction of a supervisory lawyer.¹

The First Commission adopted, with virtually no opposition or substantial public comment, the bulk of the Model Rule provisions referenced above. In particular, COPRAC and OCTC appear generally to have supported adoption of these provisions. Our preferred proposed revisions to Rule 1-120 (designated Option 1) incorporate these provisions into the rule, with the intention of arriving at a comprehensive rule that includes all provisions defining when members will be responsible, and may be disciplined, for conduct beyond actual violations of the Rules committed by those members themselves. We believe this approach is consistent with the charge to the Commission to retain the historical nature of the California Rules as a “clear and enforceable articulation of disciplinary standards.” As a less preferred alternative (designated Option 2), we propose revisions to Rule 1-120 that incorporate the responsibility provisions from Model Rule 8.4(a) and (e), but do not incorporate the responsibility provisions from Model Rules 5.1, 5.2, and 5.3, leaving the latter for consideration for inclusion in a separate series of rules.

¹ Model Rules 8.4(b), (c), (d), and (f), 5.1(a) and (b), and 5.3(a) and (d) also create additional substantive obligations. As discussed in more detail in the text below, we believe these additional substantive duties are appropriately considered in conjunction with consideration of other rules, namely, Rule 3-110 (“Failure to Act Competently”) and Rule 1-100 (defining when a lawyer may be disciplined).

With respect to the particular proposed modifications to Rule 1-120:

Proposed 1-120(a) – Two Options

Text: (w/ annotations indicating source of modifications)

Option 1 (preferred):

- (a) A member shall not, directly or through the acts of another:
 - [“acts of another” from ABA MR 8.4(a)]*
 - (i) violate or attempt to violate these Rules or the State Bar Act;
[“attempt” from ABA MR 8.4(a) – contingent on defining “attempt” as discussed in attached Drafting Team Comments]
 - (ii) knowingly order, assist in, solicit, or induce any violation of these Rules or the State Bar Act;
[current Rule 1-120 with addition of “order” from ABA MR 5.1(c)(1), 5.3(c)(1)]
 - (iii) with knowledge of the specific conduct, ratify conduct constituting a violation of these Rules or the State Bar Act; or
[from ABA MR 5.1(c)(1), 5.3(c)(1)]
 - (iv) state or imply that the member has an ability to achieve a result on behalf of a client by means that violate these Rules or the State Bar Act.
[from ABA MR 8.4(e)]

Option 2 (not preferred):

- (a) A member shall not, directly or through the acts of another:
 - [“acts of another” from ABA MR 8.4(a)]*
 - (i) violate or attempt to violate these Rules or the State Bar Act;
[“attempt” from ABA MR 8.4(a) – contingent on defining “attempt” as discussed in attached Drafting Team Comments]
 - (ii) knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act;
[current Rule 1-120]
 - (iii) state or imply that the member has an ability to achieve a result on behalf of a client by means that violate these Rules or the State Bar Act.
[from ABA MR 8.4(e)]

Related Comments: (w/ annotations indicating source)

For both Option 1 and Option 2:

This rule does not prohibit a member from advising a client concerning action the client is legally entitled to take even if that action, if taken by a member, would constitute a violation of these rules or the State Bar Act.

[from Comment 1 to ABA MR 8.4]

Discussion:

The bulk of this proposed section reflects either language already in Rule 1-120 (solicit, induce, assist in) or language taken from ABA MR 5.1(c) and 5.3 (c) (order and ratify) (Option 1 only) and 8.4(a) (acts of another, induce, assist in) (Options 1 and 2), that was not the subject of controversy when it was adopted by the First Commission and which appears appropriately to define the circumstances under which a member will be responsible for violations of the rules or State Bar Act that are actually committed not by the member but by others acting at the member's direction or encouragement or subject to the member's ratification. In comments provided in 2001, OCTC supported a similar incorporation of the additional standards from ABA MR 8.4(a), noting that it "makes clear that an attorney shall not himself or herself violate the Rules of Professional Conduct or the State Bar Act, induce another to do so, or use another to either violate the rules or induce another to violate the rules" and that this did "not change the purpose of the rule; it only provides greater detail and specificity."

The final clause of this proposed section (both Option 1 and Option 2) reflects language from ABA MR 8.4(e) (state or imply an ability to achieve a result) that similarly was not the subject of controversy when it was adopted by the First Commission and appears appropriately to define additional circumstances under which a member should be held accountable for conduct relating to violations of the rules or State Bar Act. In its 2001 comments, OCTC supported a similar incorporation of this standard from ABA MR 8.4(e).

We also recommend (both Option1 and Option 2) the inclusion in this proposed section of a general prohibition on attempts to violate the rules or State Bar Act. This is more controversial. The OCTC proposed to the First Commission the inclusion of general attempt language in its proposed version Rule 8.4, noting:

There is no sound reason to exclude this language, which protects clients and the public. An attempt to violate a rule goes to the character of an attorney and his or her fitness to practice law. The ABA's version [which includes attempt language] goes to the character of an attorney and his or her fitness to practice law. The

ABA's version better protects clients, the public, and the courts. It ensures that attorneys are and remain of good moral character.²

The First Commission nevertheless rejected the inclusion of attempt language, noting that it had “discussed making an ‘attempt’ to violate the rules an offense but determined that the issue of disciplining attempts to violate a rule was better left to a case-by-case determination.” COPRAC implicitly endorsed this approach by supporting the adoption of the rule as proposed by the First Commission.

On balance, we believe the OCTC's comments to the First Commission are well-taken, and that a provision extending the rules to cover attempts generally, rather than leaving this to a case-by-case determination, is appropriate. We believe that this is consistent with our charge to arrive at a “clear and enforceable articulation of disciplinary standards” since it will put members on notice that, as a general matter, attempts may subject them to discipline. We note the additional benefit that this will bring the California rules closer to conformity with the ABA Model Rules.

Our recommendation regarding attempts is contingent on the inclusion in the rules of an appropriate definition of what constitutes an “attempt” In this regard, we recommend a definition requiring that the member both (a) intend to engage in conduct that would violate the particular rule or State Bar Act provision; and (b) do something that constitutes a substantial step towards actually engaging in the conduct that would constitute the violation, that is, something beyond mere preparation that demonstrates that the violation would have occurred unless interrupted by independent circumstances. *See, e.g.*, Ninth Circuit Model Criminal Jury Instruction 5.3 (“Attempt”). We believe such a definition is necessary to provide a clear and enforceable articulation of a disciplinary standard governing attempts. It also appears consistent with the decisions in various cases that have addressed attempts under specific provisions of the rules or State Bar Act that already extend to attempts. *See, e.g., Walker v. State Bar* (1989) 49 Cal.3d 1107 [264 Cal.Rptr. 825] (petitioner correctly disciplined for “misappropriating or attempting to misappropriate funds from his client trust account” where he “knew that the two checks he wrote for a total of \$2,700 [one for \$1,700 to cover his own delinquency to a local car leasing agency, and the second a counter check for \$1,000 that petitioner cashed] were drawn on his client trust fund account” despite fact that one of the two checks was not honored, but was instead returned after petitioner's associate froze the client trust account); *Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838 (agreeing that despite his return of certain funds after his client disputed his entitlement to them, “respondent attempted to collect an

² OCTC has provided updated comments to the Second Commission in which it states that it recommends no revisions to Rule 1-120, but indicates that “as the Commission's work progresses, OCTC will offer comment on related issues such as whether it would be appropriate to promulgate a new rule addressing attempts to violate rules.” Because we believe a provision addressing attempts would, if agreed on, appropriately be included in a modified Rule 1-120 (as opposed to elsewhere in the rules) we address such a provision now.

unconscionable fee from Ms. Otoya in violation of rule 4-200(A)” where he “attempted to collect more than was due him under his fee agreement”).

Proposed 1-120(b) and (c) – Preferred Option 1 Only

Text: (w/ annotations indicating source of modifications)

“(b) A member shall comply with these Rules and the State Bar Act notwithstanding that the member acts at the direction of another lawyer or other person.

[from ABA MR 5.2(a)]

“(c) A member acting as a subordinate to another lawyer does not violate these Rules or the State Bar Act if that member acts in accordance with the supervisory lawyer’s reasonable resolution of an arguable question of professional duty.”

[from ABA MR 5.2(b)]

Related Comments: (w/ annotations indicating source)

“Paragraph (b) addresses the responsibility of subordinate lawyers. Although a member is not relieved of responsibility for a violation by the fact that the member acted at the direction of a supervisor, that fact may be relevant in determining whether a member has violated these rules or the State Bar Act.

[from Comment 1 to ABA MR 5.2]

“Paragraph (c) vests responsibility for professional judgments as to compliance with these rules or the State Bar Act in the supervisory lawyer. If a question regarding compliance 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, and if the supervisor and subordinate have taken reasonable steps to ensure that the supervisor has all the relevant facts, a subordinate may be guided by the supervisor’s resolution of the question, which should protect the subordinate professionally if that resolution is subsequently challenged.”

[from Comment 2 to ABA MR 5.2]

Discussion:

These two sections reflect provisions from ABA MR 5.2 (“Responsibilities of a Subordinate Lawyer”) that were not the subject of controversy when adopted by the First Commission and appear appropriately to (a) make clear that a subordinate lawyer generally will remain responsible for violations of the rules or State Bar Act even when acting under the direction of a

supervisory lawyer and (b) specify the limited circumstances in which a subordinate lawyer will not be responsible because he or she reasonably relied on a supervisor/s resolution of an arguable question regarding interpretation of the rules or State Bar Act. Both COPRAC and OCTC appear to have supported adoption of these provisions by the First Commission. OCTC expressed concern that the comments included by the First Commission were too long. OCTC also objected specifically to a sentence in one of the comments (also included in the comments to ABA MR 5.2) that stated as an example of the application of the rule that if a subordinate signed a frivolous pleading at the direction of a supervisor, the subordinate would not violate the rules unless the subordinate knew the document's frivolous character. We do not believe the comments we propose are excessively long, and we have removed from our proposed comment relating to section (b) the sentence to which OCTC objected on the belief that including one example is both unnecessary given the clear language of section (b) and the proposed comment and might give the improper impression that the one example represents the only set of circumstances under which a subordinate's reliance on directions from a supervisor would be relevant to a determination on discipline.

Proposed 1-120(d) and (e) – Preferred Option 1 Only

Text: (w/ annotations indicating source of modifications)

“(d) A member who is a partner, or individually or together with other lawyers has comparable managerial authority, in the law firm in which another lawyer practices, or has direct supervisory authority over the other lawyer, shall be responsible for the other lawyer's violation of these Rules of the State Bar Act if the member knows of the other lawyer's conduct constituting the violation at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[from ABA MR 5.1(c)(2)]

“(e) A member who is a partner, or individually or together with other lawyers has comparable managerial authority, in the law firm in which a nonlawyer is employed, or has direct supervisory authority over a nonlawyer employed or retained by or associated with the member, shall be responsible for conduct of the nonlawyer that would be a violation of these Rules or the State Bar Act if engaged in by a member if the member knows of the nonlawyer's conduct constituting the violation at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

[from ABA MR 5.3(c)(2)]

Related Comments: (w/ annotations indicating source)

“Beyond the circumstances defined in paragraph (a) under which a member will generally be responsible for conduct of both lawyers and nonlawyers constituting a violation of these rules or the State Bar Act, paragraphs (d) and (e) define additional the circumstances under which (1) a member who is a partner or has comparable managerial authority in a law firm will be responsible for violations committed by lawyers and nonlawyers practicing in or employed by the firm and (2) a member who has direct supervisory authority over the performance of specific legal work by another lawyer or nonlawyer will be responsible for violations committed by that lawyer or nonlawyer, whether or not that lawyer or nonlawyer practices in or is employed by the member’s firm. Whether a member has direct 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 direct supervisory responsibility for the work of other lawyers engaged in the matter, whether or not members of the firm. 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, consistent with the member’s duty not to disclose confidential information under Business and Professions Code Section 6068(e).

[from Comment 5 to ABA MR 5.1]

“Apart from this Rule, a member does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a member may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[from Comment 7 to ABA MR 5.1]

“This Rule does not alter the personal duty of each lawyer in a law firm to comply with the Rules of Professional Conduct.”

[from Comment 8 to ABA MR 5.1]

Discussion

These two sections reflect provisions from ABA MR 5.1(c) (“Responsibilities of Partners, Managers, and Supervisory Lawyers”) and 5.3(c) (“Responsibilities Regarding Nonlawyer Assistants”) that were not the subject of controversy when adopted by the First Commission and appear appropriately to define additional circumstances in which a member who (a) is a partner

or comparable or equivalent manager in a law firm is responsible for violations committed by lawyers or nonlawyers employed by the law firm or (b) is a direct supervisor of a lawyer or nonlawyer is responsible for violations committed by the supervised lawyer or nonlawyer, Both OCTC and the State Bar's Law Practice Management & Technology Section supported the First Commission's adoption of its proposed Rule 5.1, which included a provision similar to our proposed 1-120(d). Both COPRAC and OCTC supported the First Commission's adoption of its proposed Rule 5.3, which included a provision similar to our proposed 1-120(e). OCTC noted in both instances that it believed the proposed rule was "simply a codification of existing California law." OCTC objected to the length and number of comments to the First Commission's proposed Rule 5.1 and sought specifically the striking of comment 3 to the First Commission's proposed Rule 5.3. The comments we propose are significantly shorter, do not include the comment specifically objected to by OCTC, and include a comment (the last above) that was specifically supported by OCTC (comment 15 to the First Commission's proposed Rule 5.1).

ABA Model Rule 8.3 – Reporting Requirements

Model Rule 8.3 provides:

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
- (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
- (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a

violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

As reflected above, ABA MR 8.3 mandates reporting of any violation of the rules that raises a substantial question as to a lawyer's honesty, trustworthiness or fitness as a lawyer. The First Commission proposed a modified version of this rule that was partly permissive and partly mandatory. The First Commission's proposed rule set a standard of

permissive reporting for general misconduct that implicates a lawyer's fitness to practice but mandated reporting where another lawyer committed a felonious criminal act that raised a substantial question as to that lawyer's honesty, trustworthiness or fitness. The Board of Governors rejected the First Commission's proposed rule. This rejection appeared to reflect two concerns. First, the Board seemed to be concerned that lawyers might find it difficult to comply with a rule that appeared to assume expertise on the issue of whether misconduct would constitute a felony. Second, it appeared that the Board shared some of the concerns expressed by a minority of the First Commission that viewed any mandatory reporting rule as the wrong public policy for California. The minority statement observed that mandatory reporting issues often arise in the midst of representing a client and that the experience in jurisdictions with mandatory reporting is that when reporting occurs in this context, an innocent client might suffer. The minority asserted that reporting can lead to disputes among the lawyers representing clients in a matter and that this could cause a change in counsel, imposing delays and costs on innocent clients. In accordance with the Board of Governors' determination, a California counterpart to Model Rule 8.3 was not recommended for adoption.

In connection with rule 1-120, the Second Commission has received no public comments addressing ABA MR 8.3. OCTC has stated, however, that it plans to provide comments on whether the Second Commission should adopt a requirement that members report the misconduct of others.

On balance, while it is a close call, we tend to agree with the Board's prior decision not to recommend a reporting requirement. The pros of adopting a reporting requirement (whether in the mandatory form of ABA MR 8.3 or a hybrid permissive/mandatory form along the lines of the First Commission's proposed rule) include: (1) improving public protection by requiring lawyer reporting of certain known violations of the rules; and (2) bringing California's rules closer to the ABA Model Rules. There are also significant cons to a reporting requirement, including that either of the two forms of such a requirement would: (1) require interpretation of whether a known violation raises a substantial question as to (or implicates) the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects sufficient to trigger the reporting requirement; (2) despite the recognition that reporting could be trumped by the duty of confidentiality with respect to information learned in the course of representation of a client, pose a potential for conflict with that rule, or with the attorney-client relationship, to the extent lawyers might feel obligated to discuss waiver of confidentiality to further reporting interests of the lawyer rather than the client's own interests; and (3) pose a potential for conflicts with a lawyer's duty of loyalty if reporting posed a risk of adversely affecting a current or former client's interests. On balance, we tend to agree that the cons outweigh the pros,

particularly given that California has not had such a reporting requirement, and that the interpretations required for lawyers to determine the scope of any reporting requirement seems inconsistent with this Commission's charge to retain the historical nature of the California Rules as a "clear and enforceable articulation of disciplinary standards."

Equally important to our decision not to recommend adoption of a reporting requirement at this time, is that we believe consideration or adoption of such a requirement should not be part of the consideration of our proposed modifications to Rule 1-120. As discussed above, current Rule 1-120 addresses responsibility for other violations of the existing rules, and we have proposed two options for modifications to Rule 1-120 that accord with this general approach. Adoption of a reporting requirement would impose a new duty under the rules that we believe should be the subject of a stand-alone rule rather than incorporation into Rule 1-120. Given this, we believe consideration of a reporting requirement should be postponed until more robust public comment on the relative pros and cons can be solicited, including anticipated comments from OCTC and the State Bar Court.

CURRENT CALIFORNIA RULE 1-120
“Assisting, Soliciting, or Inducing Violations”

I. Text of Current 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.

(There is no Discussion section to this rule.)

II. Background/Purpose:

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.)

COMMISSION ASSIGNMENT DOCUMENT

III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):

A. In a 2001 Letter to the First Commission, OCTC Provided the Following Comment on Rule 1-120:

OCTC recommends expanding rule 1-120 to include additional conduct:
Remove:

~~A member shall not knowingly assist in solicit or induce any violation of these rules or the State Bar Act~~

and replace with:

A member shall not:

(a) violate or attempt to violate the Rules of Professional Conduct or the State Bar Act or other rules regulating the practice of law, knowingly assist or induce another to violate or attempt to violate the Rules of Professional Conduct or the State Bar Act or other rules regulating the practice of law, or do so through the acts of another;

(b) commit a criminal act;

(c) engage in conduct involving moral turpitude, dishonesty, corruption, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply that the member has an ability to influence a governmental agency or official or to achieve a result on behalf of a client by means that violate the Rules of Professional Conduct, the State Bar Act, or other law;

(f) knowingly assist, solicit, or induce a judge or judicial officer in conduct that is a violation of the applicable rules of judicial conduct or other law;

(g) engage in conduct that is unbecoming a member of the bar.

OCTC COMMENTS:

OCTC is suggesting that this rule be broadened and made more like ABA Model Rule 8.4.

Section (a) is similar to current rule 1-120, but makes clear that an attorney shall not himself or herself violate the Rules of Professional Conduct or the State Bar

COMMISSION ASSIGNMENT DOCUMENT

Act, induce another to do so, or use another to either violate the rules or induce another to violate the rules.

This proposal, thus, does not change the purpose of the rule; it only provides greater detail and specificity. It will also prohibit suspended, resigned, inactive, or disbarred attorneys from attempting to use other entities such as law corporations to get around their suspensions or disbarments. As written, the current law corporation rules could be used by unscrupulous attorneys to avoid the consequences of their suspension by keeping their practice running with another attorney until the suspended attorney can return to practicing law. The new proposal would make such assistance more problematic.

Section (b) would codify two principles established by the Supreme Court case law, but which is not always evident from the language of Business and Professions Code Sections 6068(a), 6101, and 6102. Under existing case law, an attorney can be disciplined when the attorney is convicted of a felony or misdemeanor which involves moral turpitude or other misconduct warranting discipline. (See e.g. *In re Larkin* (1989) 48 Cal.3d 236, 245.) However, the statute only speaks of moral turpitude. This change would clarify the rules so it is clear that any conviction may be the basis for disciplinary action. (See e.g. Business and Professions Code Sections 6101(a).) This section would also make clear that even if an attorney is not convicted of a crime the State Bar can prosecute him for committing the act. (See *Emslie v. State Bar* (1974) 11 Cal.3d 210, 224.) Again, this section is not changing existing law, but only codifying it.

Section (c) already exists. See Business & Professions Code section 6106. It is only provided here so that major bases for discipline are set forth in one place.

Section (d) also codifies existing law. The ABA also uses the section to prevent bias, which is prejudicial to the administration of justice.

Section (e) prohibits using or asserting undue influence in proceedings or in connection with public officials and prohibits using means that violate the Rules of Professional Conduct or the State Bar Act.

Section (f) should be added to this rule. Current rule 1-700 of the Rules of Professional Conduct prohibits a member, who is a candidate for judicial office, from violating the Code of Judicial Conduct. In addition, current rule 1-710 of the Rules of Professional Conduct prohibits an attorney acting as temporary judge, referee, or court-appointed arbitrator from violating Canon 6D of the Code of Judicial Conduct. However, no rule prohibits an attorney from assisting someone in violating the judicial canons. Yet, current rule 1-120 prohibits a member from assisting in a violation of the Rules of Professional Conduct or the State Bar Act. Hence, proposed section (f) fills in the gap between rule 1-120 and 1-700 and prohibits an attorney from assisting, soliciting, or inducing a judge to violate the canons.

COMMISSION ASSIGNMENT DOCUMENT

Section (g) provides a basis for disciplining a member who engages in conduct that is unbecoming a member of the bar. In *In the Matter of Wensch* (9th Cir. 1996) 84 Fed.3d 1110 the Ninth Circuit declared the provision prohibiting offensive personality by members of the bar as codified in Business & Professions Code Section 6068(f) unconstitutionally vague. The Wensch decision has meant that certain conduct that many lawyers and the bar believe is improper could not be prosecuted. The language “conduct unbecoming a member of the bar” has been approved by the Ninth Circuit and it has been found to meet constitutional requirements. (See *United States v. Hearst* (9th Cir. 1981) 638 Fed.2d 1190, 1197.)

B. New Comments from OCTC:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

IV. **Potential Deficiencies in the Current Rule:**

A. See Section III above for OCTC’s recommendation to expand the scope of rule 1-120 to include new standards that are derived from ABA Model Rule 8.4.

B. Professional Competence staff observes that rule 1-120 does not impose a duty on a lawyer to report any unprivileged knowledge of another attorney’s misconduct that raises a substantial question as to that attorney’s honesty, trustworthiness or fitness as a lawyer. (See San Diego County Bar Association Ethics Opinion No. 1992-2 in which the San Diego Bar Association’s Ethics Committee opines that: “there is no ethical duty imposed by the California Rules of Professional Conduct upon California attorneys to report the misconduct of other attorneys. This is true regardless of the nature or magnitude of such misconduct.”). Attached is an excerpt from the first Commission’s report on “Rules and Concepts that were Considered but are Not Recommended for Adoption.” This report summarizes the State Bar’s consideration of ABA Model Rule 8.3 (“Reporting Professional Misconduct”) in connection with the work of the first Commission. Regardless of the prior consideration, the drafting team may want to take a fresh look at whether Rule 1-120 should be expanded to impose a permissive or mandatory duty to report another lawyer’s misconduct. This possible change could be viewed as an enhancement that promotes greater confidence in the legal profession and administration of justice in furtherance of the self-regulation responsibilities of a mandatory State Bar.

V. **California Context:**

A. 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.

COMMISSION ASSIGNMENT DOCUMENT

Examples include: (1) a lawyer's use of a "runner" or "capper" to procure clients (Business and Professions Code section 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 section 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)).

VI. *Approach In Other Jurisdictions (National Backdrop):*

A. See Section III above for OCTC's recommendation to expand the scope of rule 1-120 to include new standards that are derived from ABA 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

The ABA provides a separate chart for Model Rule 8.4, Comment [3]:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4_cmt_3.authcheckdam.pdf

B. See Section IV.B above for Professional Competence staff's discussion of a lawyer's duty to report the misconduct of another attorney. The ABA State Adoption Chart for Model Rule 8.3 is posted at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_3.authcheckdam.pdf

VII. *Public Comment Received by the First Commission:*

A. The clean text of a proposed new rule 8.4 (including paragraph (a) which is the direct counterpart to rule 1-120) drafted by the first Commission and adopted by the Board to replace the provisions of rule 1-120 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although this proposed rule is much broader than rule 1-120, the drafting team may consider to what extent, if any, the public comments received might offer helpful information in analyzing the current rule and/or the OCTC recommendations.

COMMISSION ASSIGNMENT DOCUMENT

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 1-120 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple references in this assignment document to a particular issue do not necessarily warrant the drafting team taking action on an issue and recommending a rule change.)

(1) Whether the concept of prohibited "attempts" to violate the rules should be considered in connection with rule 1-120.

(2) Whether a duty to report known violations of the rules should be considered in connection with rule 1-120.

IX. Research Resources:

Cases that Might be Helpful in Considering Rule 1-120:

- [McIntosh v. Mills](#) (2004) 121 Cal.App.4th 333, 350 [17 Cal.Rptr.3d 66]
- [Kitsis v. State Bar](#) (1979) 23 Cal.3d 857, 866 [153 Cal.Rptr. 836]
- [In re Arnoff](#) (1978) 22 Cal.3d 740, 744-745 [150 Cal.Rptr. 479]

Cases that Might be Helpful in Considering the Issue of an Attempted Violation of a Rule.

- [Walker v. State Bar](#) (1989) 49 Cal.3d 1107 [264 Cal.Rptr. 825]
- *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752
- *In the Matter of Scapa* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr.
- *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838
- *In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47
- [Davis v. State Bar](#) (1983) 33 Cal.3d 231 [188 Cal.Rptr. 441]

Ethics Opinions that Might be Helpful in Considering the Issue of a Duty to Report Another Lawyer's Misconduct:

- [San Diego County Bar Association Ethics Opinion No. 1992-2](#)
- Los Angeles County Bar Association Formal Opinion No. 440 (not available on the LACBA website, contact staff for a copy)
- [Bar Association of San Francisco Ethics Opinion No. 1977-1](#)

Cases Referenced in the First Commission's Proposed Rule 8.4:

- [In re Kelley](#) (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]
- [In re Rohan](#) (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] (wilful failure to file a federal income tax return)
- [In re Morales](#) (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] (twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer)
- [Gassman v. State Bar](#) (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]
- [Jackson v. State Bar](#) (1979) 23 Cal.3d 509 [153 Cal.Rptr. 24]
- *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363 (habitual disregard of clients' interests)
- [Grove v. State Bar](#) (1967) 66 Cal.2d 680 [58 Cal.Rptr. 564]
- [Martin v. State Bar](#) (1978) 20 Cal.3d 717 [144 Cal.Rptr. 214]
- [Selznick v. State Bar](#) (1976) 16 Cal.3d 704 [129 Cal.Rptr. 108]
- *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179 (pattern of misconduct)
- [In re Calaway](#) (1977) 20 Cal.3d 165 [141 Cal.Rptr. 805] (act of baseness, vileness or depravity in the private and social duties which a man or woman owes to fellow human beings or to society in general, contrary to the accepted and customary rule of right and duty between human beings)
- [In re Craig](#) (1938) 12 Cal.2d 93 [82 P.2d 442]
- [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)

COMMISSION ASSIGNMENT DOCUMENT

- *In the 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)

Selected State Bar Act Sections:

1. [Business and Professions Code § 6068\(a\)](#)
2. [Business and Professions Code § 6103](#)
3. [Business and Professions Code § 6106](#)

Table of Contents

May 19, 2015 Kehr Email to Drafting Team, cc Difuntorum, Mohr & Lee:.....	1
Excerpt from Kehr Memo to Rule 3-110 Drafting Team re Model Rules 5.1, 5.2 & 5.3:.....	2
May 26, 2015 Cardona Email to Kehr, cc Langford, Difuntorum, Mohr & Lee:	3
May 26, 2015 Drafting Team Memo Response to May 19, 2015 Kehr Email:	4

Intra-Commission Emails Following Agenda Mailing:

May 19, 2015 Kehr Email to Drafting Team, cc Difuntorum, Mohr & Lee:

I have the following thoughts on your proposed draft ---

1) I disagree with your inclusion of "attempt" in proposed paragraph (a)(i). It was the consensus of the first Commission that the possibility of discipline for an attempted violation should be examined on a Rule by Rule basis, and it therefore did not include attempts in its Rule 8.4 (and this was approved by the Board of Governors). A prohibition on attempted violations is a fine example of the aspirational nature of the Model Rules that we are directed by the Supreme Court to avoid. Here is an example of my concerns: Lawyer miswords a fee agreement so that it provides for a fee that exceeds the statutory limits set in Bus. & Prof. C. § 6146 and therefore calls for a fee that is "illegal" within the meaning of Rule 1.5/4-200. However, Lawyer catches her drafting error before the client has signed the fee agreement and offers a corrected proposal that the client does sign. Lawyer has not violated the Rule 1.5/4-200 prohibition b/c she did not "enter into an agreement for, charge, or collect an illegal fee." I do not believe Lawyer should be involved in the disciplinary system in these circumstances. I think the recommendation to include attempted violations in this Rule is based on a misunderstanding of the first Commission's reasoning. Beginning at p. 3 of the Comments & Discussion memo, it is explained that including attempts would provide "clear and enforceable articulation of disciplinary standards", but that follows from the idea that the first Commission rejected including attempted violations so that they could be considered on a case-by-case basis. I don't believe the first Commission ever suggested that the disciplinary authorities should have the authority to decide on their own whether to charge an attempted violation, and there was no proposed Rule that gave that authority. The idea was that there should be a Rule-by-Rule decision on whether an attempt should be violated. I believe the result of this was that the first Commission did not include attempted violations in any Rule it sent to the Board of Governors or that was approved by the Board.

2) I disagree with your inclusion of "ratify" in proposed paragraph (a)(iii). This concept comes from MRs 5.1 and 5.3, which is where I believe it should be addressed. I think the same is true of proposed paragraphs (b), (c), (d), and (e). Among other things, placing Rule 5.1-5.3 in Rule 8.4/1-120 would make them more difficult to locate and would make them harder to understand by mixing them with the distinct Rule 8.4 concepts. B/c of the possibility that the Commission will decide to add the supervising and subordinate lawyer concepts to this Rule, I have attached for your information a Memo I did to the Rule 1.1/3-110 drafting team that includes an analysis of Rules 5.1-5.3. This is an initial draft on which the drafting team has not commented.

3) I disagree with proposed paragraph (a)(iv) in two ways:

- a. Unlike the first Commission's proposed Rule 8.4(e) (and the MR version) it does not prohibit a lawyer from saying that she has "an ability to influence improperly a government agency or official". I believe it should, and I do not see any explanation for why this was not included.
- b. The (a)(iv) prohibition is limited to "these Rules or the State Bar Act." The first Commission in its Rule 8.4(e) included "other law". I do not see any reason for not prohibiting a lawyer from saying that she can achieve a result in violation of other legal prohibitions, and I do not see any explanation for this.

4) Although this report refers to MR 8.4, its only explanation for not including any version of the first Commission's Rule 8.4(b), (c), (d), or (f) is in the attached Comments & Discussions memo, which argues that they should be in rule 3-110/1.1 (competence) or in rule 1-100. As to the former, I do not see that any of these paragraphs necessarily implicate the competence of a lawyer's representation of a client, and any of them can be violated where there is no lack of competence. Furthermore, attempting to squeeze them into the competence rule would twist it out of any recognizable shape and leave uncertainty about what is meant by competence. My attached Memo provides my preliminary thoughts about Rule 1.1/3-110. As far as placing those four paragraphs in rule 1-100, doing so would alter the rule, which currently does not contain substantive disciplinary provisions.

5) I would replace this proposal with the first Commission's proposed Rule 8.4, including its title.

6) I have not considered the proposed Comments (nor have I reconsidered the first Commission's Rule 8.4 Comments), an exercise that I think should wait until we have a fix on the content of the Rule.

7) I would not accept or reject MR 8.3 in the context of Rule 8.4/1-120. MR 8.3 raises complex and difficult issues that caused a great deal of sometimes passionate debate on the first Commission. The first Commission ultimately voted to approve a modified version of MR 8.3, but it was rejected by the Board of Governors. MR 8.3 needs to be considered, but this should be in isolation so that it is the focus of our attention. Although Rules 5.1-5.3 were not as controversial at the first Commission, I urge that not be considered as an afterthought to Rule 8.4.

8) The first sentence of the drafting teams attached Comments & Discussion memo is not correct in saying that rule 1-120 "is the only current rule that holds members responsible for violations of the rules committed by others". See, e.g., rules 1-300 and 1-311 and Bus. & Prof. C. § 6090.5.

Attached:

RRC2 - [3-110][1-1][1-3][5-1][5-2][5-3] - 04-18-15 Kehr Email to Drafting Team.doc

Excerpt from Kehr Memo to Rule 3-110 Drafting Team re Model Rules 5.1, 5.2 & 5.3:

3. Should a lawyer's duty to supervise others be separated from the competence rule, as is done in MRs 5.1, 5.2, and 5.3?

The first paragraph of the *Discussion* to current CRPC 3-110 cites to a long line of California disciplinary cases that stand for the proposition that a lawyer's duties "include the duty to supervise the work of subordinate attorney and non-attorney employees or agents." The fact that lawyers are subject to discipline and have been disciplined for failing to supervise makes it arguable that MRs 5.1 and 5.3 are not needed. Despite this, I recommend the adoption of versions of these two MRs, and of MR 5.2. My reasoning is as follows:

- CRPC 3-110 works well when the supervising lawyer is a sole practitioner or in a firm that is small enough so that a lawyer's individual responsibility is reasonably

clear. It is not at all clear how it would be applied in larger law firms. This is a concern because responsibility can be diffused: Who would be responsible for a failure to supervise if there are ten or twenty lawyers working on a major project?¹

- MRs 5.1 and 5.2 extend beyond the duty to supervise that is implicit in CRPC 3-110 and include 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 representation in compliance with other ethical standards. For example, a law firm must have conflict checking procedures and a firm culture that assures compliance with those procedures in order to avoid conflicts of interest. MRs 5.1 and 5.3 therefore have a considerably wider application than the supervision standard currently part of CRPC 3-110.
- CRPC 3-110 includes a duty to supervise but says nothing about the subordinate lawyer's duties, except to be competent. MR 5.2 addresses the broader meaning of MR 5.1 – the managing lawyers' duty to assure ethical conduct - by making clear that a subordinate generally cannot defend a disciplinary charge by blaming the supervisor.²
- California's current Rules have no equivalent to MR 5.2. However, it is consistent with existing 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. Adding a version of MR 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. Rules 5.1, 5.2, and 5.3 complement one another in a logically consistent package. Also, MR 5.2 strikes the proper balance between a subordinate's duties as a lawyer and the subordinate's duty to the organization.

May 26, 2015 Cardona Email to Kehr, cc Langford, Difuntorum, Mohr & Lee:

Thank you for the comments. Attached is a memo with the drafting team's responses. I hope this clarifies our positions on some of the points you raise. As noted, I think our differences pose some basic issues that will need to be resolved by the Commission as a whole.

Attached:

RRC2 - [1-120] - 05-26-15 Drafting Team Response to 05-19-15 Kehr Email.pdf

¹ All other jurisdictions have adopted a version of MR 5.1. I will discuss possible changes later in this Memo.

² All other jurisdictions except Kentucky and Virginia have adopted a version of MR 5.2 and only a few with any change.

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_2.authcheckdam.pdf

May 26, 2015 Drafting Team Memo Response to May 19, 2015 Kehr Email:

Drafting Team Response to Comments from Mr. Kehr

(Mr. Kehr's comments in italics, followed by drafting team response)

- 1) *I disagree with your inclusion of “attempt” in proposed paragraph (a)(i). It was the consensus of the first Commission that the possibility of discipline for an attempted violation should be examined on a Rule by Rule basis, and it therefore did not include attempts in its Rule 8.4 (and this was approved by the Board of Governors). A prohibition on attempted violations is a fine example of the aspirational nature of the Model Rules that we are directed by the Supreme Court to avoid. Here is an example of my concerns: Lawyer miswords a fee agreement so that it provides for a fee that exceeds the statutory limits set in Bus. & Prof. C. § 6146 and therefore calls for a fee that is “illegal” within the meaning of Rule 1.5/4-200. However, Lawyer catches her drafting error before the client has signed the fee agreement and offers a corrected proposal that the client does sign. Lawyer has not violated the Rule 1.5/4-200 prohibition b/c she did not “enter into an agreement for, charge, or collect an illegal fee.” I do not believe Lawyer should be involved in the disciplinary system in these circumstances. I think the recommendation to include attempted violations in this Rule is based on a misunderstanding of the first Commission’s reasoning. Beginning at p. 3 of the Comments & Discussion memo, it is explained that including attempts would provide “clear and enforceable articulation of disciplinary standards”, but that follows from the idea that the first Commission rejected including attempted violations so that they could be considered on a case-by-case basis. I don’t believe the first Commission ever suggested that the disciplinary authorities should have the authority to decide on their own whether to charge an attempted violation, and there was no proposed Rule that gave that authority. The idea was that there should be a Rule-by-Rule decision on whether an attempt should be violated. I believe the result of this was that the first Commission did not include attempted violations in any Rule it sent to the Board of Governors or that was approved by the Board.*

Our recommendation that we include attempt is not based on a misunderstanding of the first Commission’s reasoning, but on our belief that it makes sense to permit discipline for attempts to violate the rules as a general matter, rather than on a rule by rule basis. This conclusion is, as we indicated in our draft, premised on the assumption that an appropriate definition of “attempt” will be included in the rules to limit discipline for attempts to violate the rules to those instances where a lawyer’s conduct demonstrates both that the lawyer intends to engage in conduct that would constitute a violation and does something beyond mere preparation that demonstrates that the violation would have occurred unless interrupted by independent circumstances. Under such circumstances, we believe it appropriate for an attorney to face discipline for her attempt to violate any rule, even though her conduct does not result in an actual violation of the particular rule at issue. Moreover, we believe including a general prohibition on attempts, as defined in this way, is not merely aspirational, provides additional clarity to attorneys, and furthers public protection.

With a definition of “attempt” as we propose, we do not believe that a general prohibition on attempts can correctly be characterized as an “example of the aspirational nature of the Model Rules that we are directed by the Supreme Court to avoid.” The hypothetical you pose would not fall within such a proscription on attempts because the lawyer’s conduct indicates that there was neither an intent on the part of the lawyer to violate the rule nor anything to indicate that the violation of the rule would have occurred unless interrupted by independent circumstances – to the contrary, this was an unintentional “miswording” of a fee agreement that constituted a “drafting error” and was corrected by the lawyer herself.

On the other hand, a slightly modified hypothetical demonstrates, we think, the need for a general prohibition on attempts. Here is the modified example: Lawyer intentionally includes in a fee agreement a fee that would be illegal or unconscionable under Rule 4-200, drafting the agreement in such a way that it is difficult to discern the true nature of the fee it calls for. Lawyer presents the agreement to the client. Unbeknownst to lawyer, client asks a close friend who is also a lawyer to review the fee agreement. This friend advises the client that the fee called for is illegal. As a result, client does not sign the agreement. Under these circumstances, we believe it is entirely appropriate to discipline the lawyer for her attempt to enter into the illegal fee agreement. Our general inclusion of a proscription on attempts, with the definition for “attempt” that we propose, would accomplish this.

We could construct similar hypotheticals under a variety of other rules to demonstrate attempted violations of those rules that should merit discipline. But the general point is this – if we define attempt in the way we have proposed, we believe that, with respect to the rules in general, conduct constituting an attempt to violate the rules under that definition would merit discipline.¹

The application by the courts of the rule underlying your hypothetical, Rule 4-200, also demonstrates the need for increased clarity in the rules as to whether or not attempts may be the subject of discipline.

Rule 4-200 does not itself contain language extending its scope to cover attempts to collect illegal or unconscionable fees. Nevertheless, the State Bar Court has upheld discipline where “respondent attempted to collect[] an unconscionable fee.” Matter of Kroff (1998) 3 Cal. State Bar Ct. 838, 1998 WL 182802 at * 17; see also Matter of Scapa (1993) 2 Cal. State Bar Ct. (1993) 635, 646, 652 (upholding “hearing judge’s conclusions that respondents willfully violated the rules of professional conduct prohibiting attempts to charge an unconscionable fee” where attorneys “sought to charge an unconscionable fee as proscribed by rule 2-107 and its successor, rule 4-200”).

On the other hand, another court upheld a finding that a lawyer was “not culpable of violating rule 3-400(A) by his attempt to limit his liability for professional malpractice” in part “because the rule does not prohibit an *attempt* to limit liability.” Matter of Fonte (1994) 2 Cal. State Bar Ct. Rptr. 752, 760. In reaching this conclusion, the court noted that the prior rule (former rule 6-102) “prohibited a member from attempting to limit liability” and that the State Bar’s comments to the Supreme Court on submission of the amended rule “indicated that the redrafted rule 3-44(A) ‘continues the prohibition . . . on attorneys attempting to exonerate themselves from or limit liability.... [emphasis added],’ but concluded that the language of the current rule was “unambiguous” in prohibiting only “contracts, not attempts to contract.” Id.

¹ We believe a general proscription on attempts would also be consistent with the approach of courts that have recognized that attempts to engage in certain conduct may constitute acts involving moral turpitude. See Walker v. State Bar (1989) 49 Cal. 3d 1107, 1113 (upholding finding that attorney “violated Business and Professions Code Section 6106 by willfully misappropriating or attempting to misappropriate funds from his client trust account”). That is, putting attorneys on notice that, as a general matter, attempts to violate the rules may result in discipline would be consistent with the approach that attempts to engage in certain types of conduct may be viewed as conduct involving moral turpitude that may result in discipline.

We believe that the possibility that courts will, as these did, in the absence of explicit language in the rule proscribing attempts, take different approaches in interpreting individual rules as encompassing or not encompassing attempts, poses a lack of clarity to both attorneys and the State Bar in attempting to understand what is and is not within the scope of the rules. We would resolve this by adding a general provision proscribing attempts.²

2) *I disagree with your inclusion of “ratify” in proposed paragraph (a)(iii). This concept comes from MRs 5.1 and 5.3, which is where I believe it should be addressed. I think the same is true of proposed paragraphs (b), (c), (d), and (e). Among other things, placing Rule 5.1-5.3 in Rule 8.4/1-120 would make them more difficult to locate and would make them harder to understand by mixing them with the distinct Rule 8.4 concepts. B/c of the possibility that the Commission will decide to add the supervising and subordinate lawyer concepts to this Rule, I have attached for your information a Memo I did to the Rule 1.1/3-110 drafting team that includes an analysis of Rules 5.1-5.3. This is an initial draft on which the drafting team has not commented.*

See discussion under your comment 5 below. In sum, we believe that placing all of the provisions regarding responsibility for violations of rules committed by others (including responsibility for violations committed by lawyers and/or nonlawyers acting under a member’s supervision) will make these provisions easier to find.

3) *I disagree with proposed paragraph (a)(iv) in two ways:*

- a. Unlike the first Commission’s proposed Rule 8.4(e) (and the MR version) it does not prohibit a lawyer from saying that she has “an ability to influence improperly a government agency or official”. I believe it should, and I do not see any explanation for why this was not included.*
- b. The (a)(iv) prohibition is limited to “these Rules or the State Bar Act.” The first Commission in its Rule 8.4(e) included “other law”. I do not see any reason for not prohibiting a lawyer from saying that she can achieve a result in violation of other legal prohibitions, and I do not see any explanation for this.*

See discussion under your comment 5 below. In sum, we believe that these principles from 8.4, which create new substantive violations independent of the rules themselves, do not belong in a rule that defines responsibility for violations of the other rules, but rather are appropriately placed in a new rule creating the new substantive obligations.

4) *Although this report refers to MR 8.4, its only explanation for not including any version of the first Commission’s Rule 8.4(b), (c), (d), or (f) is in the attached Comments & Discussions memo, which argues that they should be in rule 3-110/1.1 (competence) or in rule 1-100. As to the former, I do not see that any of these paragraphs necessarily implicate the competence of a lawyer’s representation of a client, and any of them can be violated where there is no lack of competence. Furthermore, attempting to squeeze them into the competence rule would twist it out of any recognizable shape and leave uncertainty about*

² If the opposite conclusion is reached, and the determination is made to proscribe attempts only for particular rules, we believe the rules should make this clear and state (whether in rule or comment) that an attempt to engage in particular conduct can constitute a violation of a particular rule only if that particular rule includes language extending the rule to cover attempts.

what is meant by competence. My attached Memo provides my preliminary thoughts about Rule 1.1/3-110. As far as placing those four paragraphs in rule 1-100, doing so would alter the rule, which currently does not contain substantive disciplinary provisions.

See discussion under your comment 5 below. In sum, the only provisions that we believe should be included in Rule 3-110 (competence) are the portions of ABA MR 5.1 and 5.3 that define the duty to supervise lawyers and nonlawyers, a supervisory duty already currently included in the commentary to Rule 3-110 as falling within the duty of competence. The other provisions you cite from ABA MR 8.4 create new substantive obligations independent of the rules; accordingly, we believe they do not belong in a rule that defines responsibility for violations of the other rules, but rather are appropriately placed in a new rule creating the new substantive obligations.

5) *I would replace this proposal with the first Commission's proposed Rule 8.4, including its title.*

Your comments 2-5 all present a significant substantive issue that I think will need to be resolved, namely, is our plan: (a) to move to a system of rules that, while incorporating principles from both the current California rules and ABA model rules, analogizes more closely to the ABA model rules; or (b) stick to the current system of rules but incorporate into those rules principles from the ABA model rules as appropriate. Our draft is premised on the latter approach, as explained in more detail below. If we take this approach, we believe that our draft makes sense.³

As explained in our drafting comments, when we look at current Rule 1-120, we see a rule that does not itself define particular substantive conduct as constituting a violation of the rules, but rather sets out the circumstances under which a member will be responsible for substantive violations of the other rules that are not committed solely by that member, but involve another's conduct as well. In this sense, Rule 1-120 is analogous to 18 U.S.C. § 2 of the federal criminal code, which does not define a substantive crime, but rather states the circumstances under which a defendant can be responsible for criminal conduct committed by others, that is, by aiding or abetting in the commission of, or causing another to commit, any of the substantive crimes defined in the other sections of the criminal code. Our draft attempts to adhere to this general approach of current Rule 1-120 by (a) not incorporating into Rule 1-120 any prohibitory language that would create a substantive violation independent of the other rules and (b) incorporating into the rule those additional principles from the ABA model rules that relate to a member's responsibility for violations of the other rules committed by others.

Putting aside any differences that may exist over the merits of the particular substantive provisions, it is in accordance with principle (a) above that we have not incorporated into our draft of a proposed new Rule 1-120 the following substantive provisions from ABA Model Rules 5.1, 5.3, and 8.4, all of which create new substantive duties/violations, and which we have

³ If we were to make the move to a system of rules that tracks more closely the organization and approach of the ABA model rules (as the First Commission did), then your suggestion that Rule 1-120 be converted into something more akin to ABA Model Rule 8.4 (after appropriate discussion and review of the various additional substantive prohibitions contained within that rule) and leaves ABA Model Rules 5.1, 5.2, and 5.3 for independent adoption, might be more appropriate.

assumed would (to the extent their adoption is desired by the Commission) either be incorporated into other of the current rules (as redrafted) or be the subject of new rules:

- (1) ABA Model Rule 5.1(a), (b): recognize an independent substantive duty to supervise other lawyers *[appear appropriate for incorporation into Rule 3-110, which already references this duty in its comments as falling within the concept of competence]*;
- (2) ABA Model Rule 5.3 (a), (b): recognize an independent substantive duty to supervise other non-lawyers *[appear appropriate for incorporation into Rule 3-110, which already references this duty in its comments as falling within the concept of competence]*;
- (3) ABA Model Rule 8.4(b): makes it a substantive violation of the rules to commit a criminal act reflecting adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer *[new substantive rule along with the provisions from 8.4(c), (d), (e) (portions), and (f)]*;
- (4) ABA Model Rule 8.4(c): makes it a substantive violation of the rules to engage in conduct involving dishonesty, fraud, deceit or misrepresentation *[new substantive rule along with the provisions from 8.4(b), (d), (e) (portions), and (f)]*;
- (5) ABA Model Rule 8.4(d): makes it a substantive violation of the rules to engage in conduct that is prejudicial to the administration of justice *[new substantive rule along with the provisions from 8.4(b), (c), (e) (portions), and (f)]*;
- (6) ABA Model Rule 8.4(e) (portions): makes it a substantive violation of the rules to state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate laws other than the rules *[new substantive rule along with the provisions from 8.4(b), (c), (d), and (f)]*;
- (7) ABA Model Rule 8.4(f): makes it a substantive violation of the rules to knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law *[new substantive rule along with the provisions from 8.4(b), (c), (d), and (e) (portions)]*.

On the other hand, it is in accordance with principle (b) above that we have incorporated into our draft of a proposed new Rule 1-120 the following provisions from ABA Model Rules 5.1, 5.2, 5.3, and 8.4 that do not create new substantive duties/violations, but instead relate to either (a) responsibility for violations of the other substantive rules committed, in whole or part, by others or (b) conduct relating to violations of the other substantive rules that may result in discipline:

- (1) ABA Model Rule 5.1(c): responsibility for violations of the substantive rules committed by other lawyers (including ordering or ratifying such violations);
- (2) ABA Model Rule 5.2(a): responsible for violations of the substantive rules even if acting at direction of another lawyer or other person;
- (3) ABA Model Rule 5.2(b): not responsible for violations of the substantive rules if acting in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty;
- (4) ABA Model Rule 5.3(c): responsibility for violations of the substantive rules committed by other nonlawyers (including ordering or ratifying such violations);
- (5) ABA Model Rule 8.4(a): responsible for violations or attempted violations committed directly or through the acts of another;
- (6) ABA Model Rule 8.4(e) (portions): violation to state or imply an ability to achieve a result on behalf of a client by means that violate the other substantive rules.

We also believe that incorporating these "responsibility" provisions in one rule provides a clarity and ease of use benefit, in that it enables attorneys to look at a single rule containing all the

provisions under which, as a general matter, they may be held responsible for violations of the rules committed by others.⁴

- 6) *I have not considered the proposed Comments (nor have I reconsidered the first Commission's Rule 8.4 Comments), an exercise that I think should wait until we have a fix on the content of the Rule.*

We agree that consideration of the comments should be put off until we straighten out what approach we should be taking with respect to the Rule itself.

- 7) *I would not accept or reject MR 8.3 in the context of Rule 8.4/1-120. MR 8.3 raises complex and difficult issues that caused a great deal of sometimes passionate debate on the first Commission. The first Commission ultimately voted to approve a modified version of MR 8.3, but it was rejected by the Board of Governors. MR 8.3 needs to be considered, but this should be in isolation so that it is the focus of our attention. Although Rules 5.1-5.3 were not as controversial at the first Commission, I urge that not be considered as an afterthought to Rule 8.4.*

We agree that ABA MR 8.3 should be the subject of additional consideration since it poses difficult issues. As we have indicated in our proposal, in response to the request in our assignment memo that we consider this rule, our initial inclination is that a reporting obligation should not be adopted, but there are pros and cons that certainly merit further discussion, and we agree that consideration should be postponed until more robust public comment on the relative pros and cons can be solicited, including anticipated comments from OCTC and the State Bar Court. In addition, we agree that ABA MR 8.3 would not fit as part of Rule 1-120 (whether as we have drafted it or if converted to an analogue to ABA MR 8.4 as you suggest), and this is another reason we agree its consideration should be postponed.

- 8) *The first sentence of the drafting teams attached Comments & Discussion memo is not correct in saying that rule 1-120 "is the only current rule that holds members responsible for violations of the rules committed by others". See, e.g., rules 1-300 and 1-311 and Bus. & Prof. C. § 6090.5.*

See Discussion in footnote 4 under your comment 5 above.

⁴ In this regard, as you have pointed out (see your comment 8 below) there are two other rules that contain prohibitions, in specific circumstances, on aiding another in certain conduct. Rule 1-300 states that a member shall not "aid" an person or entity in the unauthorized practice of law. Rule 1-311(B) states that, with certain exceptions set forth in subsection (C) a member shall not "aid" a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform certain specified activities. These are provisions of limited application. Rule 1-120 is the only current rule that sets out, for general application, principles on which members are responsible for violations of the rules committed, in whole or in part, by others. Our proposal incorporates into this rule other responsibility principles of general applicability.



THE STATE BAR OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

TELEPHONE: (415) 538-2167

STATE BAR Commission for the Revision of the Rules of Professional Conduct - RULES AND CONCEPTS THAT WERE CONSIDERED, BUT ARE NOT RECOMMENDED FOR ADOPTION

(Updated to reflect the Board of Governor's action at its July 22 - 24, 2010 meeting.)

Overview of the Commission's Study:

The State Bar's Special Commission for the Revision of the Rules of Professional Conduct conducted a thorough study of the California Rules of Professional Conduct. The Commission considered each of the current California rules in rule number order. In considering each rule, any relevant ABA Model Rule or ALI Restatement section was compared and contrasted as to policy, scope, and drafting details.

The Commission also considered state variations in the Model Rules as some jurisdictions have declined to adopt certain aspects of the ABA Model Rules, or have adopted them with material revisions. Further, the Commission considered law review articles, ethics opinions issued by jurisdictions outside California that were based either on that jurisdiction's version of the Model Rules or on the earlier ABA Model Code, and national studies and other major developments, trends, and initiatives, such as multijurisdictional practice ("MJP") and multidisciplinary practice ("MDP"). The ABA Model Code, the American Trial Lawyers Association American Lawyer's Code of Conduct, and other authorities were also reviewed in connection with certain topics. Of particular interest to the Commission were the developments in California case law and advisory ethics opinions published by COPRAC and bar association ethics committees in California.

In carrying out its study, the Commission considered rules and concepts that it concluded should not be included in the Commission's final report and recommendation for revised California Rules of Professional Conduct. The following discussion summarizes these rules and concepts.

ABA Model Rules Not Recommended for Adoption:

List of Model Rules Considered but not Recommended for Adoption

<u>Model Rule</u>	<u>Title</u>
1.3	Diligence
1.8(d)	(re Literary or Media Rights)
1.8(i)	(re Proprietary Interest in the Subject Matter of Representation)
1.10(a)(2)	Imputation of Conflicts of Interests: General Rule (re use of an ethical wall or screen to rebut imputation)
1.18(d)(2)	Duties to Prospective Clients (re use of an ethical wall or screen to rebut imputation)
2.3	Evaluation for Use by Third Parties
3.2	Expediting Litigation
4.1	Truthfulness in Statements to Others
4.4	Respect for Rights of Third Persons
5.7	Responsibilities Regarding Law Related Services
7.6	Political Contributions to Obtain Government Legal Engagements or Appointments by Judges
8.3	Reporting Professional Misconduct

contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

The Commission is recommending that Model Rule 7.6 not be adopted because its substance is addressed adequately by Business and Professions Code section 6106, a State Bar Act statute serving as a disciplinary standard that encompass various forms of egregious misconduct, including acts of dishonesty and corruption, and criminal prohibitions relative to bribery and attempts to influence the conduct of elected officials. In addition, a lawyer who engages in such misconduct would be in violation of other rules the Commission has proposed, such as Rules 3.5 (impartiality of a tribunal) and 8.4 (misconduct). Further, the Commission is concerned about potential uneven application of Rule 7.6 and questions whether the Rule would be effective. The Commission does not interpret Model Rule 7.6 as reaching the improper conduct itself. The Rule does not prohibit a lawyer from contributing money to a political campaign to obtain an appointment or engagement, but rather prohibits the lawyer from *accepting* the appointment or engagement. Moreover, in studying this Rule, the Commission determined that Model Rule 7.6 is the least adopted of the ABA Model Rules. As of May 1, 2009, only seven jurisdictions had adopted the Rule (Colorado, Delaware, Idaho, Iowa, Maine, Missouri, and Washington). Consistent with the foregoing, the Commission believes that the misconduct that might be covered by Model Rule 7.6 is better regulated in California by Business and Professions Code section 6106 and by the provisions of the other proposed rules that are recommended by the Commission.

The Commission members unanimously approved the foregoing recommendation.

12. Model Rule 8.3 Reporting Professional Misconduct

Model Rule 8.3 provides:

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the

Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

At its meeting on July 22 – 24, 2010, the Board of Governors decided not to recommend the adoption of a California counterpart to Model Rule 8.3. The proposal considered by the Board was a Commission recommendation for a rule that was partly permissive and partly mandatory. The Commission's proposed rule would have set a standard of permissive reporting for general misconduct that implicates a lawyer's fitness to practice but, in circumstances where a lawyer knows that another lawyer has committed a felonious criminal act that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness, the Rule would have imposed a mandatory reporting obligation. The Commission's proposal differed from Model Rule 8.3, which *mandates* reporting of *any* violation of the Rules (not just

felonious conduct) “that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”

The Board’s action appeared to reflect two concerns. First, the Board seemed to be concerned that lawyers might find it difficult to comply with a rule that appears to assume expertise on the issue of whether misconduct would constitute a felony. Second, it appeared that the Board shared some of the concerns expressed by a minority of the Commission that viewed any mandatory reporting rule as the wrong public policy for California. The minority statement observed that mandatory reporting issues often arise in the midst of representing a client and that the experience in jurisdictions with mandatory reporting is that when reporting occurs in this context, an innocent client might suffer. The minority asserted that reporting can lead to disputes among the lawyers representing clients in a matter and that this could cause a change in counsel, imposing delays and costs on innocent clients. In accordance with the Board’s determination, a California counterpart to Model Rule 8.3 is not being recommended for adoption.

Other Concepts for Possible Rules or Additions to Rules Not Recommended for Adoption:

List of Concepts for New Rules or Additions to Model Rules Considered but not Recommended for Adoption

1. Hourly/Time Billing Rule
2. Class Action Rule
3. Law Firm Discipline Rule
4. Good Faith Reliance on Advice of Counsel Rule
5. Waiver of Attorney-Client Privilege Rule
6. Use of Private Will Depositories
7. Practice Succession Plan
8. Lawyer Acting As Lobbyist
9. Proposed Rule 1.11(e) Special Conflicts Of Interest For Former And Current Government Officers And Employees (re requiring imputation of conflicts when government lawyer has moved from private practice and use of an ethical wall or screen to rebut imputation)
10. Special Provisions for the Regulation of Nonrefundable Advance Fees Under Proposed Rule 1.5 (Fees For Legal Services)

1. Hourly/Time Billing Rule

A member of the Commission suggested a new rule focusing on abusive billing practices, in particular practices arising from hourly and other time-based fee arrangements. In addition, the Commission received input from a concerned lawyer who asserted that clients in hourly fee arrangements, and the general public’s perception of lawyers, suffer due to abusive billing practices. In support of the suggested rule, the Commission was referred to various articles and studies, including an article entitled “Time Bandits” ([Los Angeles Lawyer](#), March 2001, vol. 24 no. 1, by Gerald F. Phillips) in which the author states:

The fact that lawyers are held in very low esteem is without dispute. While the causes of this poor standing are varied and worth debating, it is clear that overbilling is partly responsible. Time padding and task padding are major