

**Draft Opinion 20-0002 – Succession Planning
Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Position	Comment	COPRAC Response
1	Schneidereit, Adele (17385609)	N	O		
2	Zohrabyan, Narek (17385949)	N	SM	Sure so long as there is actual training and support from the calbar on how to setup such mechanisms for such an eventuality.	The opinion as drafted already cites Cal. State Bar and ABA online resources on succession planning.
3	Anthes, Louis (17450389)	N	O	<p>I write this comment to express my concern that imposing further obligations on lawyers to engage in succession planning to benefit clients will likely have the effect of discriminating among those lawyers whose practice focuses on discrete legal services of relatively short duration in which the client's assets and financial needs are relatively less significant than other clients more capitalized.</p> <p>As is often the case with proposed expansion of CRPC rules, the current rules adequately address attorneys' duties to protect clients' interests in those cases where lawyer-client relationships encompass on-going, long-term services to protect a client having significant assets.</p> <p>For the above-stated reason, I am opposed to expanding the rules of professional conduct which impose</p>	<p>The concern seems to be that the opinion provides ethical guidance that is more likely to apply in long-term client relationships than in short-term client relationships, and that this is somehow unfair to lawyers with long-term client relationships.</p> <p>The opinion's guidance could apply to both short-term and long-term client relationships. A lawyer's inability to practice law or incapacity can affect lawyers in both situations.</p>

TOTAL =7 S = 0
SM = 5
O = 2

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				class-based expectations on all attorneys across the board. The State Bar should demonstrate its recognition and understanding that attorneys serve different social needs and that "one-size-fits-all" approaches often have the effect of social discrimination among attorneys and the clients attorneys serve.	
4	McCrea, Don (17525244)	N	SM	This is an excellent first draft for law firm succession planning. However, there are a number of elements missing, based on my experience with business exit planning, of which succession planning is a significant piece. See the attachment for suggested additions. Let me know if you have questions or want more input.	The provided attachment does nicely outline goals and steps. We should review the opinion and determine if there are ways we can clarify the goals and steps outlined in the opinion to be more reader-friendly.
5	Rudolph, Anne (17694366)	N	SM	As a trusts and estates specialist who has dealt with succession planning, I am very puzzled about the oversights in this proposed opinion. The proposed opinion seems to suggest that an appropriate and viable plan is simply to identify another attorney to assist. But, an attorney cannot just hand off clients to another attorney of their choice who the client has not hired, and with whom there is no attorney-client privilege.	See comments re: CLA. Some additional discussion of Probate Code to provide statutory references may be appropriate, as well as clarifying the use of the term Practice Administrator.

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				<p>Here are some thoughts on the proposed opinion: The opinion does not even mention applicable statutes that address how to deal with the practice of a disabled or deceased attorney.</p> <p>The opinion refers to a "Practice Administrator" as an agreement between Lawyer B and C to be an "assisting attorney." But, a Practice Administrator is a court-appointed role. Probate Code section 2468 provides a procedure for appointment of a practice administrator to deal with the practice of a disabled attorney.</p> <p>Probate Code section 9764 provides a procedure for appointment of a practice administrator to deal with the practice of a deceased attorney.</p> <p>Probate Code section 17200(b)(23) provides that when an attorney has transferred their practice to a trust, and then becomes disabled, a petition to appoint a practice administrator under PC section 2468 may be initiated. B&P section 6185 sets out the duties of a practice administrator appointed under the above statutes.</p>	

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				<p>None of these statutes setting out the practice administrator... .. procedure are even mentioned, other than a passing reference to B&P section 6185 in footnote 8. How can you have an opinion about the need to do succession planning and not mention these statutes?</p> <p>There are issues of confidentiality that seem to be ignored in the proposed opinion also. It recommends giving somebody passwords so they have access to confidential client information in the event the attorney dies or becomes disabled. An attorney cannot share a client's confidential information without their informed consent.</p> <p>How do you have an appropriate succession plan? Do a proper estate plan and nominate a practice administrator. The person nominated will need a court order, which can be obtained ex parte if needed.</p>	
6	California Lawyers Association (Buchanan) (17848059)	Y	SM	See att.	<p>The proposal to re-phrase parts of the Digest seems acceptable.</p> <p>CLA seems to propose adding discussion about diminished capacity situations resulting in the need for</p>

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O = 2**

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					<p>succession planning. Cross-reference to our diminished capacity opinion may be appropriate, but without getting too far afield on sub-issues. Other wordsmithing proposals seem acceptable.</p> <p>There is reference to adding Probate Code sections to more specifically address death of the lawyer. As this comment was raised in another comment, it seems worthy of further explication, at least in a footnote that provides statutory references for the reader.</p>
7	Lee, Olivia (17849259)	N	SM	I just wanted to note that the Santa Clara County Counsel Attys. Assn v. Woodside case that is cited on page 5, under Duty of Loyalty, is from 1994. The proposed opinion incorrectly cites it as a 1984 case.	This should be changed to say 1994.

Public Comment - Proposed Opinion 20-0002

Commenting on behalf of an organization	No
Name	Adele Schneidereit
City	Atascadero
State	California
Email address	adele@amslawoffices.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

Public Comment - Proposed Opinion 20-0002

Commenting on behalf of an organization	No
Name	Anne Rudolph
City	San Diego
State	California
Email address	arudolph@hplawsd.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>As a trusts and estates specialist who has dealt with succession planning, I am very puzzled about the oversights in this proposed opinion.</p> <p>The proposed opinion seems to suggest that an appropriate and viable plan is simply to identify another attorney to assist. But, an attorney cannot just hand off clients to another attorney of their choice who the client has not hired, and with whom there is no attorney-client privilege.</p> <p>Here are some thoughts on the proposed opinion:</p> <p>The opinion does not even mention applicable statutes that address how to deal with the practice of a disabled or deceased attorney.</p> <p>The opinion refers to a "Practice Administrator" as an agreement between Lawyer B and C to be an "assisting attorney." But, a Practice Administrator is a court-appointed role.</p> <p>Probate Code section 2468 provides a procedure for appointment of a practice administrator to</p>

deal with the practice of a disabled attorney.

Probate Code section 9764 provides a procedure for appointment of a practice administrator to deal with the practice of a deceased attorney.

Probate Code section 17200(b)(23) provides that when an attorney has transferred their practice to a trust, and then becomes disabled, a petition to appoint a practice administrator under PC section 2468 may be initiated.

B&P section 6185 sets out the duties of a practice administrator appointed under the above statutes.

None of these statutes setting out the practice administrator...

... procedure are even mentioned, other than a passing reference to B&P section 6185 in footnote 8. How can you have an opinion about the need to do succession planning and not mention these statutes?

There are issues of confidentiality that seem to be ignored in the proposed opinion also. It recommends giving somebody passwords so they have access to confidential client information in the event the attorney dies or becomes disabled. An attorney cannot share a client's confidential information without their informed consent.

How do you have an appropriate succession plan? Do a proper estate plan and nominate a practice administrator. The person nominated will need a court order, which can be obtained ex parte if needed.

Public Comment - Proposed Opinion 20-0002

Reference #	17848059
Status	Complete
Commenting on behalf of an organization	Yes
Professional Affiliation	California Lawyers Association Ethics Committee
Name	Alison Buchanan
City	San Jose
State	California
Email address	alison.buchanan@hogequenton.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ATTACHMENTSYou may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	CLA_ethics_committee_COPRAC_Interim_Op._20-0002_-_succession_planning_signed.pdf (240 KB)
Last Update	2023-09-11 11:14:21
Start Time	2023-09-11 11:08:31
Finish Time	2023-09-11 11:14:21
IP	Anonymous
Browser	Other
Device	Other
Referrer	N/A

September 8, 2023

Committee on Professional Responsibility and Conduct (COPRAC)
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Formal Opinion Interim No. 20-0002 (Succession Planning)

Dear COPRAC members:

On behalf of the California Lawyers Association Ethics Committee, we appreciate the opportunity to comment on COPRAC'S Formal Opinion No. 20-0002.

The ethical issues that arise when a lawyer does not adequately plan ahead of when the lawyer will no longer be practicing law are important. Perhaps most important is the duty to communicate with the lawyer's clients. We offer a few suggestions for improving the Opinion.

1. Points applicable to the Opinion generally

The Opinion identifies some of the ethical issues when a lawyer is unable to practice law, whether on a temporary or permanent basis, but still has an active caseload. The opinion astutely recognizes that a lawyer owes several ethical duties to the lawyer's clients, including duties of competence, diligence and communication, that are implicated when a lawyer does not have a succession plan in place when the lawyer is unable to practice. However, the Opinion understates those duties to clients in planning for those situations. This Opinion has considerable significance for the many California lawyers who are solo practitioners and it should more strongly stress the relevance and importance of those duties.

2. Comments about the Digest

Lawyers who have active caseloads have an ethical obligation to engage in succession planning, since it is virtually impossible to anticipate an "inability to practice law." Instead of leading with the phrase "while no specific Rule of Professional Conduct requires that a California lawyer develop or adopt a succession plan," the digest should start along the following lines: "Existing California rules, including the duty of competence, diligence

and communication, obligate lawyers to take reasonable steps to protect the client's interests in the event the lawyer is no longer in a position to do so."

3. Comments about the Introduction

The introduction assumes that the lawyer's inability to practice law is always a sudden event, such as someone who has a stroke or suffers some other sudden, unexpected illness. But more frequently, as the lawyer population continues to age, skills gradually decline with the result that clients may be prejudiced. This common scenario is not referenced in the opinion. However, it also implicates the duty of competence in Rule 1.1, which requires the mental, emotional and physical health necessary to practice law. It is important this common scenario's contribution to the "great risk of prejudice" to the client referenced in the second sentence of the Introduction be explained at the outset of this opinion: The client's best position is at risk of not being fully and fairly presented in a matter because of the lawyer's partial or complete lack of competence.

The last paragraph of the Introduction, which leads with "[m]any law firms also see succession plans for senior lawyers as a good business strategy," seems out of place for an ethics opinion. That statement may be true as a practice management issue, but that comment is not particularly helpful for an ethics opinion. We suggest the opinion focus on not only Rules 1.1, 1.3, and 1.4, but also on the managing partner's duties to ensure that all lawyers working in a law firm are fulfilling their ethical duties under Rule 5.1. We suggest revising the last sentence of the paragraph along the following lines:

However, the better approach is for law firms should also consider to recognize succession planning as an important client-protective measure and, pursuant to rules 5.1 and 5.3, to make reasonable efforts to ensure that the firm has policies and procedures in place designed to protect clients in the event that a lawyer at the firm becomes unable to continue practicing law.

4. Comments about Death vs. Other Temporary/Permanent Incapacity

In many places, the Opinion refers to the "death" of a lawyer. In the event of death, it is important to take into consideration the applicable law, which should be referenced briefly. The potential for a lawyer to address their practice in their own estate plan could also be mentioned.

The applicable Probate Code provisions should be noted briefly, for the sake of completeness. The Business and Professions Code provisions through which the State Bar and Superior Court may take jurisdiction over the deceased lawyer's practice should also be referenced. We recognize that these are not strictly ethical obligations of

the lawyer undertaking succession planning but believe that lawyers engaging in succession planning would benefit from such references.

5. Comments about the ethical duties implicated by the hypotheticals

Competence. The duty of competence (Rule 1.1) is the starting point on why lawyers should engage in concrete succession planning. Rule 1.1 requires that lawyers perform legal services competently. If a lawyer practices without a succession plan and then either gradually or suddenly cannot perform competent legal services, then Rule 1.1 is implicated. Competence requires that the lawyer has the “mental, emotional and physical ability reasonably necessary for the performance of such services.” (Rule 1.1(b)). We would propose leading the discussion explaining why the duty of competence is implicated if a lawyer fails to engage in succession planning.

Diligence. Footnote 5 of the opinion refers to Comment [5] of ABA Model Rule 1.3, which states the duty of diligence may require that a lawyer develop a succession plan.¹ It then states that “other jurisdictions have implied a duty without such language,” and includes a parenthetical, “(See New York State Bar, Oregon State Bar, Washington State Bar, etc.).” The opinion provides no additional explanation. What was the basis for each of these conclusions that the duty was “implied.” Was it a court opinion? An ethics opinion? A conclusion of a report? A “practice alert”? The opinion should be modified to include a citation to the specific authority on which the statement is based.

If there is indeed such authority in those jurisdictions that implies a duty to prepare a succession plan, then the opinion should explain in the body of the opinion how those other jurisdictions reached that conclusion. If the conclusion reached in those jurisdictions was well-reasoned, it would support the statement in the last paragraph on page 4 that “[i]t is reasonable to conclude that ‘reasonable diligence’ as defined includes making sure that client interests are protected in the event of a lawyer’s inability or unavailability to practice law, and failure to do so may be viewed as reckless or gross negligence.” However, relying solely on a footnote with no citation to specific authority leaves that statement unsupported.

Loyalty. The duty of loyalty is implicated when the lawyer puts their interest ahead of their clients by concealing health issues or plans to “slow down” while cases are pending. ABA Formal Opn. 92-369 illustrates the duty of loyalty is implicated when there is a failure to communicate the lawyer is retiring or a law firm is dissolving. This

¹ Comment [5] to ABA Model Rule 1.3 provides: “To prevent neglect of client matters in the event of a sole practitioner’s death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer’s death or disability, and determine whether there is a need for immediate protective action.”

opinion by analogy is supportive of the concept that the duty of loyalty is implicated when the lawyer does not plan for someone else to handle the law practice in the event there is a break in the law practice. We suggest explaining that the duty of loyalty requires that the clients' interests are placed ahead of the lawyer's personal interests that may consume the lawyer's efforts and attention in the event of a serious illness.

Communication. The duty to communicate is certainly implicated if the lawyer is unable to practice law, whether this break from practicing law is temporary or permanent. (Rule 1.4). If the lawyer cannot communicate with clients because of an illness or disability, then the duty of diligence requires advance planning by the lawyer to designate another attorney or staff member to communicate "significant developments" to the clients.

We suggest rephrasing the language under Section E, "While a lawyer's death or incapacity does not typically involve a scenario in which the lawyer anticipates terminating the representation," to affirmatively state: "A lawyer's death or incapacity will terminate the attorney-client relationship and a lawyer should plan for that event."

Scenario 1

At the end of the first sentence of the paragraph, we recommend expressly citing to the ethical rules breached by the lawyer abandoning clients because of the lawyer's hospitalization. This would include rules 1.1, 1.3, 1.4 and 1.16.

The second paragraph should cite to rules 1.1 and 1.4, since in Scenario #1, deadlines were missed and the clients were not informed of these significant developments.

The third paragraph does not affirmatively state that Lawyer A had ethical obligations to Lawyer A's clients to arrange for an "assisting lawyer" to step in when Lawyer A was unable to provide competent legal services. This includes providing access to passwords and access codes to enable the clients' interests to be protected. It should not be an option where the lawyer can pick and choose how their clients' interests can be protected in the lawyer's absence.

In addition, this scenario may be a good place to note briefly what occurs when a lawyer has not made a plan, and to reference Business and Professions Code sections 6180, et seq., 6190, et seq., and the relevant Probate Code provisions. As it is, the scenario begs the question of what happens when a lawyer does nothing.

Scenario 2: Ethical duties implicated for assisting lawyers

We suggest including a paragraph on the duty of competence for the assisting lawyer. (Rule 1.1). Excessive work demands are not a defense to a Rule 1.1 violation.

Depending on a lawyer's workload when assistance is required, the lawyer may not have the bandwidth to handle on an emergency basis Lawyer's C law practice.

We suggest reworking the existing subsection 1 (The Existence of an Attorney-Client Relationship between Lawyer B and Lawyer C's clients) to explain that Lawyer C's duty to preserve the client confidences may be implicated unless there is consent by the clients to disclose confidences to the assisting lawyer. Lawyer B may be handicapped in providing the assistance expected by Lawyer C if Lawyer B cannot freely communicate with Lawyer C's clients without fear that confidential information of Lawyer C's clients may not be protected without clear parameters defining the scope of the assisting lawyer's responsibilities. The first paragraph discussing whether there is an automatic attorney-client relationship with Lawyer B is confusing.

The second paragraph, which leads with "In most cases, the role of an assisting attorney (sometimes called Successor Attorney or Practice Administrator) is simply to step in and respond, administratively, to an unexpected event," is not necessarily true, particularly when Lawyer C has active litigation cases. Under certain circumstances, Lawyer B may be required to make special appearances in court and/or arrange for continuances of hearings to protect Lawyer C's clients' rights.

Scenario 2 does not mention whether Lawyer C has provided notice to Lawyer C's clients about Lawyer B's need to access client files to perform basic but necessary functions while Lawyer C is unavailable. The opinion should discuss Lawyer C's obligation to provide notice and obtain the clients' consent for Lawyer B to access files and review confidential information.

Scenario 3: Law firm's duty to plan

We suggest emphasizing the ethical responsibilities of the law firm's managing partner to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with these rules and the State Bar Act." (Rule 5.1(a)). Comment [1] to Rule 5.1 requires that the law firm establish "internal policies and procedures" to make sure that the lawyers in the firm comply with their ethical responsibilities. A senior lawyer who is practicing "alone" is a potential risk to all of their clients that their competency skills will erode without having colleagues available to assist in representing the clients.

The Managing Partner has an ethical duty to affirmatively act to ensure that Lawyer D is currently practicing competently, that there is a concrete succession plan which may involve training another member of the firm in the discrete practice area and certainly ensuring that the clients are informed of significant developments, including identifying the team that is supporting Lawyer D's practice. (Rules 5.1, 1.1, 1.3, 1.4). Based on the hypothetical, since none of the other lawyers in the satellite office where Lawyer D

practice in the same specialized field as Lawyer D, all of the firm's clients that are receiving these specialized legal services from Lawyer D are at risk if there is either a decline in Lawyer D's competence or an abrupt break in Lawyer D's ability to practice.

Thank you for your consideration of these views.

Sincerely,

A handwritten signature in black ink, appearing to read "Alison Buchanan". The signature is fluid and cursive, with a large initial "A" and a long, sweeping underline.

Alison Buchanan, Chair
California Lawyers Association
Ethics Committee

From: noreply@fs16.formsite.com on behalf of [Formsite](#)
To: [Marlaud, Angela](#)
Subject: 20-0002 - Public Comment Form Result #17525244
Date: Wednesday, July 12, 2023 3:44:39 PM
Attachments: [f-142-86-17525244_NTApcB6H_Succession_Planning_for_Law_Firms.pdf](#)

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Name	Don McCrea
City	San Rafael
State	California
Email address	don@yourbusinesslegacy.net
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	This is an excellent first draft for law firm succession planning. However, there are a number of elements missing, based on my experience with business exit planning, of which succession planning is a significant piece. See the attachment for suggested additions. Let me know if you have questions or want more input.
ATTACHMENTS You may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	Succession_Planning_for_Law_Firms.pdf (221 KB)

This email was sent to angela.marlaud@calbar.ca.gov as a result of a form being completed.
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Succession Planning for Law Firms

Succession Planning Goals

- Start your succession planning with adequate time to implement a successful succession
- Know what decisions and actions must be made in your absence and when to make them
- Identify and select the key leadership and advisors your practice requires for successful operation without you
- Ensure your succession plan addresses all the areas and actions required
- Know how and when to successfully implement your succession plan
 - What are the triggers that invoke your plan?
 - Who makes that decision in your absence?
 - Who oversees the implementation?

The Succession Planning Process



- Clearly define your responsibilities, decisions, actions
- Identify your successor
 - Individual or team?
 - If no one, then what?
- How prepared is your successor?
 - What are the gaps?
 - Develop a process to fill the gaps: critical milestones
- What advisors and support will your successor require?
 - How prepared are they?
 - What are the gaps?
 - What staff/advisor development is required?

How Can I Know If My Successor and My Succession Process are Ready?

- Is my successor ready to step in?
 - Test your successor's readiness—more than once!
 - Start with small incremental steps: Take a week's vacation at a time when you're immediately available (in case of an urgent situation—or panic!)
 - Take a longer time away from your practice and assess readiness
- What are some other ways to build confidence that your successor is ready?
- The above will also test the readiness of your succession process and the readiness of your successor's support staff and advisors

What & Who Will Trigger Your Plan?

- What event will trigger your plan?
 - Vacation?
 - Illness?
 - Death?
 - Other?
- Who will make that decision?
- Who will oversee the successful implementation of your succession plan?

Other Considerations

- What is the length of the absence your plan covers?
 - You will need at least one plan for temporary absence and one for permanent absence
- What options have you considered for permanent absence?
 - Close the practice
 - Sell the practice: immediate or instalment?
 - Merge or be acquired
 - For single practitioners, bring younger partner into the firm with intent to sell
- What is your estate plan and intent for surviving family members?
- How to value the practice?
 - Financial value
 - Brand value and legacy
 - Qualitative value: to clients, staff, referral partners, community?
- What is your legacy and the legacy of your practice?
 - Is it important that these are preserved?

Public Comment - Proposed Opinion 20-0002

Name	Louis Anthes
City	Long Beach
State	California
Email address	louis.antes@gmail.com

From the choices below, we ask that you indicate your position. (This is a required field.)

Oppose

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I write this comment to express my concern that imposing further obligations on lawyers to engage in succession planning to benefit clients will likely have the effect of discriminating among those lawyers whose practice focuses on discrete legal services of relatively short duration in which the client's assets and financial needs are relatively less significant than other clients more capitalized.

As is often the case with proposed expansion of CRPC rules, the current rules adequately address attorneys' duties to protect clients' interests in those cases where lawyer-client relationships encompass on-going, long-term services to protect a client having significant assets.

For the above-stated reason, I am opposed to expanding the rules of professional conduct which impose class-based expectations on all attorneys across the board. The State Bar should demonstrate its recognition and understanding that attorneys serve different social needs and that "one-size-fits-all" approaches often have the effect of social

discrimination among attorneys and the clients
attorneys serve.

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Commenting on behalf of an organization	No
Name	Narek Zohrabyan
City	Glendale
State	California
Email address	nzoh@philip.law
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Sure so long as there is actual training and support from the calbar on how to setup such mechanisms for such an eventuality.

Public Comment - Proposed Opinion 20-0002

Commenting on behalf of an organization	No
Name	Olivia Lee
City	San Francisco
State	California
Email address	olee@minamitamaki.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	I just wanted to note that the Santa Clara County Counsel Attys. Assn v. Woodside case that is cited on page 5, under Duty of Loyalty, is from 1994. The proposed opinion incorrectly cites it as a 1984 case.