DISCUSSION DRAFT

PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA

Commission for the Revision of the
Rules of Professional Conduct

State Bar of California

January, 2010

SUMMARY OF PUBLIC COMMENT PROPOSAL

PLEASE NOTE: Publication for public comment is not, and shall not be construed as a recommendation or approval by the Board of Governors of the materials published.

SUBJECT: Twelve proposed new or amended Rules of Professional Conduct of the State Bar of California developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

BACKGROUND: The Rules of Professional Conduct of the State Bar of California are attorney conduct rules the violation of which will subject an attorney to discipline. Pursuant to statute, rule amendment proposals may be formulated by the State Bar for submission to the Supreme Court of California for approval. The State Bar has assigned a special commission to conduct a thorough study of the rules and to recommend comprehensive amendments.

In 2006, the Commission completed work on a group of twenty-seven proposed rules and those rules were distributed for a public comment period, which ended on October 16, 2006. In 2007, the Commission completed work on a group of five proposed rules and those rules were distributed for a public comment period, which ended on October 26, 2007. In 2008, the Commission completed work on a group of thirteen proposed rules and those rules were distributed for a public comment period, which ended on June 6, 2008. In July of 2009, the Commission completed work on a group of eight proposed rules and those rules were distributed for a public comment period, which ended on October 23, 2009. In September of 2009, the Commission completed a fifth group of proposed rules and the public comment period on those eleven proposed rules ended on November 13, 2009. Public hearings have been conducted in connection with each of these public comment distributions.

The Commission has now completed work on twelve more proposed rules that are the subject of this present request for public comment.

PROPOSAL: The twelve proposed amended rules are listed below by proposed new rule number. Where applicable, the rule number of the comparable current California rule is indicated in brackets. Each of these proposed rules are subject to change following consideration of the public comment received.

Each proposed rule is presented in a comparison table format preceded by a summary cover sheet and a general introduction. The comparison table format has three columns. The first column presents the clean version of an American Bar Association (ABA) Model Rule counterpart, if any. The second column presents a redline draft of the Commission's proposal that shows changes to the ABA Model Rule counterpart. If there is no Model Rule counterpart but there is a California rule counterpart, then the chart compares the proposed

rule to the California rule. The third column presents the Commission's explanation of each deviation from the ABA Model Rule language. In addition, at the end of each table is the clean version of the Commission's proposed rule and an excerpt that summarizes selected state variations. This format is intended to simplify the consideration of any changes to the ABA Model Rules and to make plain the Commission's rationale for such changes. Three other ABA Model Rules were also considered but are not being recommended for adoption by the Commission.

FISCAL/PERSONNEL IMPACT: No unbudgeted fiscal or personnel impact.

SOURCE: State Bar Special Commission for the Revision of the Rules of Professional Conduct

COMMENT DEADLINE: 5 p.m., March 12, 2010

HOW TO COMMENT:

The State Bar encourages all interested persons or organizations to submit comments on the proposed new and amended Rules of Professional Conduct.

This Discussion Draft includes clean rule drafts of the Rules in (.doc) format. The word processing files are provided to facilitate your ability to submit comments with suggested language for modifying a proposed rule. These can be found by opening the Discussion Draft document and then by clicking the Attachments icon () located at the bottom right corner of the Acrobat Reader window. Select the Rule document from the Attachments window and choose Open from the Options menu. Submitting a redraft of a rule will help the Rules Revision Commission understand a commentator's desired changes to the proposed rules.

Electronic Submission: Comments may be submitted ***electronically*** by using the online Public Comment Form.*/ A link to the Public Comment Form is also posted at the State Bar's website on the Public Comment page for the proposed Rules.

Mail or Fax Submission: Comments may also be submitted in writing by ***mail*** or ***fax***. To facilitate the Commission's consideration of written comments, each rule you choose to comment on should be on a ***separate sheet of paper***. Indicate the rule number ***in the subject line at the beginning of the letter***, your name, any organization or entity on whose behalf you are submitting comment, and any brief information about yourself which you wish to be considered on each page.

Mail or Fax to:
Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639
Ph. # (415) 538-2167
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*/ The url for the online comment form is: **http://fs16.formsite.com/SB_RRC/batch6/index.html**

I. INTRODUCTION

A. History and Commission Charge

The last complete revision of the California rules occurred in the late 1980's and it was at that time that the State Bar established its Special Commission for the Revision of the Rules of Professional Conduct ("the Commission")*. In 2001, the State Bar reactivated the Commission, in part, to respond to the American Bar Association's ("ABA") near completion of its own "Ethics 2000" project for a systematic revision of the Model Rules of Professional Conduct. The Commission has been given the following charge:

> The Commission is to evaluate the existing California Rules of Professional Conduct in their entirety considering developments in the attorney professional responsibility field since the last comprehensive revision of the rules occurred in 1989 and 1992. In this regard, the Commission is to consider, along with judicial and statutory developments, the Final Report and Recommendations of the ABA Ethics 2000 Commission, the American Law Institute's Restatement of the Law Third, The Law Governing Lawyers, as well as other authorities relevant to the development of professional responsibility standards. The Commission is specifically charged to also consider the work that has occurred at the local, state and national level with respect to multi-disciplinary practice, multi-jurisdictional practice, court facilitated *in propria persona* assistance, discrete task representation and other subjects that have a substantial impact upon the development of professional responsibility standards.
>
> The Commission is to develop proposed amendments to the California Rules that:
>
> 1) Facilitate compliance with and enforcement of the rules by eliminating ambiguities and uncertainties in the rules;
> 2) Assure adequate protection to the public in light of developments that have occurred since the rules were last reviewed and amended in 1989 and 1992;
> 3) Promote confidence in the legal profession and the administration of justice; and
> 4) Eliminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues.

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* For more information about the Commission, including the schedule of meetings, open session agendas, and meeting materials, visit: http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10129&id=1100.

B. State Bar Rule Amendment Process and the Commission's Methodology

The Board of Governors of the State Bar ("the Board") has the statutory responsibility for formulating and adopting amendments to the Rules of Professional Conduct. Business and Professions Code section 6076 provides: "With the approval of the Supreme Court, the Board of Governors may formulate and enforce rules of professional conduct for all members of the bar of this State." The amendments adopted by the Board are submitted to the Supreme Court for approval and upon approval become binding disciplinary standards for all members of the State Bar. Business and Professions Code section 6077, in part, provides: "The rules of professional conduct adopted by the board, when approved by the Supreme Court, are binding upon all members of the State Bar."

The State Bar's process for consideration of rule amendments generally involves the following steps: (1) development of draft rules (including proposed new rules, amended rules, and deletion of existing rules); (2) publication of the draft rules for public comment; (3) further drafting following consideration of public comments received; (4) Board Committee and full Board action to adopt the draft rules; and (5) State Bar submission of a memorandum to the Supreme Court requesting approval of the rules adopted by the Board. The Commission's role is to carry out the substantive study and drafting aspects of the process, both before and after public comment. Ultimately, the Commission will issue a final report and recommendation to the Board setting forth its recommendations for comprehensive rule amendments.

The Commission's methodology for conducting its study and developing rule amendment proposals is a seriatim approach. The Commission is considering each of the current California rules in current rule number order. In considering each rule, any relevant ABA Model Rule or Restatement section is compared and contrasted, both as to policy as well as language. Developments in case law and analysis found in ethics opinions are also analyzed. If there are significant state variations of the rule, national studies or other major developments, trends or initiatives, those matters are also considered. The Commission's deliberations are conducted in open session and several groups, including representatives of local bar associations, regularly attend and monitor the work of the Commission.

The Commission's plan involves the issuance of six groups or batches of proposed rule amendments. In 2006, 27 proposed new and amended rules were distributed for public comment. In 2007, 5 proposed amended rules were distributed for public comment. In 2008, 13 proposed amended rules were distributed for public comment. In July of 2009, 8 proposed amended rules were distributed for public comment. In September of 2009, 11 proposed amended rules were distributed for public comment. This current Discussion Draft presents 12 proposed new and amended rules and is the anticipated final batch of the six batches of rules.

After each of the six batches are issued for, and returned from public comment, the Commission will seek Board committee authorization to publish the entirety of the proposed rule amendments as a single, comprehensive work product for a final additional public comment period. This redistribution for further public comment of the entirety of the rules would follow any changes implemented by the Commission in response to each of the six initial public comment periods. Following consideration of the public comments received in response to this distribution, the Commission will present its final report and recommendation to the Board with a request that the Board adopt the Commission's proposed rule amendments.

C. Ethics Resources

The following ethics resources are available on the internet and may be helpful in evaluating the proposed new and amended rules.

The California Rules of Professional Conduct:
http://www.calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf

The State Bar Act portion of the California Business and Professions Code:
http://www.calbar.ca.gov/calbar/pdfs/ethics/State-Bar-Act.pdf

The ABA Model Rules of Professional Conduct:
http://www.abanet.org/cpr/mrpc/mrpc_toc.html

Detailed Comparison Chart: California Rules to ABA Model Rules:
http://calbar.ca.gov/calbar/pdfs/ethics/ca_to_aba.pdf

Detailed Comparison Chart: ABA Model Rules to California Rules:
http://calbar.ca.gov/calbar/pdfs/ethics/aba_to_ca.pdf

Commission's Draft Rule Amendments Page (provides links to Public Comment Discussion Draft for Batches 1-5)
http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10129&id=7682

State Bar of California Ethics Information page:
http://www.calbar.ca.gov/ethics

NOTE: The State Bar website is in the process of transitioning to a new server. If any links in this document do not work, please go to: www.calbar.ca.gov/ethics.

D. Discussion Draft is Available on CD-ROM Disc

This Discussion Draft is available on a CD-ROM disc upon request (contact Audrey Hollins: (415) 538-2167). If you have received this Discussion Draft on a disc, then with the exception of the ABA Model Rules, the internet resources listed above are included on your disc. You will need Adobe Acrobat Reader (6.0 or newer) in order to view the Proposed Rules Discussion Draft. A free copy of Adobe Acrobat Reader is available for download from Adobe's Web site.

Proposed Rule 1.0.1 [1-100]
"Terminology"

(**Draft #4, 12/13/09**)

Summary: Proposed Rule 1.0.1, which is based on Model Rule 1.0 ("Terminology"), defines 14 terms used in other Rules in order to place these definitions in a single location for ease of reference (it also cross-references one definition that is located in another Rule and one definition defined in California by statute). Eleven of these definitions exactly track or closely track the corresponding Model Rule definition; the remaining definitions differ from the Model Rule counterpart, as explained in the Comparison Chart.

Comparison with ABA Counterpart

Rule	Comment
☑ ABA Model Rule substantially adopted	☑ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☑ Some material additions to ABA Model Rule	☑ Some material additions to ABA Model Rule
☑ Some material deletions from ABA Model Rule	☑ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rule	RPC 3-310(A)
Statute	Evid. Code section 250
Case law	

☑ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Michigan Rule 1.0.1(b) (definition of "person").

☐ Other Primary Factor(s)

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): ☐ Yes ☑ No

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☑ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.0.1* Terminology

December 2009
(Draft rule to be considered for public comment.)

INTRODUCTION:

Proposed Rule 1.0.1 is based on Model Rule 1.0. For convenience of reference, this Rule is the repository for most of the defined terms used in other rules. It contains 14 separate definitions. In addition, it incorporates the Evidence Code definition of "writing". Finally, it contains a cross-reference to the definition found in another rule of the term "confidential information relating to the representation". The Commission has chosen to use this cross-reference because the term is particularly important since it is used in several other rules, and it is believed this cross-reference will make it more easily available.

Variations in other jurisdictions. There is a wide range of variation among the jurisdictions in their adoption of Model Rule 1.0. Although nearly every jurisdiction has adopted the Model Rule number (Alaska is an exception), many have revised, added, or deleted terms within the Rule. See "Selected State Variations," below.

A Note on the Rule Number. Because the Commission has recommended and the Board of Governors has adopted, Rule 1.0, which sets forth the purpose and scope of the Rules of Professional Conduct, the Commission recommends re-numbering the Terminology section as "Rule 1.0.1".

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* Proposed Rule 1.0.1, Draft #4 (12/13/09).

ABA Model Rule Rule 1.0 Terminology	Commission's Proposed Rule* Rule 1.0.1 Terminology	Explanation of Changes to the ABA Model Rule
(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.	(a) "Belief" or "believes" ~~denotes~~means that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.	The Commission recommends changing "denotes" to "means" throughout the definitions in order to be more specific and definite. At least Maine has also made the same change in its Rules. Paragraph (a) otherwise is identical to Model Rule 1.0(a).
(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.	~~(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.~~	The phrase "confirmed in writing" is not used in the proposed Rules and therefore has been removed. The proposed Rules use either the Model Rule term "informed consent" [see paragraph (e), below] or California's higher standard of "informed written consent" [see paragraph (e-1), below].
	(b) "Confidential information relating to the representation" is defined in Rule 1.6, Comments [3] - [6].	Paragraph (b) has no counterpart in Model Rule 1.0. The threshold use of the term "confidential information relating to the representation" is in the confidentiality rule, Rule 1.6, and the Commission proposes to keep the definition in that rule. It has added this cross-reference merely to simplify locating the definition. New York and North Carolina similarly cross-reference their Rule 1.6 definitions. Oregon has changed its term to "information relating to the representation of a client", and Wyoming uses the Model Rule term, but both have placed their definitions in Rule 1.0.

* Proposed Rule 1.0.1, Draft 4 (12/13/09).

ABA Model Rule **Rule 1.0 Terminology**	**Commission's Proposed Rule*** **Rule 1.0.1 Terminology**	**Explanation of Changes to the ABA Model Rule**
(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.	(c) "~~Firm" or "law~~Law firm" ~~denotes a lawyer or lawyers in~~means a law partnership~~,~~; a professional law corporation~~,~~; a sole proprietorship or ~~other~~an association ~~authorized to~~engaged in the practice of law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, a government entity or other organization.	Paragraph (c) modifies the Model Rule definition in several non-substantive ways, including referring to governmental law offices (this is not stated in the Model Rule but is intended, as is shown by the Model Rule Comment). This change emphasizes the need to comply with the California principle that all lawyers are bound by the Rules of Professional Conduct, specifically including government lawyers. See *People ex rel. Deumkejian v. Brown* (1981) 29 Cal.3d 150). The substitution of "engage in" for "authorized to" is to assure that the requirements of the Rules apply to everyone acting as a law firm even if not authorized to do so [at least Maryland, Michigan, and South Carolina similarly have removed "authorized to"]. The remaining changes are for clarity. In addition, The Commission intends to use the single term "law firm" and therefore recommends dropping the reference here to "firm".
(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.	(d) "Fraud" or "fraudulent" ~~denotes~~means conduct that is fraudulent under the ~~substantive or procedural~~ law of the applicable jurisdiction and has a purpose to deceive.	Paragraph (d) is nearly identical to the Model Rule definition but removes "substantive or procedural" because of difficulty with the concept that a procedural requirement can define fraud. These three words also have been removed in Alaska, Florida, North Dakota, Ohio and Tennessee, often with substantial additional changes. There are other substantive changes to the definition in the versions adopted in New York, North Carolina, South Carolina, Washington, and Wyoming.
(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material	(e) "Informed consent" ~~denotes the agreement by~~means a ~~person~~person's agreement to a proposed course of conduct after the lawyer has communicated adequate information and	The re-ordering of the first portion of this definition is for clarity. The same change has been made at least in Maine. The addition of "reasonably foreseeable" conforms the definition to California case law that a lawyer's disclosure only needs to include

ABA Model Rule Rule 1.0 Terminology	Commission's Proposed Rule* Rule 1.0.1 Terminology	Explanation of Changes to the ABA Model Rule
risks of and reasonably available alternatives to the proposed course of conduct.	explanation about the reasonably foreseeable material risks of, and reasonably available alternatives to, the proposed course of conduct.	reasonably foreseeable consequences. See, *e.g.*, *Sharp v. Next Entertainment, Inc.* (2008) 163 Cal. App. 4th 410, 429-31. There are substantive changes to the definition in Alaska, Maine Rule, Michigan Missouri; New York, North Carolina, Oregon, Penn., South Carolina, and Wyoming.
	(e-1) "Informed written consent" means that both the communication and consent required by paragraph (e) must be in writing.	Paragraph (e-1) has no counterpart in Model Rule 1.0. The Commission has added this definition of California's higher standard of written disclosure and written consent, a concept that is not found in the Model Rules. The use of Model Rule language is not intended to substantively change California's current rule 3-310(A) definition.
(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.	(f) "Knowingly," "known," or "knows" ~~denotes~~means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.	Paragraph (f) is identical to the Model Rule definition except for the single change previously explained.
(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.	(g) "Partner" ~~denotes~~means a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.	Paragraph (g) is identical to the Model Rule definition except for the single change previously explained.

ABA Model Rule Rule 1.0 Terminology	Commission's Proposed Rule* Rule 1.0.1 Terminology	Explanation of Changes to the ABA Model Rule
	(g-1) "Person" means a natural person or an organization.	Paragraph (g-1) has no counterpart in Model Rule 1.0. The Commission added the paragraph (g-1) definition in order to avoid any possibility that "person" might be read as referring only to natural persons. There are six other jurisdictions that have adopted definitions of "person"; the Commission's definition is based on the definition the one adopted in Michigan.
(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.	(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer ~~denotes~~means the conduct of a reasonably prudent and competent lawyer.	Paragraph (h) is identical to the Model Rule definition except for the single change previously explained.
(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.	(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer ~~denotes~~means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.	Paragraph (i) is identical to the Model Rule definition except for the single change previously explained.
(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.	(j) "Reasonably should know" when used in reference to a lawyer ~~denotes~~means that a lawyer of reasonable prudence and competence would ascertain the matter in question.	Paragraph (j) is identical to the Model Rule definition except for the single change previously explained.

ABA Model Rule Rule 1.0 Terminology	Commission's Proposed Rule* Rule 1.0.1 Terminology	Explanation of Changes to the ABA Model Rule
(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.	(k) "Screened" ~~denotes~~means the isolation of a lawyer from any participation in a matter ~~through~~, including the timely imposition of procedures within a firm that are ~~reasonably~~ adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and non-lawyer personnel communicating with the lawyer with respect to the matter.	Paragraph (k) is identical to the Model Rule definition but makes three changes. First, the substitution of "including" for "through" reflects the variability of what is needed to impose an effective screen, as is discussed in Comment [10], below. Second, the removal of "reasonably" is intended to avoid the suggestion that half-way measures will suffice. The imposition of a non-consensual screen by a law firm is an extremely serious matter. Finally, the Commission recommends added the concept in subpart (ii), which fills a gap in the Model Rule definition.
(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.	(l) "Substantial" when used in reference to degree or extent ~~denotes~~means a material matter of clear and weighty importance.	Paragraph (l) is identical to the Model Rule definition except for the single change previously explained.
(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.	(m) "Tribunal" ~~denotes~~means: (i) a court, an arbitrator ~~in a binding arbitration proceeding~~, or ~~a legislative body,~~an administrative ~~agency or other body~~law judge acting in an adjudicative capacity~~. A legislative body, administrative agency~~ and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other ~~body acts in an adjudicative capacity when~~person to whom a ~~neutral official, after the presentation of evidence~~court refers one or ~~legal argument by a party~~more issues and whose decision or ~~parties, will render a~~recommendation can be binding ~~legal judgment directly affecting a~~	Paragraph (m) is a material change from the Model Rule definition. The purpose of the changes is to distinguish the extremely high standards that apply to a lawyer's conduct as a client representative in a court of law or its equivalent, which is labeled as a "tribunal" by this definition (see Rule 3.3), from the more limited but still important duty of honesty that applies when a lawyer appears in a representative capacity before a legislative or administrative body (see Rule 3.9). The Commission concluded that this distinction is important because First Amendment protections apply in dealing with legislative and administrative bodies, involved in such things as writing statutes and administrative regulations and granting and denying governmental licenses and permits. First Amendment considerations do not similarly apply to court proceedings. Also, a lawyer's

ABA Model Rule Rule 1.0 Terminology	Commission's Proposed Rule* Rule 1.0.1 Terminology	Explanation of Changes to the ABA Model Rule
	~~party's interests in a particular matter~~on the parties if approved by the court.	representative work with legislative and administrative bodies involves elements of contractual and other negotiations that are not present in courts, and that role is more akin to a lawyer serving as an advocate in non-governmental negotiations.
(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.	(n) ~~"Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.~~ "Writing" or "written" has the meaning stated in Evidence Code section 250 .	Because California has a statutory definition of "writing", the Commission proposes to substitute a reference to it in place of the Model Rule definition. Although the statutory definition and the Model Rule definition are substantially the same, the Commission concluded that substituting a cross-reference to the statute would avoid confusion by California lawyers who are familiar with the statutory definition.

ABA Model Rule Rule 1.0 Terminology Comment	Commission's Proposed Rule Rule 1.0.1 Terminology Comment	Explanation of Changes to the ABA Model Rule
Confirmed in Writing [1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.	~~**Confirmed in Writing**~~ ~~[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.~~	The Commission removed Model Rule 1.0, cmt. [1] because the term explained in the Comment is not used in the proposed Rules.
Firm [2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule	**Firm** [~~2~~1] A sole proprietorship is a law firm for purposes of these Rules. Whether two or more lawyers constitute a law firm ~~within paragraph (c)~~ can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they ~~should~~may be regarded as a law firm for purposes of ~~the~~these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is	Comment [1] is nearly the same as Model Rule 1.0, cmt. [2], but has the following differences: First, the Commission has added the first sentence in order to track the language of paragraph (c), which in both the Model Rule and proposed versions include a sole proprietorship within the definition of "law firm". The Commission recommends removal of the last Model Rule sentence because it does not serve to explain the defined term but instead muses about other legal issues.

ABA Model Rule Rule 1.0 Terminology Comment	Commission's Proposed Rule Rule 1.0.1 Terminology Comment	Explanation of Changes to the ABA Model Rule
that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.	relevant in doubtful cases to consider the underlying purpose of the ~~Rule~~rule that is involved. ~~A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.~~	
[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.	~~[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.~~	The Commission recommends deleting Model Rule 1.0, cmt. [3]. The first sentence contradicts the plain language of paragraph (c). The second sentence does not help explain the rule but instead muses to no effect on the question of who a lawyer's client is.
	[2] Whether a lawyer who is denominated as "of counsel" should be deemed a member of law firm can also depend on the specific facts. The term "of counsel" implies that the lawyer so designated has a relationship with the firm, other than as a partner or associate, or officer or shareholder, that is close, personal, continuous, and regular. Thus, to the extent the relationship between a law firm and a	Comment [2] has no counterpart in Model Rule 1.0. The Commission recommends its addition in order to express a pertinent rule of California law.

ABA Model Rule Rule 1.0 Terminology Comment	Commission's Proposed Rule Rule 1.0.1 Terminology Comment	Explanation of Changes to the ABA Model Rule
	lawyer is sufficiently "close, personal, regular and continuous," such that the lawyer is held out to the public as "of counsel" for the law firm, the relationship of the firm and "of counsel" lawyer will be considered a single firm for purposes of disqualification. See, e.g., *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816]. On the other hand, even when a lawyer has associated as "of counsel" with another lawyer and is providing extensive legal services on a matter, they will not necessarily be considered the same firm for purposes of dividing fees under Rule 1.5.1 where, for example, they both continue to maintain independent law practices with separate identities, separate addresses of record with the State Bar, and separate clients, expenses, and liabilities. See, e.g., *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].	
[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.	[43] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.	Comment [3] is identical to Model Rule 1.0, cmt. [4].

ABA Model Rule Rule 1.0 Terminology Comment	Commission's Proposed Rule Rule 1.0.1 Terminology Comment	Explanation of Changes to the ABA Model Rule
	[4] This Rule is not intended to authorize any person or entity to engage in the practice of law in this state except as otherwise permitted by law.	Comment [4] has no counterpart in Model Rule 1.0. The Commission recommends its addition in order to prevent the definition of "law firm" from being misread as an authorization to practice law. The consequence is that anyone acting as a law firm has all the duties of law firms even if not authorized to practice law.
Fraud [5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.	**Fraud** [5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the ~~substantive or procedural~~ law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.	Comment [5] is identical to Model Rule 1.0, cmt. [5], changed only to track the revision to paragraph (d).
Informed Consent [6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication	**Informed Consent and Informed Written Consent** [6] Many of the Rules ~~of Professional Conduct~~ require ~~the~~a lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. Other Rules require a lawyer to obtain informed written consent. See,	Comment [6] is based on Model Rule 1.0, cmt. [6]. It has been modified to cover the paragraph (e) and (e-1) definitions of "informed consent" and "informed written consent". The removal of "ordinarily" clarifies that the obligation to disclose exists invariably. The addition of "reasonably available" tracks the change in paragraph (e), explained above. The removal of the two sentences beginning "In some circumstances ..." sentence

ABA Model Rule Rule 1.0 Terminology Comment	Commission's Proposed Rule Rule 1.0.1 Terminology Comment	Explanation of Changes to the ABA Model Rule
necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving	e.g., Rules 1.2(c), 1.6(a), and 1.7~~(b)~~. The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain ~~informed~~ consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. ~~Ordinarily~~ In any event, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's or other person's reasonably available options and alternatives. ~~In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid.~~ In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. ~~Normally, such persons need less information and explanation than~~	removes practice tips that do not explain the Rule. The removal of the last sentence is to avoid its suggestion that a lawyer has no disclosure obligation to a client that is independently represented.

ABA Model Rule Rule 1.0 Terminology Comment	Commission's Proposed Rule Rule 1.0.1 Terminology Comment	Explanation of Changes to the ABA Model Rule
the consent should be assumed to have given informed consent	~~others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.~~	
[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).	[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. ~~Consent~~ However, except where the standard is one of informed *written* consent, consent may be inferred~~, however,~~ from the conduct of a client or other person who has reasonably adequate information about the matter. ~~A number of Rules require that a person's consent be confirmed in writing.~~ See ~~Rules 1.7~~paragraph (~~b~~n) ~~and 1.9(a). For a~~for the definition of "writing" and "~~confirmed in writing,~~written"~~ see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n)~~.	Comment [7] is based on Model Rule 1.0, cmt. [7]. Changes conform the Comment to the paragraph (e) definition.
Screened [8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.	**Screened** [8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules ~~1.10,~~ 1.11, 1.12 or 1.18.	Comment [8] is identical to Model Rule 1.0, cmt. [8], except that the reference to Rule 1.10 has been deleted because the Commission has recommended against adoption of the screening provision in Model Rule 1.10.

ABA Model Rule Rule 1.0 Terminology Comment	Commission's Proposed Rule Rule 1.0.1 Terminology Comment	Explanation of Changes to the ABA Model Rule
[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.	[9] The purpose of screening is to assure the affected ~~parties~~client, former client, or prospective client that confidential information known by the personally ~~disqualified~~prohibited lawyer ~~remains protected~~is neither disclosed to other law firm lawyers or non-lawyer personnel nor used to the detriment of the person to whom the duty of confidentiality is owed. The personally ~~disqualified~~prohibited lawyer ~~should~~shall acknowledge the obligation not to communicate with any of the other lawyers and non-lawyer personnel in the firm with respect to the matter. Similarly, other lawyers and non-lawyer personnel in the firm who are working on the matter ~~should~~promptly shall be informed that the screening is in place and that they may not communicate with the personally ~~disqualified~~prohibited lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected ~~lawyers~~firm personnel of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.	Comment [9] is based on Model Rule 1.0, cmt. [9], but makes several changes: First, "parties" in the first sentence is replaced because a lawyer's duty of confidentiality is owed only to clients, former clients, and prospective clients and not to anyone else that might be called a "party". Second, to conform to proposed language in the applicable conflicts rules, "disqualified" has been replaced throughout the comment with "prohibited". Third, a gap in the Model Rule Comment has been eliminated by stating on each occasion that screening involves both all other law firm lawyers and all non-lawyer personnel. The same change has been made to paragraph (k). Fourth, the obligation of the screened lawyer to acknowledge the existence of the screen is stated in mandatory ("shall") rather than permissive ("should") terms. Fifth, the obligation to inform other law firm personnel of the screen is made mandatory and, to conform to the paragraph (k) requirement of timeliness, the requirement is to do so "promptly". This mandatory statement also appears in the Connecticut Comment, and the mandatory language also appears in the New York Comment.

ABA Model Rule Rule 1.0 Terminology Comment	Commission's Proposed Rule Rule 1.0.1 Terminology Comment	Explanation of Changes to the ABA Model Rule
[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.	[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.	Comment [10] is identical to Model Rule 1.0, cmt. [10].
	Tribunal [11] This definition is limited to courts and their equivalent in order to distinguish the special and heightened duties that lawyers owe to courts from the important but more limited duties of honesty and integrity that a lawyer owes when acting as an advocate before a legislative body or administrative agency. Compare Rule 3.3 to Rule 3.9.	Comment [11] has no counterpart in Model Rule 1.0. It has has been added as a brief explanation of the narrow definition of "tribunal" that the Commission recommends. See the paragraph (m) explanation, above.
	Writing and Written [12] These Rules utilize California's statutory definition to avoid confusion by California lawyers familiar with it. It is substantially the same as the definitions in the ABA Model Rules and most other jurisdictions.	See the paragraph (n) explanation, above.

Rule 1.0.1: Terminology
(Commission's Proposed Rule – Clean Version)

(a) "Belief" or "believes" means that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confidential information relating to the representation" is defined in Rule 1.6, Comments [3] – [6].

(c) "Law firm" means a law partnership; a professional law corporation; a sole proprietorship or an association engaged in the practice of law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, a government entity or other organization.

(d) "Fraud" or "fraudulent" means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" means a person's agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the reasonably foreseeable material risks of, and reasonably available alternatives to, the proposed course of conduct.

(e-1) "Informed written consent" means that both the communication and consent required by paragraph (e) must be in writing.

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

(g) "Partner" means a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(g-1) "Person" means a natural person or an organization.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a firm that are adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and non-lawyer personnel communicating with the lawyer with respect to the matter.

(l) "Substantial" when used in reference to degree or extent means a material matter of clear and weighty importance.

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

(n) "Writing" or "written" has the meaning stated in Evidence Code section 250.

COMMENT

Firm

[1] A sole proprietorship is a law firm for purposes of these Rules. Whether two or more lawyers constitute a law firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they may be regarded as a law firm for purposes of these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved.

[2] Whether a lawyer who is denominated as "of counsel" should be deemed a member of law firm can also depend on the specific facts. The term "of counsel" implies that the lawyer so designated has a relationship with the firm, other than as a partner or associate, or officer or shareholder, that is close, personal, continuous, and regular. Thus, to the extent the relationship between a law firm and a lawyer is sufficiently "close, personal, regular and continuous," such that the lawyer is held out to the public as "of counsel" for the law firm, the relationship of the firm and "of counsel" lawyer will be considered a single firm for purposes of disqualification. See, e.g., *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816]. On the other hand, even when a lawyer has associated as "of counsel" with another lawyer and is providing extensive legal services on a matter, they will not necessarily be considered the same firm for purposes of dividing fees under Rule 1.5.1 where, for example, they both continue to maintain independent law practices with separate identities, separate addresses of record with the State Bar, and separate clients, expenses, and liabilities. See, e.g., *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].

[3] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

[4] This Rule is not intended to authorize any person or entity to engage in the practice of law in this state except as otherwise permitted by law.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the law of the applicable jurisdiction and has a purpose to deceive. This does not include

merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent and Informed Written Consent

[6] Many of the Rules require a lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. Other Rules require a lawyer to obtain informed written consent. See, e.g., Rules 1.2(c), 1.6(a), and 1.7. The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. In any event, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's or other person's reasonably available options and alternatives. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. However, except where the standard is one of informed *written* consent, consent may be inferred from the conduct of a client or other person who has reasonably adequate information about the matter. See paragraph (n) for the definition of "writing" and "written".

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11, 1.12 or 1.18.

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

with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

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

Tribunal

[11] This definition is limited to courts and their equivalent in order to distinguish the special and heightened duties that lawyers owe to courts from the important but more limited duties of honesty and integrity that a lawyer owes when acting as an advocate before a legislative body or administrative agency. Compare Rule 3.3 to Rule 3.9.

Writing and Written

[12] These Rules utilize California's statutory definition to avoid confusion by California lawyers familiar with it. It is substantially the same as the definitions in the ABA Model Rules and most other jurisdictions.

Rule 1.0: Definition of "Law Firm"

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Connecticut adds: "'Client' or 'person' as used in these Rules includes an authorized representative unless otherwise stated."

District of Columbia defines "matter" as "any litigation, administrative proceeding, lobbying activity, application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a negotiation, estate or family relationship practice issue, or any other representation, except as expressly limited in a particular rule."

Illinois retains the 1983 version of the ABA Terminology, retains the definitions of "confidence" and "secret" derived from DR 4-101(A) of the ABA Model Code of Professional Responsibility, and adds the following terminology:

> "Contingent fee agreement" denotes an agreement for the provision of legal services by a lawyer under which the amount of the lawyer's compensation is contingent in whole or in part upon the successful completion of the subject matter of the agreement, regardless of whether the fee is established by formula or is a fixed amount.
>
> "Disclose" or "disclosure" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.
>
> "Person" denotes natural persons, partnerships, business corporations, not-for-profit corporations, public and quasi-public corporations, municipal corporations, State and Federal governmental bodies and agencies, or any other type of lawfully existing entity.

Massachusetts: Rule 9.1 retains the 1983 version of the ABA Terminology and adds a definition of a "qualified legal assistance organization." Amended Comment 3 to Rule 9.1 provides as follows: "The final category of qualified legal assistance organization requires that the organization 'receives no profit from the rendition of legal services.' That condition refers to the entire legal services operation of the organization; it does not prohibit the receipt of a court-awarded fee that would result in a 'profit' from that particular lawsuit."

New York defines "fraud" as follows:

> "Fraud" does not include conduct, although characterized as fraudulent by statute or administrative rule which lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another.

New York also defines "domestic relations matters," and defines "tribunar" to include "all courts, arbitrators and other adjudicatory bodies."

Ohio: Rule 1.0 defines "fraud" and "fraudulent" as denoting "conduct that has an intent to deceive and is either of the following:"

> (1) an actual or implied misrepresentation of a material fact that is made either with knowledge of its falsity or with such utter disregard and recklessness about its falsity that knowledge may be inferred; (2) a knowing concealment of a material fact where there is a duty to disclose the material fact.

Oregon adds or alters the meaning of a number of phrases, including "electronic communication, "informed consent," "law firm," "knowingly," and "matter."

Texas generally retains the 1983 version of the ABA Terminology, but modifies some of the 1983 definitions and adds others that are neither in the 1983 nor current versions of the ABA Terminology. Specifically, Texas includes the following definitions:

> "Adjudicatory Official" denotes a person who serves on a Tribunal.
>
> "Adjudicatory Proceeding" denotes the consideration of a matter by a Tribunal.
>
> "Competent" or "Competence" denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.
>
> "Firm" or "Law firm" denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.
>
> "Fitness" denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.
>
> "Should know" when used in reference to a lawyer denotes that a reasonable lawyer under the same or similar circumstances would know the matter in question.
>
> "Substantial" when used in reference to degree or extent denotes a matter of meaningful significance or involvement.
>
> "Tribunal" denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. "Tribunal" includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter; but it does not include jurors, prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity.

Virginia retains the 1983 version of the Terminology section and adds:

"'Should' when used in reference to a lawyer's action denotes an aspirational rather than a mandatory standard."

Wisconsin: Wisconsin adds or alters the meaning of a number of phrases, including "consultation," "firm," "misrepresentation," and "prosecutor."

Proposed Rule 1.4.1 [3-410]
"Disclosure of Professional Liability Insurance"

(Draft #4, 12/15/09)

Summary: Proposed Rule 1.4.1 is based on rule 3-410, which was adopted by the Supreme Court to become operative on January 1, 2010. Rule 3-410 requires lawyers who do not have professional liability insurance to disclose that fact to clients. Rule 3-410 exempts government lawyers and in-house counsel with regard to the representation of their employer. Proposed Rule 1.4.1 largely tracks rule 3-410 but incorporates the Model Rule format and style conventions, and exempts from the rule court-appointed lawyers as to those matters in which they have been appointed.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☑ No ABA Model Rule counterpart	☑ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rule	RPC 3-410
Statute	Repealed Bus. & Prof. Code §§ 6147 & 6148.
Case law	

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): ☐ Yes ☑ No

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☑ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.4.1* Disclosure of Professional Liability Insurance*

December 2009
(Draft rule to be considered for public comment.)

INTRODUCTION:

Proposed Rule 1.4.1 is based on rule 3-410, which was adopted by the Supreme Court in July 2009 to become operative on January 1, 2010. Rule 3-410 requires lawyers who do not have professional liability insurance to disclose that fact to clients. Rule 3-410 exempts government lawyers and in-house counsel with regard to the representation of their employer.

Proposed Rule 1.4.1 largely tracks rule 3-410 but incorporates the Model Rule format and style conventions, and exempts from the Rule court-appointed lawyers as to those matters in which they have been appointed. See Explanation of Changes for paragraph (c) and Comment [5].

* Proposed Rule 1.4.1, Draft 4 (12/15/09).

No Comparable ABA Model Rule (Text provided is current California Rule 3-410)	**Commission's Proposed Rule**[*] (Redline/strikeout showing changes to the current California Rule 3-410)	**Explanation of Changes to California Rule 3-410**
(A) A member who knows or should know that he or she does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the member, that the member does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours.	(~~A~~a) A ~~member~~ lawyer who knows or should know that he or she does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the ~~member~~lawyer, that the ~~member~~ lawyer does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the ~~member~~lawyer's legal representation of the client in the matter will exceed four hours.	The word "member" is changed to "lawyer" throughout the Rule to conform to the format and style of the proposed Rules, which is based upon that of the Model Rules. Paragraph "(A)" has been changed to paragraph "(a)" to conform to the format and style of the proposed Rules.
(B) If a member does not provide the notice required under paragraph (A) at the time of a client's engagement of the member, and the member subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the member shall inform the client in writing within thirty days of the date that the member knows or should know that he or she no longer has professional liability insurance.	(~~B~~b) If a ~~member~~lawyer does not provide the notice required under paragraph (~~A~~a) at the time of a client's engagement of the ~~member~~lawyer, and the ~~member~~lawyer subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the ~~member~~lawyer shall inform the client in writing within thirty days of the date that the ~~member~~lawyer knows or should know that he or she no longer has professional liability insurance.	See Explanation of Changes to Paragraph (a).

[*] Proposed Rule 1.4.1, Draft 4 (12/15/09). Redline comparisons are to current rule 3-410.

No Comparable ABA Model Rule (Text provided is current California Rule 3-410)	**Commission's Proposed Rule*** (Redline/strikeout showing changes to the current California Rule 3-410)	**Explanation of Changes to California Rule 3-410**
(C) This rule does not apply to a member who is employed as a government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity.	(~~C~~c) This ~~rule~~ Rule does not apply to a ~~member~~lawyer who is employed as a government lawyer or in-house counsel when that ~~member~~lawyer is representing or providing legal advice to a client in that capacity, or to a court-appointed lawyer in a criminal or civil action or proceeding, but only as to those actions or proceedings in which the lawyer has been appointed.	Paragraph (c) has been modified to include court-appointed lawyers in criminal and civil matters who represent or provide advice to clients in that capacity. The change is recommended in response to concerns raised by criminal defense lawyers and civil lawyers who regularly serve on panels as court appointed counsel for indigent clients. The public policy of encouraging lawyers to serve as court appointed counsel merits including these lawyers along with government lawyers and full time in house counsel in the exception to the rule. "Member" has also been changed to "lawyer." See Explanation of Changes to Paragraph (a).
(D) This rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.	(~~D~~d) This ~~rule~~ Rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.	See Explanation of Changes to Paragraph (a).
(E) This rule does not apply where the member has previously advised the client under Paragraph (A) or (B) that the member does not have professional liability insurance.	(~~E~~e) This ~~rule~~ Rule does not apply where the ~~member~~lawyer has previously advised the client under ~~Paragraph~~ paragraph (~~A~~a) or (~~B~~b) that the ~~member~~lawyer does not have professional liability insurance.	See Explanation of Changes to Paragraph (a).

No Comparable ABA Model Rule (Text provided is current California Rule 3-410)	**Commission's Proposed Rule**[*] (Redline/strikeout showing changes to the current California Rule 3-410)	**Explanation of Changes to California Rule 3-410**
Discussion: [1] The disclosure obligation imposed by Paragraph (A) of this rule applies with respect to new clients and new engagements with returning clients.	~~Discussion~~Comment: [1] The disclosure obligation imposed by Paragraph (~~A~~a) of this ~~rule~~ Rule applies with respect to new clients and new engagements with returning clients.	Comment [1] has been modified to conform to the format and style of the proposed Rules. See Explanation of Changes to Paragraph (a).
[2] A member may use the following language in making the disclosure required by Rule 3-410(A), and may include that language in a written fee agreement with the client or in a separate writing: *"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance."*	[2] A ~~member~~lawyer may use the following language in making the disclosure required by ~~Rule 3-410~~paragraph (~~A~~a), and may include that language in a written fee agreement with the client or in a separate writing: *"Pursuant to California Rule of Professional Conduct ~~3-410~~1.4.1, I am informing you in writing that I do not have professional liability insurance."*	"Member" has been changed to "lawyer." The reference to "Rule 3-410(A)" has been changed to "paragraph (a)" to conform to the format and style of the proposed Rules. The reference to "3-410" in the form notice has been changed to "1.4.1" to conform to the rule numbering system the Commission recommends for the proposed Rules, which largely tracks the Model Rule numbering system.
[3] A member may use the following language in making the disclosure required by Rule 3-410(B): *"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I no longer have professional liability insurance."*	[3] A ~~member~~lawyer may use the following language in making the disclosure required by ~~Rule 3-410~~paragraph (~~B~~b): *"Pursuant to California Rule of Professional Conduct ~~3-410~~1.4.1, I am informing you in writing that I no longer have professional liability insurance."*	See Explanation of Changes to Comment [1]. See Explanation of Changes to Comment [2].

No Comparable ABA Model Rule (Text provided is current California Rule 3-410)	**Commission's Proposed Rule*** (Redline/strikeout showing changes to the current California Rule 3-410)	**Explanation of Changes to California Rule 3-410**
[4] Rule 3-410(C) provides an exemption for a "government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity." The basis of both exemptions is essentially the same. The purpose of this rule is to provide information directly to a client if a member is not covered by professional liability insurance. If a member is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the member is or is not covered by professional liability insurance. The exemptions under this rule are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured.	[4] ~~Rule 3-410~~Paragraph (~~C~~c) in part provides an exemption for a "government lawyer or in-house counsel when that ~~member~~lawyer is representing or providing legal advice to a client in that capacity." The basis of both exemptions is essentially the same. The purpose of this ~~rule~~ Rule is to provide information directly to a client if a ~~member~~lawyer is not covered by professional liability insurance. If a ~~member~~lawyer is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the ~~member~~lawyer is or is not covered by professional liability insurance. The exemptions ~~under this rule~~ for government lawyers and in-house counsel are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured.	"Rule 3-410(C)" has been changed to "Paragraph (c)" and "member" has been changed to "lawyer" to conform to the format and style of the proposed Rules, which are based on the Model Rules. The phrase, "for government lawyers and in-house counsel" has been substituted for "under this Rule" because paragraph (c) now also refers to "court-appointed" lawyers and the rationale underlying the extension of the exemption to the latter is not the same as for government lawyers or in-house counsel. See Explanation of Changes for paragraph (c).
	[5] Paragraph (c) also provides an exemption for "a court-appointed lawyer in a criminal or civil action or proceeding, but only as to those actions or proceedings in which the lawyer has been appointed." A lawyer must provide notification in all other actions and proceedings as required by paragraphs (a) and (b).	Comment [5] is new. It has been added to explain the limited scope of the paragraph (c) exemption for court-appointed lawyers. The comment clarifies that such lawyers must comply with the notification requirements of paragraphs (a) and (b) in actions and proceedings where the lawyers are not serving by court appointment.

Rule 1.4.1: Disclosure of Professional Liability Insurance
(Commission's Proposed Rule – Clean Version)

(a) A lawyer who knows or should know that he or she does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the lawyer, that the lawyer does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the lawyer's legal representation of the client in the matter will exceed four hours.

(b) If a lawyer does not provide the notice required under paragraph (a) at the time of a client's engagement of the lawyer, and the lawyer subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the lawyer shall inform the client in writing within thirty days of the date that the lawyer knows or should know that he or she no longer has professional liability insurance.

(c) This Rule does not apply to a lawyer who is employed as a government lawyer or in-house counsel when that lawyer is representing or providing legal advice to a client in that capacity, or to a court-appointed lawyer in a criminal or civil action or proceeding, but only as to those actions or proceedings in which the lawyer has been appointed.

(d) This Rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.

(e) This Rule does not apply where the lawyer has previously advised the client under paragraph (a) or (b) that the lawyer does not have professional liability insurance.

COMMENT

[1] The disclosure obligation imposed by Paragraph (a) of this Rule applies with respect to new clients and new engagements with returning clients.

[2] A lawyer may use the following language in making the disclosure required by paragraph (a), and may include that language in a written fee agreement with the client or in a separate writing:

"Pursuant to California Rule of Professional Conduct 1.4.1, I am informing you in writing that I do not have professional liability insurance."

[3] A lawyer may use the following language in making the disclosure required by paragraph (b):

"Pursuant to California Rule of Professional Conduct 1.4.1, I am informing you in writing that I no longer have professional liability insurance."

[4] Paragraph (c) in part provides an exemption for a "government lawyer or in-house counsel when that lawyer is representing or providing legal advice to a client in that capacity." The basis of both exemptions is essentially the same. The purpose of this Rule is to provide information directly to a client if a lawyer is not covered by professional liability insurance. If a lawyer is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the lawyer

is or is not covered by professional liability insurance. The exemptions for government lawyers and in-house counsels are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured.

[5] Paragraph (c) also provides an exemption for "a court-appointed lawyer in a criminal or civil action or proceeding, but only as to those actions or proceedings in which the lawyer has been appointed." A lawyer must provide notification in all other actions and proceedings as required by paragraphs (a) and (b).

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON CLIENT PROTECTION

STATE IMPLEMENTATION OF ABA *MODEL COURT RULE ON INSURANCE DISCLOSURE*

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (NY, TX, UT and VT)	**Information Made Available to Public**	**Other Info** (***See also*, Oregon:** Professional liability insurance mandated) (AR, CT, FL and KY have decided not to adopt the Model Court Rule)
AL					
AK Adopted effective 7/15/93; Amended effective 4/15/2000.	Alaska Rules of Professional Conduct, Rule 1.4			N/A	
AZ Effective 1/1/07		Supreme Court Rule 32(c), effective January 1, 2007. http://www.supreme.state.az.us/rules/rand_pdf/R-04-0025.pdf		Yes. State Bar of Arizona website.	
AR					On January 21, 2006 the House of Delegates of the Arkansas Bar Association voted not to adopt a disclosure rule.
CA Effective 1/1/2010	Rule 3-410. Disclosure of Professional Liability Insurance. California Rules of professional Conduct.  Supreme Ct Orde adopting RPC 3-41			N/A	

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (NY, TX, UT and VT)	**Information Made Available to Public**	**Other Info** (***See also*, Oregon:** Professional liability insurance mandated) (AR, CT, FL and KY have decided not to adopt the Model Court Rule)
CO Effective 1/1/09		**X** http://www.courts.state.co.us/Media/Press_Docs/attorney%20reg%20insurance%20disclosure%20FINAL.pdf		**X** C.R.C.P. 227: **(c) Availability of Information.** The information provided by the lawyer regarding professional liability insurance shall be available to the public through the Supreme Court Office of Attorney Registration and on the Supreme Court Office of Attorney Registration website.	**Colorado:** Supreme Court requires Colorado lawyers to disclose insurance status *Private-practice attorneys must make disclosure in annual registration.* DENVER – Beginning Jan. 1, 2009, all
CT					At its February 23, 2009 meeting, the Connecticut Superior Court Rules Committee voted unanimously to deny a proposal to adopt an insurance disclosure rule. http://www.jud.ct.gov/Committees/rules/rules_minutes_022309.pdf

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (NY, TX, UT and VT)	**Information Made Available to Public**	**Other Info** (***See also*, Oregon:** Professional liability insurance mandated) (AR, CT, FL and KY have decided not to adopt the Model Court Rule)
DE Beginning with 1007 Annual Registration Form.		Registration Form		2007 Registration Form no longer available to public. 2009 Registration Form: http://courts.delaware.gov/forms/download.aspx?id=27968	
DC					
FL					Have declined to adopt the Model Court Rule.
GA					
HI Effective 12/1/07		**RSCH 2.17(d)** http://www.state.hi.us/jud/ctrules/rsch.htm#Rule_17		N/A	
ID Effective 10/1/06		Idaho Bar Commission Rule 302(7), effective October 1, 2006		Available to the public upon request.	
IL Effective 10/1/04		Amended Illinois Supreme Court Rule 756		Yes http://www.iardc.org/malpracticeinfo.html	
KS Effective 9/6/05		Supreme Court Rule 208A		Yes, by means designated by the Court.	http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+Discipline+of+Attorneys&r2=281
KY					On or about November 14,

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (NY, TX, UT and VT)	**Information Made Available to Public**	**Other Info** (***See also*, Oregon:** Professional liability insurance mandated) (AR, CT, FL and KY have decided not to adopt the Model Court Rule)
					2006 the KY Sup. Ct. declined to adopt a disclosure rule.
LA					
MD					
MA Effective 9/1/06		Rule 4:02 Effective Sept. 1, 2006. http://www.massreports.com/courtrules/sjcrules.htm#4:02		Yes.	

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (NY, TX, UT and VT)	**Information Made Available to Public**	**Other Info** (***See also*, Oregon:** Professional liability insurance mandated) (AR, CT, FL and KY have decided not to adopt the Model Court Rule)
MI Beginning with the notice issued for fiscal year 2003-2004		Administrative Order No. 2003-5, dated August 6, 2003 http://www.icle.org/contentfiles/milawnews/Rules/Ao/2003-27_08-06-03%20_or.html		**No.**	
MN Effective 10/1/06		Rule 6 of the Rules of the Supreme Court on Lawyer Registration. Annual Reporting of Professional Liability Insurance Coverage (Effective October 1, 2006) http://www.courts.state.mn.us/documents/0/Public/Clerks_Office/July%202006%20Lawyer%20Registration%20Amend.doc		Yes. Rule 7. Access to Lawyer Registration Records	
MO					Not currently being considered.
NE Effective 11/1/03	http://casemaker.nebar.com/pdfs/nsbainfo/rules.pdf	Rules Creating, Controlling, and Regulating Nebraska State Bar Association, Article III, Membership, paragraph (f).		Shall be made available to the public.	
NV Adopted 9/13/05 and effective 11/13/05	http://www.leg.state.nv.us/CourtRules/scr.html	Amended Supreme Court Rule 79 (Adopted September 13, 2005 and effective November 13, 2005)		Yes. It will be part of the lawyer's public record available by phone or email inquiry.	

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (NY, TX, UT and VT)	**Information Made Available to Public**	**Other Info** (***See also*, Oregon:** Professional liability insurance mandated) (AR, CT, FL and KY have decided not to adopt the Model Court Rule)
NH Effective 3/1/03	New Hampshire Rules of Professional Conduct, Rule 1.19. (Disclosure of Information to the Client) http://www.courts.state.nh.us/supreme/orders/20072507.pdf			N/A	
NM Effective 11/2/09	Rule 16-104 Rules of Professional Conduct http://www.nmcompcomm.us/nmrules/nmruleset.aspx?rs=16				
NY			Under consideration.		
NC Adopted 10/1/03		North Carolina-Rules and Regulations, Subchapter A, Organization of the North Carolina State Bar, Section .0204, Certificate of Insurance Coverage		On the Bar's website: http://www.ncbar.com/home/member_directory.asp and http://www.ncbar.com/InsuranceDisclosure.asp	The North Carolina State Bar Association has proposed that the Rule Requiring Certification of Insurance Coverage be eliminated. http://www.ncbar.gov/rules/proprul.asp

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (NY, TX, UT and VT)	**Information Made Available to Public**	**Other Info** (***See also*, Oregon:** Professional liability insurance mandated) (AR, CT, FL and KY have decided not to adopt the Model Court Rule)
ND Effective 8/1/09	http://www.court.state.nd.us/rules/Conduct/frameset.htm	Amended Rule 1.15 of the North Dakota Rules of Professional Conduct		Yes	
OH Effective 7/1/01	Ohio Rules of Professional Conduct, Rule 1.4(c) http://www.sconet.state.oh.us/Atty-Svcs/ProfConduct/rules/default.asp#Rule1_4			N/A	Lawyers who hire themselves out to do research and writing for other lawyers need not comply. (Ohio Supreme Court Bd. of Commissioners on Grievances and Discipline, Op. 2005-1, 2/4/05).
OR					All lawyers required to maintain professional liability insurance.
PA Effective 7/1/06	Pennsylvania adopted RPC 1.4(c), effective 7/1/2006. http://www.aopc.org/OpPosting/Supreme/out/50drd.1attach.pdf			N/A	
RI Effective 4/15/07		Rule 1(b) of Article IV "Periodic Registration of Attorneys". (Effective April 15, 2007)		http://www.courts.state.ri.us/supreme/pdf-files/ORDER_Amendments_to_RI_Supreme_Court_Aticle_IV_Rule_1(Attorney_registration).pdf	

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (NY, TX, UT and VT)	**Information Made Available to Public**	**Other Info** (***See also*, Oregon:** Professional liability insurance mandated) (AR, CT, FL and KY have decided not to adopt the Model Court Rule)
SC					
SD Effective 1/1/99	South Dakota Model Rules of Professional Conduct, Rule 1.4 (Communication)	(SD also requires lawyers to disclose on their annual registration statements.) http://www.sdbar.org/memberspublic/Information/2007_Certificate.pdf		N/A	SD has 7 years of certification to the Supreme Court - 97% have at least $100,000 in coverage, together with name and policy number of the policy. Over the past 7 years, the percentage has never dropped below 96% nor been higher than 97.5% in any given year.
TX Effective 9/1/09			**X** The State Bar of Texas has scheduled a series of public hearings. Hearings will be held Oct. 14 in San Antonio, Oct. 15 in Harlingen, Oct. 16 in Houston, Oct. 27 in El Paso, Oct. 28 in Dallas, Oct. 29 in Lubbock and Nov. 9 in Austin. The public also can post comments regarding the issue on the Bar's Web site. After all comments from the hearings and Web site are compiled, the Bar board will vote Jan. 29, 2010, on a recommendation that will go to the Texas Supreme Court.		A Bill has been introduced in the Texas Legislature to require the Tx S Ct to adopt a rule providing for disclosure of insurance. http://www.legis.state.tx.us/search/DocViewer.aspx?K2DocKey=odbc%3a%2f%2fTLO%2fTLO.dbo.vwCurrBillDocs%2f81%2fR%2fH%2fB%2f02825%2f1%2fB%40TloCurrBillDocs&QueryText=insurance%3cOR%3edisclosure%3cOR%3eattorneys&HighlightType=1

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (NY, TX, UT and VT)	**Information Made Available to Public**	**Other Info** (***See also*, Oregon:** Professional liability insurance mandated) (AR, CT, FL and KY have decided not to adopt the Model Court Rule)
			See also, http://www.texasbar.com/Template.cfm?Section=Home&CONTENTID=25310&TEMPLATE=/ContentManagement/ContentDisplay.cfm		
UT			Rule 1.4 Proposed Amendment - Disclosure of Malpractice Insurance Rule 1.4. Communication. http://webster.utahbar.org/news/2005/07/		Required to disclose on registration statement but no Rule enacted. Bar will collect date on coverage for a 2-year period (2009-2011).
VT			On December 28, 2006 the Civil Rules Committee proposed that the Vermont Supreme Court consider adoption of a rule requiring insurance disclosure, not in the Vermont Rules of Professional Conduct, but as part of the Rules for Licensing of Attorneys. In adopting the rule, consideration should be given to requiring disclosure of the liability limits and deductibles of the coverage.		

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (NY, TX, UT and VT)	**Information Made Available to Public**	**Other Info** (***See also*, Oregon:** Professional liability insurance mandated) (AR, CT, FL and KY have decided not to adopt the Model Court Rule)
VA Amended effective 7/1/89; 1/1/90; 4/1/90.		Rules of the Virginia Supreme Court, Part 6 § 4 Paragraph 18. Financial Responsibility		Yes, on Bar's website: (See, www.vsb.org, under the headings Public Information, Attorney Records Search, Attorneys without Malpractice Insurance). Total Members Answering PL Questions: 25,921 - FY2005 Private Practice – No Insurance: 1,892 (11%) Private Practice – With Insurance: 14,703 (89%)	Virginia State Bar is seeking comments on a proposed Rule requiring legal malpractice insurance. Comments are due by September 26, 2008. http://www.vsb.org/site/news/item/proposed-insurance-requirement/
WA Effective 7/1/07		Admission to Practice Rule 26 - Insurance Disclosure. (Effective July 1, 2007) http://www.courts.wa.gov/court_Rules/proposed/2005Dec/APR26.doc.		Yes.	
WV Effective 5/6/05		State Bar By-Laws – Article III (A) - Financial Responsibility Disclosure http://www.state.wv.us/wvsca/rules/ArticleIII.htm		Yes. . . . shall be made available to the public by such means as may be designated by the West Virginia State Bar.	
WI					

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (NY, TX, UT and VT)	**Information Made Available to Public**	**Other Info** (***See also*, Oregon:** Professional liability insurance mandated) (AR, CT, FL and KY have decided not to adopt the Model Court Rule)
WY					

Model Rule 1.8(d)
"Literary or Media Rights"

RECOMMENDATION: NO ADOPTION

Summary: The Commission is not recommending adoption of a California version of Model Rule 1.8(d) which prohibits a lawyer from acquiring literary or media rights to a portrayal or an account of a client's representation prior to the conclusion of that matter.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☑ ABA Model Rule substantially rejected	☑ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rule	RPC 3-300
Statute	
Case law	*Maxwell v. Superior Court* (1982) 30 Cal.3d 606

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☑

Favor Rule for Adoption __0___
Opposed Rule for Adoption __7___
Abstain __2___

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority Position Included. (See Introduction): ☐ Yes ☑ No

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☑ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.4* Literary or Media Rights

December 2009
(No rule is recommended for adoption.)

INTRODUCTION:

The Commission is not recommending adoption of a California version of Model Rule 1.8(d). The Model Rule carries forward concepts expressed in the Model Code. DR 5-103(A) stated in relevant part: "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client..." EC 5-4 stated: "If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended."

California has not adopted a similar prohibition. Instead, literary rights arrangements between lawyers and clients have been considered under the Rule 3-300 rubric. (See *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 616, n. 6.) The California Supreme Court addressed the conflict issues associated with literary rights agreements in *Maxwell* and rejected the conflict of interest considerations that have been used to justify the Model Rule. *Maxwell* involved an agreement by which a criminal defendant charged with a capital offense entered into an agreement to confer the ownership of his life story to his defense counsel. The agreement had extensive disclosures. It advised the client to seek the advice of independent counsel. The defendant was examined and was determined to have knowingly consented to the arrangement. Nevertheless, the trial court recused the defendant's lawyers on the grounds that the agreement created a conflict of interest.

The Supreme Court disagreed. It stated, "A life-story agreement creates no such inherent or inevitable conflict. The contract here discloses that the value of petitioner's story might benefit from a long, sensational trial leading to conviction and death. It seems not unlikely, though, that counsel's self-interests might best be served by a careful, diligent defense that avoids conviction or minimizes the penalty. A quiet strategy that succeeds may well make a better story than a flamboyant failure. Counsel's reputation, a precious professional and commercial asset, is enhanced; and the risks of professional discipline and demeaning criticism are reduced. Also, it may be commercially prudent to keep lurid facts confidential until the legal battle has ended.

Justice Files' dissenting remarks in the Court of Appeal are particularly apt: 'Although the literary rights contract is not a common experience for attorneys, the kind of 'conflict' discussed here is not at all unusual. . . . [Almost] any fee arrangement between attorney and client may give rise to a 'conflict.' An attorney who received a flat fee in advance would have a 'conflicting interest' to dispose of the case as quickly as possible, to the client's disadvantage; and an attorney employed at a daily or hourly rate would have a 'conflicting interest' to drag the case on beyond the point of maximum benefit to the client.

The contingent fee contract so common in civil litigation creates a 'conflict' when either the attorney or the client needs a quick settlement while the other's interest would be better served by pressing on in the hope of a greater recovery. The variants of this kind of 'conflict' are infinite. Fortunately most attorneys serve their clients honorably despite the opportunity to profit by neglecting or betraying the client's interest.'" (*Maxwell*, *supra*, 30 Cal.3d at 619, n. 8.) The Court concluded that a client could give an informed consent to the conflicts of interest that could arise from a literary rights agreement.

The Court's concluding comment in *Maxwell* states, "We stress that our opinion connotes no moral or ethical approval of life-story fee contracts. We have addressed only this narrow question: May a criminal defendant (here charged with capital crimes) be denied his right to representation by retained counsel simply because of potential conflicts or ethical concerns even when he has asserted, after extensive disclosure of the risks, that he wishes to proceed with his chosen lawyers and no others? Our answer is No." (*Maxwell*, *supra*, 30 Cal.3d at 622.)

In a concluding footnote, the Court stated, "As Justice Files observed below: 'I do not disagree with EC 5-4 of the American Bar Association's Code of Professional Responsibility, which declares that the kind of contract which is here involved 'should be scrupulously avoided.' But we are here dealing with a fact and not a theory. The defendant and his attorneys have made the contract. The question now is whether this defendant, charged with four capital offenses, shall be deprived of his chosen attorneys and forced to accept the trial court's choice who, in the words of the Faretta court: '"represents" the defendant only through a tenuous and unacceptable legal fiction.'" (*Maxwell*, *supra*, 30 Cal.3d at 622, n. 13.)

Model Rule 1.8(d) imposes an unconsentable prohibition on literary right agreements based on principles that the Supreme Court did not accept in *Maxwell*. *Maxwell* demonstrates that such agreements do not always involve a conflict of interest and that a client can consent to a literary rights agreement in the face of potential conflicts. The Commission is not aware of any particular development that would suggest that the Court would be prepared to abandon *Maxwell.* Indeed, the Court cited *Maxwell* in its concluding footnote in *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706 without questioning its holding.

In considering whether to adopt a California version of Model Rule 1.8(d), the Commission reassessed California's existing law and policy and concluded that the absolute prohibition in Rule 1.8(d) is not warranted. Adequate client protection is afforded if literary rights agreements are permitted with appropriate disclosures and consents that are involved with compliance with the Commission's proposed Rule 1.8.1.

ABA Model Rule Rule 1.8(d) Conflict Of Interest: Specific Rules: Literary or Media Rights	Commission's Proposed Rule* Rule 1.8.4 Literary or Media Rights	Explanation of Changes to the ABA Model Rule
(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.	~~(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.~~	The Commission is recommending that no version of Model Rule 1.8(d) be adopted. See introduction.

* No California version of Model Rule 1.8 (d) is recommended.

ABA Model Rule **Rule 1.8(d) Conflict Of Interest: Specific Rules: Literary or Media Rights Comment**	Commission's Proposed Rule **Rule 1.8.4 Literary or Media Rights Comment**	Explanation of Changes to the ABA Model Rule
[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).	~~[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).~~	The Commission is recommending that no version of Model Rule 1.8(d) be adopted. See introduction.

Rule 1.8.4: Literary or Media Rights

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman. The text relevant to proposed Rule 1.8.4 is highlighted.)

Alabama. In the rules effective June 2008, Alabama's Rule 1.8(e)(3) provides as follows:

> (3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer.

Alabama also adds Rule 1.8(k), which identifies when a lawyer can represent both parties to an uncontested divorce or domestic relations proceeding. Relating to Rule 1.8(h), the Alabama Legal Services Liability Act, Ala. Code §6-5-570 et seq., provides as follows: "There shall be only one form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action." Finally, Rules 1.8(l) and (m) describe prohibitions on sexual relations between lawyers and clients. Notably, Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

Arizona: Rule 1.8(h)(2) adds a clause forbidding a lawyer to "make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities." Rule 1.8(l), which retains the 1983 version of ABA Model Rule 1.8(i), provides: "A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

California: California's rules are generally equivalent to Model Rule 1.8, but two exceptions deserve attention. Rule 3-320 provides as follows:

> A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

And Rule 4-210 provides in part as follows:

> (A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a

prospective or existing client, except that this rule shall not prohibit a member: . . . (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan.

Connecticut adds the following language to Rule 1.8(a), providing that lawyers can enter into business transactions with clients under the following circumstances:

> (4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.
>
> (5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by legal liability insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.
>
> For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding." Rule 1.8(i) provides as follows:

> A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

Florida adds Rule 4-8.4(i), which provides that a lawyer shall not engage in sexual conduct with a client "or a representative of a client" that:

> exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:
>
> (1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;
>
> (2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or
>
> (3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client sexual relations do not violate the rule if a sexual relationship existed between the lawyer and client before commencement of the lawyer-client relationship.

Georgia: Rule 1.8(a), drawing on DR 5-104 of the ABA Code of Professional Responsibility, applies "if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client." Georgia retains the language of deleted ABA Model Rule 1.8(i) but adds that the disqualification of a lawyer due to a parent, child, sibling, or spousal relationship "is personal and is not imputed to members of firms with whom the lawyers are associated." Georgia adds that the maximum penalty for violating Rule 1.8(b) (which relates to confidentiality) is disbarment, but the maximum penalty for violating any other provision of Rule 1.8 is only a public reprimand.

Illinois: Rule 1.8(a), which borrows heavily from DR 5-104 of the ABA Model Code of Professional Responsibility, provides that unless the client has consented after disclosure, a lawyer "shall not enter into a business transaction with the client if: (1) the lawyer knows or reasonably should know that the lawyer and the client have or may have conflicting interests therein; or (2) the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client." Illinois deletes the language of ABA Model Rule 1.8(b), and retains the original 1983 version of ABA Model Rule 1.8(c). Illinois Rule 1.8(e) permits a lawyer to advance or guarantee the expenses of litigation if: "(1) the client remains ultimately liable for such expenses; or (2) the repayment is contingent on the outcome of the matter; or (3) the client is indigent." Illinois Rule 1.8(h) provides that a lawyer "shall not settle a claim against the lawyer made by an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith." Illinois adds language to Rule 1.8, providing as follows:

> (h) A lawyer shall not enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Attorney Registration and Disciplinary Commission.

Illinois has no provision regulating sex with clients, but in In re Rinella, 175 Ill. 2d 504, (1997), the court suspended a lawyer for three years for having sexual relations with three different clients (and then lying about it during the Bar's investigation). The court said that no lawyer could reasonably have considered such conduct acceptable under the existing ethics rules even though the rules do not expressly address sex with clients.

Louisiana: Rule 1.8(g) permits an aggregate settlement if "a court approves the settlement in a certified class action." Rule 1.8(e) permits a lawyer to "provide financial assistance to a client who is in necessitous circumstances" subject to strict controls, including:

> (ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer's behalf, to secure employment.
>
> (iii) Neither the lawyer nor anyone acting on the lawyer's behalf may offer to make advances or loan guarantees prior to being hired by a client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.

Massachusetts: Rule 1.8(b) forbids a lawyer to use confidential information "for the lawyer's advantage or the advantage of a third person" without consent.

Michigan: Rules 1.8(a)(2) and 1.8(h)(2) (regarding business transactions with clients and settlement of legal malpractice claims) both require that the client be given a reasonable opportunity to seek the advice of independent counsel but lack the ABA requirement that the client be "advised in writing of the desirability of seeking" independent counsel. Michigan Rule 1.8(g), regarding aggregate settlements, lacks the ABA requirement that the client's consent be "in a writing signed by the client." Michigan retains the language of deleted ABA Model Rule 1.8(i) verbatim.

Minnesota: Rule 1.8(e)(3) allows a lawyer to guarantee a loan necessary for a client to withstand litigation delay. Rule 1.8(k)'s provision on sexual relationships with clients prohibits a lawyer from having sexual relations with a client unless a consensual relationship existed between the lawyer and client when the client-lawyer relationship commenced. The rule also defines "sexual relations" and adds the following Rules 1.8(k)(2)-(3) to explain the meaning of sex with a "client" when a lawyer represents an organization:

> (2) if the client is an organization, any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client . . .
>
> (3) this paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client ...

Mississippi: Rule 1.8(e)(2) permits a lawyer to advance medical and living expenses to a client under certain narrowly defined circumstances.

New Hampshire: The New Hampshire rules include a Rule 1.19 (Disclosure of Information to the Client), which requires a lawyer (other than a government or in-house lawyer) to inform a client at the time of engagement if "the lawyer does not maintain professional liability insurance" of at least $100,000 per occurrence and $300,000 in the aggregate "or if the lawyer's professional liability insurance ceases to be in effect."

New Jersey: Rule 1.8(e)(3) creates an exception allowing financial assistance by a "non-profit organization authorized under [other law]" if the organization is representing the indigent client without a fee. Rule 1.8(h)(1), while forbidding agreements prospectively limiting liability to a client, contains an exception if "the client fails to act in accordance with the lawyer's advice and the lawyer nevertheless continues to represent the client at the client's request." (New Jersey Rule 1.8(k) and (l) provide as follows:

> (k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.
>
> (l) A public entity cannot consent to a representation otherwise prohibited by this Rule.

New York: Relating to ABA Model Rule 1.8(a), New York DR 5-104(A) governs business deals between a lawyer and

client only if "they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client." If so, the lawyer shall not enter into a business transaction unless the lawyer meets conditions identical to Rule 1.8(a)(1), the lawyer advises the client to seek the advice of independent counsel in the transaction, and the client "consents in writing, after full disclosure, to the terms of the transaction and to the lawyer's inherent conflict of interest in the transaction." DR 5-104 does not govern acquisition of "an ownership, possessory, security or other pecuniary interest adverse to a client."

Relating to Rule 1.8(e), New York DR 5-103(B)(1) permits a lawyer representing "an indigent or pro bono client" to pay court costs and reasonable expenses of litigation on behalf of the client. For all clients, DR 5-103(B)(2) tracks ABA Model Rule 1.8(f)(1) verbatim. New York adds DR 5-103(B)(3), which provides:

> (3) A lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

In addition, N.Y. Judiciary Law §488 generally permits a lawyer to advance the costs and expenses of litigation contingent on the outcome of the matter.

Relating to Rule 1.8(j), New York DR 5-111(B) provides that a lawyer shall not "(1) Require or demand sexual relations with a client or third party incident to or as a condition of any professional representation," or "(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client." DR 5-111(B)(3) forbids lawyers to begin a sexual relationship with a "domestic relations" client, not with other clients.

New York has no specific counterpart to Rule l.8(k), and New York's counterpart to Rule 1.8(c) is found only in EC 5-5, but various Disciplinary Rules in Canons 4 and 5 generally parallel the provisions of Rules 1.8(b), (d), and (f)-(i).

North Dakota: Rule 1.8(g), regarding aggregate settlements, applies "other than in class actions." North Dakota adds Rule 1.8(k), which restricts the practice of law by a part-time prosecutor or judge in certain circumstances.

Ohio: Rule 1.8(c) forbids a lawyer to solicit "any substantial gift from a client" and forbids a lawyer to "prepare on behalf of the client an instrument giving the lawyer, the lawyer's partner, associate, paralegal, law clerk or other employee of the lawyer's firm, a lawyer acting 'of counsel' in the lawyer's firm, or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client." "Gift" is defined to include "a testamentary gift." Ohio Rule 1.8(f)(4) provides a detailed "statement of insured client's rights" that a lawyer "selected and paid by an insurer to represent an insured" must give to the client.

Oregon: Rule 1.8(b) permits a lawyer to use confidential information to a client's disadvantage only if the client's consent is "confirmed in writing" (except as otherwise permitted or required by the Rules). Rule 1.8(e) permits a lawyer to advance litigation expenses only if "the client remains ultimately liable for such expenses to the extent of the client's ability to pay." Finally, Oregon's rule governing sexual relations with clients contains a detailed description of "sexual relations," providing that it includes "sexual intercourse or any touching of the sexual or other intimate parts of a person or

causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party."

Pennsylvania: Rule 1.8(g) does not require that client consent be "confirmed in writing."

Texas: Rule 1.08(c) provides that prior to the conclusion of "all aspects of the matter giving rise to the lawyer's employment," a lawyer shall not make or negotiate an agreement "with a client, prospective client, or former client" giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation. Rule 1.08(d) provides as follows:

> (d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:
>
> (1) a lawyer may advance guarantee court costs, expenses of litigation or administrative-proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Virginia: Rule 1.8(b) forbids the use of information "for the advantage of the lawyer or of a third person or to the disadvantage of the client." Rule 1.8(e)(1) requires a client ultimately to be liable for court costs and expenses. Rule 1.8(h) contains an exception where the lawyer is "an employee" of the client "as long as the client is independently represented in making the agreement" prospectively limiting the lawyer's liability for malpractice.

Washington: Rule 1.8(e) permits a lawyer to (1) advance or guarantee the expenses of litigation "provided the client remains ultimately liable for such expenses; and (2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter." Washington deletes ABA Model Rule 1.8(e)(2) (permitting lawyers to pay litigation costs for indigent clients).

Wisconsin: Rule 1.8(c) creates an exception to testamentary gifts where:

> (1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

Proposed Rule 1.8(i)
"Proprietary Interest in the Subject Matter of Representation"

RECOMMENDATION: NO ADOPTION

Summary: The Commission is not recommending adoption of a California version of Model Rule 1.8(i) which, with limited exceptions, prohibits a lawyer from acquiring a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☑ ABA Model Rule substantially rejected	☑ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rule	RPC 3-300
Statute	
Case law	

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☑

Favor Rule for Adoption __0___
Opposed Rule for Adoption __9___
Abstain __0___

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority Position Included. (See Introduction): ☐ Yes ☑ No

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☑ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.9* Proprietary Interest in the Subject Matter of Representation

December 2009
(No rule is recommended for adoption.)

INTRODUCTION:

The Commission is not recommending adoption of a California version of Model Rule 1.8(i). As explained in the Model Rule comments, Model Rule 1.8(i) is based on (i) common law prohibitions on champerty and maintenance and (ii) the potential difficulty in discharging counsel. California has never included the concept of maintenance and champerty in a rule of professional conduct. The Commission believes that an acquisition of an ownership interest should be governed by proposed Rule 1.8.1, the general rule governing a business transaction with a client and a lawyer's acquisitions of an adverse interest. The comments to Model Rule 1.8(i) suggest that the ABA had a specific transaction in mind when it adopted the Model Rule, but neither the Model Rule nor the Comment provides any specific information on this point. The result is a Model Rule that is overbroad (in that it would apply to acquisitions that may be fair and reasonable and could pass muster under Rule 1.8.1) and that covers a subject that is already addressed in Rule 1.8.1. Rule 1.8.1 does a much better job of distinguishing between those acquisitions that should be prohibited and those that should not.

ABA Model Rule **Rule 1.8(i) Conflict Of Interest: Specific Rules: Proprietary Interest in Subject Matter of Representation**	**Commission's Proposed Rule*** **Rule 1.8.9 Proprietary Interest in Subject Matter of Representation**	**Explanation of Changes to the ABA Model Rule**
(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:	~~(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:~~	The Commission is recommending that no version of Model Rule 1.8(i) be adopted. See introduction.
(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and	~~(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and~~	The Commission is recommending that no version of Model Rule 1.8(i) be adopted. See introduction.
(2) contract with a client for a reasonable contingent fee in a civil case.	~~(2) contract with a client for a reasonable contingent fee in a civil case.~~	The Commission is recommending that no version of Model Rule 1.8(i) be adopted. See introduction.

* No California version of Model Rule 1.8(i) is recommended.

ABA Model Rule **Rule 1.8(i) Conflict Of Interest: Specific Rules: Proprietary Interest in Subject Matter of Representation Comment**	Commission's Proposed Rule **Rule 1.8.9 Proprietary Interest in Subject Matter of Representation Comment**	Explanation of Changes to the ABA Model Rule
[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.	~~[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.~~	The Commission is recommending that no version of Model Rule 1.8(i) be adopted. See introduction.

Rule 1.8.9: Proprietary Interest in the Subject Matter of Representation

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman. The text relevant to proposed Rule 1.8.9 is highlighted.)

Alabama. In the rules effective June 2008, Alabama's Rule 1.8(e)(3) provides as follows:

> (3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer.

Alabama also adds Rule 1.8(k), which identifies when a lawyer can represent both parties to an uncontested divorce or domestic relations proceeding. Relating to Rule 1.8(h), the Alabama Legal Services Liability Act, Ala. Code §6-5-570 et seq., provides as follows: "There shall be only one form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action." Finally, Rules 1.8(l) and (m) describe prohibitions on sexual relations between lawyers and clients. Notably, Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

Arizona: Rule 1.8(h)(2) adds a clause forbidding a lawyer to "make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities." Rule 1.8(l), which retains the 1983 version of ABA Model Rule 1.8(i), provides: "A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

California: California's rules are generally equivalent to Model Rule 1.8, but two exceptions deserve attention. Rule 3-320 provides as follows:

> A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

And Rule 4-210 provides in part as follows:

> (A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a

prospective or existing client, except that this rule shall not prohibit a member: . . . (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan.

Connecticut adds the following language to Rule 1.8(a), providing that lawyers can enter into business transactions with clients under the following circumstances:

> (4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.
>
> (5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by legal liability insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.
>
> For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding." Rule 1.8(i) provides as follows:

> A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

Florida adds Rule 4-8.4(i), which provides that a lawyer shall not engage in sexual conduct with a client "or a representative of a client" that:

> exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:
>
> (1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;
>
> (2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or
>
> (3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client sexual relations do not violate the rule if a sexual relationship existed between the lawyer and client before commencement of the lawyer-client relationship.

Georgia: Rule 1.8(a), drawing on DR 5-104 of the ABA Code of Professional Responsibility, applies "if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client." Georgia retains the language of deleted ABA Model Rule 1.8(i) but adds that the disqualification of a lawyer due to a parent, child, sibling, or spousal relationship "is personal and is not imputed to members of firms with whom the lawyers are associated." Georgia adds that the maximum penalty for violating Rule 1.8(b) (which relates to confidentiality) is disbarment, but the maximum penalty for violating any other provision of Rule 1.8 is only a public reprimand.

Illinois: Rule 1.8(a), which borrows heavily from DR 5-104 of the ABA Model Code of Professional Responsibility, provides that unless the client has consented after disclosure, a lawyer "shall not enter into a business transaction with the client if: (1) the lawyer knows or reasonably should know that the lawyer and the client have or may have conflicting interests therein; or (2) the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client." Illinois deletes the language of ABA Model Rule 1.8(b), and retains the original 1983 version of ABA Model Rule 1.8(c). Illinois Rule 1.8(e) permits a lawyer to advance or guarantee the expenses of litigation if: "(1) the client remains ultimately liable for such expenses; or (2) the repayment is contingent on the outcome of the matter; or (3) the client is indigent." Illinois Rule 1.8(h) provides that a lawyer "shall not settle a claim against the lawyer made by an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith." Illinois adds language to Rule 1.8, providing as follows:

> (h) A lawyer shall not enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Attorney Registration and Disciplinary Commission.

Illinois has no provision regulating sex with clients, but in In re Rinella, 175 Ill. 2d 504, (1997), the court suspended a lawyer for three years for having sexual relations with three different clients (and then lying about it during the Bar's investigation). The court said that no lawyer could reasonably have considered such conduct acceptable under the existing ethics rules even though the rules do not expressly address sex with clients.

Louisiana: Rule 1.8(g) permits an aggregate settlement if "a court approves the settlement in a certified class action." Rule 1.8(e) permits a lawyer to "provide financial assistance to a client who is in necessitous circumstances" subject to strict controls, including:

> (ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer's behalf, to secure employment.
>
> (iii) Neither the lawyer nor anyone acting on the lawyer's behalf may offer to make advances or loan guarantees prior to being hired by a client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.

Massachusetts: Rule 1.8(b) forbids a lawyer to use confidential information "for the lawyer's advantage or the advantage of a third person" without consent.

Michigan: Rules 1.8(a)(2) and 1.8(h)(2) (regarding business transactions with clients and settlement of legal malpractice claims) both require that the client be given a reasonable opportunity to seek the advice of independent counsel but lack the ABA requirement that the client be "advised in writing of the desirability of seeking" independent counsel. Michigan Rule 1.8(g), regarding aggregate settlements, lacks the ABA requirement that the client's consent be "in a writing signed by the client." Michigan retains the language of deleted ABA Model Rule 1.8(i) verbatim.

Minnesota: Rule 1.8(e)(3) allows a lawyer to guarantee a loan necessary for a client to withstand litigation delay. Rule 1.8(k)'s provision on sexual relationships with clients prohibits a lawyer from having sexual relations with a client unless a consensual relationship existed between the lawyer and client when the client-lawyer relationship commenced. The rule also defines "sexual relations" and adds the following Rules 1.8(k)(2)-(3) to explain the meaning of sex with a "client" when a lawyer represents an organization:

> (2) if the client is an organization, any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client . . .
>
> (3) this paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client ...

Mississippi: Rule 1.8(e)(2) permits a lawyer to advance medical and living expenses to a client under certain narrowly defined circumstances.

New Hampshire: The New Hampshire rules include a Rule 1.19 (Disclosure of Information to the Client), which requires a lawyer (other than a government or in-house lawyer) to inform a client at the time of engagement if "the lawyer does not maintain professional liability insurance" of at least $100,000 per occurrence and $300,000 in the aggregate "or if the lawyer's professional liability insurance ceases to be in effect."

New Jersey: Rule 1.8(e)(3) creates an exception allowing financial assistance by a "non-profit organization authorized under [other law]" if the organization is representing the indigent client without a fee. Rule 1.8(h)(1), while forbidding agreements prospectively limiting liability to a client, contains an exception if "the client fails to act in accordance with the lawyer's advice and the lawyer nevertheless continues to represent the client at the client's request." (New Jersey Rule 1.8(k) and (l) provide as follows:

> (k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.
>
> (l) A public entity cannot consent to a representation otherwise prohibited by this Rule.

New York: Relating to ABA Model Rule 1.8(a), New York DR 5-104(A) governs business deals between a lawyer and client only if "they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client." If so, the lawyer shall not enter into a business transaction unless the lawyer meets conditions identical to Rule 1.8(a)(1), the lawyer advises the client to seek the advice of independent counsel in the transaction, and the client "consents in writing, after full disclosure, to the terms of the transaction and to the lawyer's inherent conflict of interest in the transaction." DR 5-104 does not govern acquisition of "an ownership, possessory, security or other pecuniary interest adverse to a client."

Relating to Rule 1.8(e), New York DR 5-103(B)(1) permits a lawyer representing "an indigent or pro bono client" to pay court costs and reasonable expenses of litigation on behalf of the client. For all clients, DR 5-103(B)(2) tracks ABA Model Rule 1.8(f)(1) verbatim. New York adds DR 5-103(B)(3), which provides:

> (3) A lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

In addition, N.Y. Judiciary Law §488 generally permits a lawyer to advance the costs and expenses of litigation contingent on the outcome of the matter.

Relating to Rule 1.8(j), New York DR 5-111(B) provides that a lawyer shall not "(1) Require or demand sexual relations with a client or third party incident to or as a condition of any professional representation," or "(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client." DR 5-111(B)(3) forbids lawyers to begin a sexual relationship with a "domestic relations" client, not with other clients.

New York has no specific counterpart to Rule 1.8(k), and New York's counterpart to Rule 1.8(c) is found only in EC 5-5, but various Disciplinary Rules in Canons 4 and 5 generally parallel the provisions of Rules 1.8(b), (d), and (f)-(i).

North Dakota: Rule 1.8(g), regarding aggregate settlements, applies "other than in class actions." North Dakota adds Rule 1.8(k), which restricts the practice of law by a part-time prosecutor or judge in certain circumstances.

Ohio: Rule 1.8(c) forbids a lawyer to solicit "any substantial gift from a client" and forbids a lawyer to "prepare on behalf of the client an instrument giving the lawyer, the lawyer's partner, associate, paralegal, law clerk or other employee of the lawyer's firm, a lawyer acting 'of counsel' in the lawyer's firm, or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client." "Gift" is defined to include "a testamentary gift." Ohio Rule 1.8(f)(4) provides a detailed "statement of insured client's rights" that a lawyer "selected and paid by an insurer to represent an insured" must give to the client.

Oregon: Rule 1.8(b) permits a lawyer to use confidential information to a client's disadvantage only if the client's consent is "confirmed in writing" (except as otherwise permitted or required by the Rules). Rule 1.8(e) permits a lawyer to advance litigation expenses only if "the client remains ultimately liable for such expenses to the extent of the client's ability to pay." Finally, Oregon's rule governing sexual relations with clients contains a detailed description of "sexual

relations," providing that it includes "sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party."

Pennsylvania: Rule 1.8(g) does not require that client consent be "confirmed in writing."

Texas: Rule 1.08(c) provides that prior to the conclusion of "all aspects of the matter giving rise to the lawyer's employment," a lawyer shall not make or negotiate an agreement "with a client, prospective client, or former client" giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation. Rule 1.08(d) provides as follows:

> (d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:
>
> (1) a lawyer may advance guarantee court costs, expenses of litigation or administrative-proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Virginia: Rule 1.8(b) forbids the use of information "for the advantage of the lawyer or of a third person or to the disadvantage of the client." Rule 1.8(e)(1) requires a client ultimately to be liable for court costs and expenses. Rule 1.8(h) contains an exception where the lawyer is "an employee" of the client "as long as the client is independently represented in making the agreement" prospectively limiting the lawyer's liability for malpractice.

Washington: Rule 1.8(e) permits a lawyer to (1) advance or guarantee the expenses of litigation "provided the client remains ultimately liable for such expenses; and (2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter." Washington deletes ABA Model Rule 1.8(e)(2) (permitting lawyers to pay litigation costs for indigent clients).

Wisconsin: Rule 1.8(c) creates an exception to testamentary gifts where:

> (1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

Proposed Rule 1.11 [N/A]
"Special Conflicts Of Interest For Former And Current Government Officers And Employees"

(**Draft #7, 12/14/09**)

Summary: Proposed Rule 1.11 is based on Model Rule 1.11 and addresses conflicts arising from a lawyer moving to or from government service. Although there is no current rule counterpart in California, there is ample case law that concerns this Rule's topic. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [43 Cal.Rptr.3d 771]; *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17 [18 Cal.Rptr.3d 403]; *Chambers v. Superior Court* (1981) 121 Cal.App.3d 893 [175 Cal.Rptr. 575]; *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108 [164 Cal.Rptr. 864].

Comparison with ABA Counterpart

Rule	Comment
☑ ABA Model Rule substantially adopted	☑ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☑ Some material additions to ABA Model Rule	☑ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☑ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rule	RPC 3-310.
Statute	
Case law	*City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [43 Cal.Rptr.3d 771]; *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17 [18 Cal.Rptr.3d 403].

☑ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

D.C. Rule 1.11; N.Y. Rule 1.11.

☐ Other Primary Factor(s)

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): ☑ Yes ☐ No

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☑ Moderately Controversial – Explanation:

The proposed Rule departs from the Model Rule by requiring, pursuant to California case law, that a government lawyer's disqualification be imputed to other lawyers in the governmental organization that employs the lawyer unless the former client consents or the disqualified lawyer is screened.

☐ Not Controversial – Explanation:

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.11* Special Conflicts of Interest for Former and Current Government Officers and Employees

December 2009
(Draft rule to be considered for public comment.)

INTRODUCTION:

Proposed Rule 1.11 is based on Model Rule 1.11 and addresses conflicts arising from a lawyer moving to or from government service. Although there is no current rule counterpart in California, there is ample case law that concerns this Rule's topic. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [43 Cal.Rptr.3d 771]; *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17 [18 Cal.Rptr.3d 403]; *Chambers v. Superior Court* (1981) 121 Cal.App.3d 893 [175 Cal.Rptr. 575]; *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108 [164 Cal.Rptr. 864]. In consideration of the policy reflected in the case law, the proposed Rule departs from the Model Rule by requiring that a government lawyer's conflict that arises from representation of either a former private or employment by a different government entity be imputed to other lawyers in the governmental organization that employs the lawyer unless the former client consents, or the prohibited lawyer is timely and effectively screened. See Explanation of Changes for paragraph (e) and Comment [9B]. In addition, Paragraph (a)(2) tracks the approach of Model Rule paragraph (a)(2). However, the Commission has changed the Model Rule's standard of "consent, confirmed in writing" to "informed written consent" because the latter provides more client protection.

Minority. A minority of the Commission objects to paragraph(e) to the extent that screening is permitted to rebut the presumption of shared confidences between a former private lawyer now in the employ of the government and other lawyer's in the prohibited lawyer's office or agency. The minority takes the position that paragraph (e) will undermine the ability of lawyers to promote client candor, an attribute that is essential to the effective functioning of the attorney-client relationship. See full Dissent, below.

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* Proposed Rule 1.11, Draft #7 (12/14/09).

A second minority of the Commission objects to the recommended adoption of the Model Rule's "knowingly" standard as applied to imputation in paragraphs (b) and (e). This minority takes the position that it will immunize lawyers who fail to conduct an adequate conflicts check. See Explanation of Changes for paragraph (b).

Variations in Other Jurisdictions. Every jurisdiction has adopted the concept found in Model Rule 1.11, i.e., a loosening of a strict application of conflicts principles in the government lawyer context, and all permit screening of a former government lawyer who moves to private practice. See Selected State Variations, below.

ABA Model Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees**	Commission's Proposed Rule* **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees**	Explanation of Changes to the ABA Model Rule
(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government: (1) is subject to Rule 1.9(c); and	(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government: (1) is subject to Rule 1.9(c); and	Paragraphs (a) and subparagraph (a)(1) are identical to Model Rule 1.11(a) and (a)(1).
(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.	(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed written consent~~, confirmed in writing~~, to the representation. This paragraph shall not apply to matters governed by Rule 1.12(a).	Paragraph (a)(2) tracks the approach of Model Rule paragraph (a)(2). However, the Commission has changed "consent, confirmed in writing" to "informed written consent" because the latter provides more client protection. The last sentence of this paragraph has been added to make clear that matters that come within the scope of proposed Rule 1.12(a) are governed by that rule and not by Rule 1.11. Lawyers should not be confused about which rule applies in a given circumstance.
(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:	(b) When a lawyer is ~~disqualified~~prohibited from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:	Paragraph (b) is substantially the same as Model Rule 1.11(b). However, the word "disqualified" has been changed to "prohibited." Whether a lawyer is potentially subject to discipline will be determined by this Rule, but whether a lawyer will be disqualified by representation will be a matter for decision by the tribunal before whom the lawyer appears. Under paragraph (b), a law firm is permitted to use screening in order to avoid imputation of a conflict from one lawyer to the rest of the law firm.

* Proposed Rule 1.11, Draft 7 (12/14/09); Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	Commission's Proposed Rule* Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	Explanation of Changes to the ABA Model Rule
		Minority. A minority of the Commission dissents from this paragraph because the use of the word "knowingly" will require actual knowledge before a lawyer who has a conflict of interest under this Rule may be disciplined. The minority believes this will immunize from discipline a lawyer who does not bother to check for conflicts of interest. The lawyer who knows or reasonably should know that he or she is prohibited from representation under this Rule ought to be subject to discipline, and not merely the lawyer that OCTC can prove had actual knowledge.
(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.	(1) the ~~disqualified~~personally prohibited lawyer is timely and effectively screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this ~~rule~~Rule.	Subparagraphs (a)(1) and (a)(2) track the language of the Model Rule. However, "prohibited" is substituted for "disqualified" for the same reasons stated in the Explanation for paragraph (b), above. The phrase "and effectively" has been added to require a law firm to create an effective screen before it may avoid imputation of a lawyer's conflict to other members of the firm. This is similar to a change adopted by New York in its version of Rule 1.11(b)(1)(ii). In subparagraph (2), "rule" has been capitalized in accordance with the convention followed by the Commission in referring to these Rules.

ABA Model Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees**	Commission's Proposed Rule* **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees**	Explanation of Changes to the ABA Model Rule
(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.	(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority ~~and which~~, that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and ~~which~~that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the ~~disqualified~~personally prohibited lawyer is timely and effectively screened from any participation in the matter and is apportioned no part of the fee therefrom.	Paragraph (c) largely tracks the wording of Model Rule 1.11(c). However, in the second sentence, the subordinate clauses have been broken up by commas , and the word "that" is used for clarity and for correct parallel construction. In the third sentence, "prohibited" has been substituted for the word "disqualified" because this Rule will be applied in disciplinary matters, while whether a law firm will or will not be disqualified is a matter for decision by the tribunal before which the law firm is appearing. The phrase "and effectively" has been added in order to require that, before a law firm may avoid imputation of a lawyer's conflict to the rest of the firm, the firm's screen must be effective.
(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:	(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:	Paragraph (d) and its subparagraphs are nearly identical to Model Rule 1.11(d).

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	Commission's Proposed Rule* Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	Explanation of Changes to the ABA Model Rule
(1) is subject to Rules 1.7 and 1.9; and	(1) is subject to Rules 1.7 and 1.9; and	
(2) shall not: (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or	(2) shall not: (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed written consent~~, confirmed in writing~~; or	In subparagraph (d)(2)(i), "informed written consent" has been substituted for "consent confirmed in writing" because the phrase "informed written consent," which is used throughout the proposed Rules, provides greater client protection than the Model Rule formulation.
(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).	(ii) negotiate for private employment with any person who is involved as a party, or as a lawyer for a party, or with a law firm for a party, in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).	The phrase "or with a law firm for a party" has been added to broaden the scope of the prohibition on negotiation to encompass not only negotiating with the particular lawyer who is representing the party, but also that lawyer's law firm.

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	Commission's Proposed Rule* Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	Explanation of Changes to the ABA Model Rule
	(e) If a lawyer is prohibited from participating in a matter under paragraph (d) of this Rule, no other lawyer serving in the same government office, agency or department as the personally prohibited lawyer may knowingly undertake or continue representation in the matter unless:	Paragraph (e) has no counterpart in the Model Rule. The Commission recommends the adoption of paragraph (e) and its subparagraphs because it reflects current California law and policy that fosters the important duties of confidentiality and loyalty to clients. Under the introductory clause to paragraph (e), when a former private lawyer who is now working for the government is personally prohibited from being involved in a law suit, that lawyer's prohibition is imputed to all other lawyers in the same government, office, agency or department. Unlike California, e.g., *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17 [18 Cal.Rptr.3d 403], the Model Rule does not impute a former private lawyer's prohibition to other lawyers in government. The Commission has determined that the policy underlying imputation in these situation is sound, whether the private lawyer moves to another private firm (see Explanation of Changes for proposed Rule 1.10) or moves to the government employment. In either situation, the lawyer's former private clients have a reasonable expectation that the lawyers they have retained will not switch sides and work in the same firm or office as their opponents. Nevertheless, the imputation of the former private lawyer's prohibition to other lawyers in the government office is not irrebuttable. Other lawyers in the office will be permitted to continue the representation so long as the requirements of subparagraphs (1) and (2) are satisfied, i.e., the prohibited lawyer is timely and effectively screened, and appropriate notice is given to the former client to enable the client to monitor the screen and ensure it retains its effectiveness.

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	Commission's Proposed Rule* Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	Explanation of Changes to the ABA Model Rule
	(1) the personally prohibited lawyer is timely and effectively screened from any participation in the matter; and	See Explanation of Changes for paragraph (a).
	(2) the personally prohibited lawyer's former client is notified in writing of the circumstances that warranted implementation of the screening procedures required by this paragraph and of the actions taken to comply with those requirements. However, notice to the former client is not required if prohibited by law or a court order.	See Explanation of Changes for paragraph (a). The second sentence has been added to avoid creating a situation where requiring notice might unduly prejudice the public interest, for example, an ongoing criminal investigation. However, because of concerns with due process rights of an accused, the exception to giving notice is available only if there is law prohibiting the notice or a court has ordered that notice not be given. Otherwise, the responsible government lawyers will be in violation of the subparagraph if notice is not given.
(e) As used in this Rule, the term "matter" includes: (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and (2) any other matter covered by the conflict of interest rules of the appropriate government agency.	(ef) As used in this Rule, the term "matter" includes: (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and (2) any other matter covered by the conflict of interest rules of the appropriate government agency.	Proposed paragraph (f) and its subparagraphs are identical to Model Rule 1.1(e) and its subparagraphs. That paragraph has been re-lettered because of the addition of new paragraph (e), which does not have a counterpart in the Model Rule.

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Commission's Proposed Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Explanation of Changes to the ABA Model Rule
[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.	[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to ~~the~~these Rules ~~of Professional Conduct~~, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 and conflicts resulting from duties to former clients as stated in Rule 1.9. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule ~~1.0~~1.0.1(e) for the definition of "informed written consent."	Proposed Comment [1] is substantially the same as Model Rule 1.11, cmt. [1]. However, the reference to the Rules of Professional Conduct has been changed to "these Rules" to conform with the drafting convention the Commission is following. The reference to Rule 1.9 has been added because a lawyer who served or who is currently serving as a public officer or employee is subject to both Rule 1.7 and Rule 1.9. "Informed consent" has been changed to "informed written consent" in the last sentence because it affords greater protection to the government agency.
[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.	[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. ~~Because of the special problems raised by imputation within a government agency~~ Similarly, paragraph (~~d~~e) ~~does not impute~~provides that the conflicts of a lawyer currently serving as an officer or employee of the government shall be imputed to other associated government officers or employees, ~~although ordinarily it will be prudent to screen such~~	The first three sentences of proposed Comment [2] are identical with its counterpart in the Model Rule. The fourth sentence has been modified to provide the exact opposite of the Model Rule, which has no counterpart to proposed paragraph (e) and, contrary to California law, does not impute the personal prohibition of a former government lawyer to other lawyers in the same office or agency as the prohibited lawyer.

ABA Model Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees** **Comment**	Commission's Proposed Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees** **Comment**	Explanation of Changes to the ABA Model Rule
	~~lawyers~~but also provides for screening and notice in certain situations.	
[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.	[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by ~~these~~ paragraphs (a)(2) and (d)(2).	Comment [3] is nearly identical to Model Rule 1.11, cmt. [3]. The references to specific paragraphs of Rule 1.11 have been added for clarity.
[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional	[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional	Comment [4] is substantially the same as Model Rule 1.11, cmt. [4]. The reference to "this Rule" has been changed because this Rule does not dictate how a tribunal may rule on the subject of disqualification and because the rewording makes the next to last sentence active voice instead of passive.

ABA Model Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees** **Comment**	Commission's Proposed Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees** **Comment**	Explanation of Changes to the ABA Model Rule
functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.	functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent ~~the disqualification rule~~this Rule from imposing too severe a deterrent against entering public service. The ~~limitation~~limitations of ~~disqualification~~representation in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than ~~extending disqualification~~imputing conflicts to all substantive issues on which the lawyer worked, serves a similar function.	The last sentence has been revised because this Rule does not dictate whether a lawyer or law firm will be disqualified. Instead, the subject of disqualification will be decided by tribunals on a case by case basis. See also Comment [9C].
	[4A]By requiring a former government lawyer to comply with Rule 1.9(c), Rule 1.11(a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client.	Comment [4A] has no counterpart in the Model Rule. The Commission recommends it addition to clarify the purposes of Rule 1.11(a)(1) and (c). This comment has been copied from proposed New York Rule 1.11, cmt. [4A].

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Commission's Proposed Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Explanation of Changes to the ABA Model Rule
	Accordingly, unless the information acquired during government service is "generally known" or these Rules would otherwise permit its use or disclosure, the information may not be used or revealed to the government's disadvantage. This provision applies regardless of whether the lawyer was working in a "legal" capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by Rule 1.11(a)(1). Paragraph (c) of this Rule adds further protections against exploitation of confidential information. Paragraph (c) prohibits a lawyer who has information about a person acquired when the lawyer was a public officer or employee, that the lawyer knows is confidential government information, from representing a private client whose interests are adverse to that person in a matter in which the information could be used to that person's material disadvantage. A firm with which the lawyer is associated may undertake or continue representation in the matter only if the lawyer who possesses the confidential government information is timely and effectively screened. Thus, the purpose and effect of the prohibitions contained in Rule 1.11(c) are to prevent the lawyer's subsequent private client from obtaining an unfair advantage because the lawyer has confidential government information about the client's adversary.	

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Commission's Proposed Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Explanation of Changes to the ABA Model Rule
[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [9].	[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. ~~However, because~~ Because the conflict of interest is governed by ~~paragraph~~paragraphs (d) and (e), the latter agency is ~~not~~ required to screen the lawyer ~~as paragraph (b) requires a law firm to do~~. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [~~9~~14]. See also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70 [209 Cal.Rptr. 159].	The first sentence of proposed Comment [5] is identical with that in Comment [5] of the Model Rule. The second sentence has been amended to conform to California law. In the last sentence, the citation has been changed to Comment [14] of proposed Rule 1.13 because that is the California counterpart of Comment [9] of Model Rule 1.13. A reference to *Civil Service Commission v. Superior Court* has been added to direct readers to that important case on the issue of when a government entity is the same or a different client.
[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.	**Screening of Former Government Lawyers Pursuant to Paragraphs (b) and (c)** [6] Paragraphs (b) and (c) contemplate a screening arrangement for former government lawyers. See Rule ~~1.0~~1.0.1(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.	Comment [6] is nearly identical to Model Rule 1.11, cmt. [6]. The phrase, "for former government lawyers" has been added to distinguish the screening arrangement permitted by these provisions from the screening arrangement provided in paragraph (e) that may be utilized by former private lawyers who are now in government service.

ABA Model Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees** **Comment**	Commission's Proposed Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees** **Comment**	Explanation of Changes to the ABA Model Rule
[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.	[7] Notice to the appropriate government agency, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.	Comment [7] is nearly identical to Model Rule 1.11, cmt. [7]. The phrase "to the appropriate government agency" is added in order to clarify the appropriate recipient of the notice.
[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.	[8] Paragraph (c) operates only when the lawyer in question has actual knowledge of the information~~, which means actual knowledge~~; it does not operate with respect to information that merely could be imputed to the lawyer.	Comment [7] is based on Model Rule 1.11, cmt. [8]. It has been reworded for brevity. New York made the same change. *Minority*. A minority of the Commission disagrees with the substance of this comment because both this comment and the Model Rule permit easy evasion of the client protections of Rule 1.11 by a lawyer who does not, for example, run a conflicts of interest check and thereby evades actual knowledge of the conflict.
[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.	[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.	Comment [9] is identical to Model Rule 1.11, cmt. [9].

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Commission's Proposed Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Explanation of Changes to the ABA Model Rule
	Consent required to permit government lawyer to represent the government in a matter in which the lawyer participated personally and substantially. [9A] A government officer or employee may participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment only if: (i) the government agency gives its informed written consent as required by subparagraph (d)(2)(i); and (ii) the former client gives its informed written consent as required by Rule 1.9, to which the lawyer is subject by subparagraph (d)(1).	Comment [9A] has no counterpart in the Model Rule. The Commission recommends its addition make clear precisely what consents a former government lawyer must obtain to *personally* participate in a matter. Although subparagraph (d)(2)(ii) appears on its face to require only the consent of the government agency, the consent of the private lawyer's former client is also required because (d)(1) makes that lawyer subject to Rule 1.9, under which a former client's consent is required for an otherwise prohibited lawyer's personal participation in a matter. The Commission is concerned that without this clarifying comment, the requirement of the former client's consent will not be apparent.
	Screening of Current Government Lawyers Pursuant to Paragraph (e) [9B]Under paragraph (e), lawyers in a government agency are not prohibited from participating in a matter because another lawyer in the agency has participated personally and substantially in the matter, so long as the personally prohibited lawyer is timely and effectively screened and notice is given promptly to the former client to enable it to ensure the government's compliance with the screen. However, if the personally prohibited lawyer is (i) the head of the office, agency or department, or a lawyer	Comment [9B] has no counterpart in the Model Rule, in part because the Model Rule does not have paragraph (e). More important, however, this Comment calls the reader's attention to important California decisional law, including Cobra Solutions and Younger, that reject screening when the personally-prohibited lawyer is the head of the office or has direct supervisory responsibility over the lawyers actually handling the matter. The Commission determined that rather than codify these cases in the Rule itself and subject lawyers to discipline in an area of the law that is still developing, these cases should be referenced in a

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Commission's Proposed Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Explanation of Changes to the ABA Model Rule
	with comparable managerial authority, or (ii) a lawyer with direct supervisory authority over any of the lawyers participating in the matter, then both the personally prohibited lawyer and the office may be disqualified from the representation. See *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006); *Younger v. Superior Court* (1978) 77 Cal. App. 3d 892 [144 Cal.Rptr. 34].	comment as guidance.
	This Rule Not Determinative of Disqualification [9C] This Rule does not address whether a law firm will be disqualified from a representation. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal.	Comment [9C] has no counterpart in the Model Rule. It has been added in order to clarify that, although this Rule affects discipline, whether a lawyer or law firm will or will not be disqualified is a matter to be determined by the appropriate tribunal and is not necessarily dictated by this Rule.
[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.	**Matter** [10] For purposes of paragraph (~~e~~f) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.	Comment [10] is substantively identical to Model Rule 1.11, cmt. [10].

Proposed Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

Minority Dissent

A minority of the Commission dissents to the inclusion of screening in Rule 1.11(e), which allows screening, without a former client's consent, when a lawyer, possessing a former client's confidential information, becomes employed by a government agency. For example, a lawyer representing a client with respect to matters that are the subject of a governmental investigation, may, while the investigation is ongoing, become employed by that agency. Under Rule 1.11(e) the agency could continue to pursue the investigation as long as the lawyer is screened. In the meantime, the now former client must live in fear that he or she has revealed information to the lawyer now working for the government that could further the investigation against the former client. The now former client cannot object to the screen and has no way to verify that the screen is actually working. The legal profession cannot expect promote client candor when such situations are allowed to occur.

The duty of confidentiality expressed in Business & Professions Code section 6068(e)(1) and Rule 3-100 prohibits a lawyer from using or disclosing any information that a client wants the lawyer to hold inviolate or the disclosure of likely would be embarrassing or detrimental to the client. This duty exists to assure that anyone can discuss with a lawyer how the law applies to his or her most intimate problem without fear of consequence. This duty also exists because effective representation depends on open communication between lawyer and client. (*City & County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 235 (1951) ["Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. Unless he makes known to the lawyer all the facts, the advice that follows will be useless, if not misleading."].)
California law presumes that confidential information possessed by one lawyer in a law firm is shared by all other lawyers in the firm. This presumption exists because the client has no means to assure that information in the possession of a firm representing the client's adversary will not be shared and used or disclosed against the client's interests. As the Court of Appeal stated in *Adams v. Aerojet General* (2001) 86 Cal.App.4th 1324 in adopting Cal. State Bar Formal Opn. 1998-152:

> The vicarious disqualification rule has been established as a prophylactic device to protect the sanctity of former client confidences where a law firm with a member attorney who has acquired knowledge of confidential information material to the current controversy would otherwise be permitted to represent the former client's adversary. ***"No amount of assurances or***

> ***screening procedures, no 'cone of silence,' could ever convince the opposing party that the confidences would not be used to its disadvantage. . . . No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent."*** (*Cho v. Superior Court* (1995) 39 Cal. App. 4th 113, 125 [45 Cal. Rptr. 2d 863], fn. omitted.) As the State Bar Committee observes: "the absence of an effective means of oversight combined with the law firm's interest as an advocate for the current client in the adverse representation are factors that tend to undermine a former client's trust, and in turn the public's trust, in a legal system that would permit such a situation to exist without the former client's consent." (Formal Opn. No. 1998-152, supra, at p. IIA-418.) (Emphasis added.)

Screening without client consent does not protect clients because it cannot be verified by a client. A client who has not expressed confidence in a screen by consenting to it should not be forced to accept screening by fiat. A client who has shared confidential information with a lawyer, justifiably would feel a sense of betrayal to learn after the representation has ended that information the client expected would be held in confidence is in the possession of a law firm representing the former client's adversary in a situation where that information could benefit that adversary.

These considerations apply with equal force when a lawyer armed with a former client's confidential information becomes employed by a government agency that is adverse to theformer client. The Bar cannot fulfill the purpose of the duty of confidentiality, and it cannot expect clients to trust that they can communicate with lawyers in confidence, when a government agency can harbor that confidential information behind an unconsented and unverifiable screen while the agency pursues a course of action against the former client in a situation where the information would advance the agency's position.

Commission members have not objected to screening in Rule 1.11(b), which applies to lawyers moving from public agencies to private practice or between public agencies. Screening in this context facilitates government service without jeopardizing the interests of private clients. Furthermore, the governmental legal community has participated actively in the Commission's deliberations and has not raised any concerns or objections to screening in this limited context. However, there are very difference considerations when the former client is a member of the public. In such situations, screening is not appropriate and undermines public trust in the ability to communicate with a lawyer in confidence.

Rule 1.11: Special Conflicts Of Interest For Former And Current Government Officers And Employees

(Commission's Proposed Rule – Clean Version)

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed written consent, to the representation. This paragraph shall not apply to matters governed by Rule 1.12(a).

(b) When a lawyer is prohibited from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the personally prohibited lawyer is timely and effectively screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority, that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the personally prohibited lawyer is timely and effectively screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed written consent; or

(ii) negotiate for private employment with any person who is involved as a party, or as a lawyer for a party, or with a law firm for a party, in a matter in which the lawyer is

participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) If a lawyer is prohibited from participating in a matter under paragraph (d) of this Rule, no other lawyer serving in the same government office, agency or department as the personally prohibited lawyer may knowingly undertake or continue representation in the matter unless:

(1) the personally prohibited lawyer is timely and effectively screened from any participation in the matter; and

(2) the personally prohibited lawyer's former client is notified in writing of the circumstances that warranted implementation of the screening procedures required by this paragraph and of the actions taken to comply with those requirements. However, notice to the former client is not required if prohibited by law or a court order.

(f) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

COMMENT

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to these Rules, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 and conflicts resulting from duties to former clients as stated in Rule 1.9. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0.1(e) for the definition of "informed written consent."

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Similarly, paragraph (e) provides that the conflicts of a lawyer currently serving as an officer or employee of the government shall be imputed to other associated government officers or employees, but also provides for screening and notice in certain situations.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so

by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by paragraphs (a)(2) and (d)(2).

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent this Rule from imposing too severe a deterrent against entering public service. The limitations of representation in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than imputing conflicts to all substantive issues on which the lawyer worked, serves a similar function.

[4A] By requiring a former government lawyer to comply with Rule 1.9(c), Rule 1.11(a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. Accordingly, unless the information acquired during government service is "generally known" or these Rules would otherwise permit its use or disclosure, the information may not be used or revealed to the government's disadvantage. This provision applies regardless of whether the lawyer was working in a "legal" capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by Rule 1.11(a)(1). Paragraph (c) of this Rule adds further protections against exploitation of confidential information. Paragraph (c) prohibits a lawyer who has information about a person acquired when the lawyer was a public officer or employee, that the lawyer knows is confidential government information, from representing a private client whose interests are adverse to that person in a matter in which the information could be used to that person's material disadvantage. A firm with which the lawyer is associated may undertake or continue representation in the matter only if the lawyer who possesses the confidential government information is timely and effectively screened. Thus, the purpose and effect of the prohibitions contained in Rule 1.11(c) are to prevent the lawyer's subsequent private client from obtaining an unfair advantage because the lawyer has confidential government information about the client's adversary.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. Because the conflict of interest is

governed by paragraphs (d) and (e), the latter agency is required to screen the lawyer. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [14]. See also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70 [209 Cal.Rptr. 159].

Screening of Former Government Lawyers Pursuant to Paragraphs (b) and (c)

[6] Paragraphs (b) and (c) contemplate a screening arrangement for former government lawyers. See Rule 1.0.1(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice to the appropriate government agency, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

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

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

Consent required to permit government lawyer to represent the government in a matter in which the lawyer participated personally and substantially.

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

Screening of Current Government Lawyers Pursuant to Paragraph (e)

[9B] Under paragraph (e), lawyers in a government agency are not prohibited from participating in a matter because another lawyer in the agency has participated personally and substantially in the matter, so long as the personally prohibited lawyer is timely and effectively screened and notice is given promptly to the former client to enable it to ensure the government's compliance with the screen. However, if the personally prohibited lawyer is (i) the head of the office, agency or department, or a lawyer with comparable managerial authority, or (ii) a lawyer with direct supervisory authority over any of the lawyers participating in the matter, then both the personally prohibited lawyer and the office may be disqualified from the representation. See *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006); *Younger v. Superior Court* (1978) 77 Cal. App. 3d 892 [144 Cal.Rptr. 34].

This Rule Not Determinative of Disqualification

[9C] This Rule does not address whether a law firm will be disqualified from a representation. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal.

Matter

[10] For purposes of paragraph (f) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

Rule 1.11: Special Conflicts for Government Employees

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Arizona, Connecticut, Florida, and Illinois omit the law clerk exception to ABA Model Rule 1.11(d)(2).

California has no provision comparable to ABA Model Rule 1.11.

Colorado: Rule 1.11(b)(2) requires the written notice to contain "a general description of the personally disqualified lawyer's prior participation in the matter and the screening procedures to be employed." Colorado also adds a subparagraph (b)(3) prohibiting other lawyers in the firm from undertaking or continuing, representation unless the personally disqualified lawyer and the partners of the firm "reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client."

District of Columbia: Rule 1.11 tracks the basic provisions of ABA Model Rule 1.11, but D.C. requires a personally disqualified former government lawyer and another lawyer in the firm to file certain documents with the disqualified lawyer's former agency or department. As an alternative, the rule permits the former government lawyer to file those documents with bar counsel under seal if the firm's client requests it.

Georgia has adopted a Rule 9.5 that provides as follows:

> *Rule 9.5 Lawyer as a Public Official*
>
> (a) A lawyer who is a public official and represents the State, a municipal corporation in the State, the United States government, their agencies or officials, is bound by the provisions of these Rules.
>
> (b) No provision of these Rules shall be construed to prohibit such a lawyer from taking a legal position adverse to the State, a municipal corporation in the State, the United States government, their agencies or officials, when such action is authorized or required by the U.S. Constitution, the Georgia Constitution or statutes of the United States or Georgia.

Illinois: Rule 1.11(a) covers any lawyer who knows "or reasonably should know" of the former government lawyer's prior participation. Rules 1.11(a)(1) and 1.11(b) condition the exceptions on apportioning the disqualified lawyer "no specific share" of the fee.

Iowa adds the following paragraph to Rule 1.11 relating to part-time prosecutors serving as criminal defense counsel:

(f) Prosecutors for the state or county shall not engage in the defense of an accused in any criminal matter during the time they are engaged in such public responsibilities. However, this paragraph does not apply to a lawyer not regularly employed as a prosecutor for the state or county who serves as a special prosecutor for a specific criminal case, provided that the employment does not create a conflict of interest or the lawyer complies with the requirements of rule 32:1.7(b).

Massachusetts: The law clerk exception in Model Rule 1.11(d)(2)(ii) is extended to law clerks working for mediators.

Missouri: Rule 1.11(e) provides as follows:

(1) A lawyer who also holds public office, whether full or part-time, shall not engage in activities in which his or her personal or professional interests are or foreseeably could be in conflict with his or her official duties or responsibilities…

(2) No lawyer in a firm in which a lawyer holding a public office is associated may undertake or continue representation in a matter in which the lawyer who holds public office would be disqualified, unless the lawyer holding public office is screened in the manner set forth in Rule 4-1.11(a).

New Hampshire adds a detailed provision regarding the responsibilities of "lawyer-officials," who are defined as lawyers who are "actively engaged in the practice of law" and who are members of a "governmental body."

New Jersey: Rules 1.11(a), (b), and (d) deviate from the Model Rules as follows:

(a) Except as law may otherwise expressly permit, and subject to RPC 1.9, a lawyer who formerly has served as a government lawyer or public officer or employee of the government shall not represent a private client in connection with a matter:

(1) in which the lawyer participated personally and substantially as a public officer or employee; or

(2) for which the lawyer had substantial responsibility as a public officer or employee; or

(3) when the interests of the private party are materially adverse to the appropriate government agency, provided, however, that the application of this provision shall be limited to a period of six months immediately following the termination of the attorney's service as a government lawyer or public officer.

(b) Except as law may otherwise expressly permit, a lawyer who formerly has served as a government lawyer or public officer or employee of the government:

(1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party or information that the lawyer knows is confidential government information about a person acquired by the lawyer while serving as a government lawyer or public officer or employee of the government, and

(2) shall not represent a private person whose interests are adverse to that private party in a matter in which the information could be used to the material disadvantage of that party…

(d) Except as law may otherwise expressly permit, a lawyer serving as a government lawyer or public officer or employee of the government:

(1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party acquired by the lawyer while in private practice or nongovernmental employment.

(2) shall not participate in a matter (i) in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, or (ii) for which the lawyer had substantial responsibility while in private practice or nongovernmental employment, or (iii) with respect to which the interests of the appropriate government agency are materially adverse to the interests of a private party represented by the lawyer while in private practice or nongovernmental employments unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter or unless the private party gives its informed consent, confirmed in writing, and

(3) shall not negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially or for which the lawyer has substantial responsibility, except that a lawyer serving as a law clerk shall be subject to RPC 1.12(c)…

New York: DR 9-101(B) partly tracks ABA Model Rule 1.11, but New York does not define the terms "confidential government information" and "matter." If a lawyer is disqualified from a representation because the lawyer has participated personally and substantially in the matter as a public officer or employee, DR 9-101(B)(1) permits other lawyers in the firm to undertake or continue representation in the matter if (a) the disqualified lawyer is "effectively screened from any participation, direct or indirect, including discussion, in the matter and is apportioned no part of the fee therefrom," and (b) there are "no other circumstances in the particular representation that create an appearance of impropriety." Under DR 9-101(B)(2), concerning disqualification based on "confidential government information," the "appearance of impropriety" criterion is not expressly mentioned.

Oregon expands the "law clerk" exception to include a lawyer who is a "staff lawyer to or otherwise assisting in the official duties of" a judge, other adjudicative officer or arbitrator.

Oregon Rule 1.11(d) adds language drawn partly from DR 8-101 of the ABA Model Code of Professional Responsibility providing that, except as law otherwise expressly permits, a lawyer shall not:

(i) use the lawyer's public position to obtain, or attempt to obtain, special advantage in legislative matters for the lawyer or for a client.

(ii) use the lawyer's public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client.

(iii) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

(iv) either while in office or after leaving office use information the lawyer knows is confidential

government information obtained while a public official to represent a private client.

Oregon also deletes ABA Model Rule 1.11(e) and adds these paragraphs to Rule 1.11:

> (e) Notwithstanding any Rule of Professional Conduct, and consistent with the "debate" clause, Article IV, section 9, of the Oregon Constitution, or the "speech or debate" clause, Article I, section 6, of the United States Constitution, a lawyer-legislator shall not be subject to discipline for words uttered in debate in either house of the Oregon Legislative Assembly or for any speech or debate in either house of the United States Congress.
>
> (f) A member of a lawyer-legislator's firm shall not be subject to discipline for representing a client in any claim against the State of Oregon provided:
>
> > (1) the lawyer-legislator is screened from participation or representation in the matter in accordance with the procedure set forth in Rule 1.10(c) (the required affidavits shall be served on the Attorney General); and
> >
> > (2) the lawyer-legislator shall not directly or indirectly receive a fee for such representation.

Pennsylvania: Rule 1.11(a)(2) does not require that client consent be "confirmed in writing."

Texas: Rule 1.10(f) specifically excludes "regulation-making" and "rule-making" from the definition of "matter."

Virginia adheres mostly to the original 1983 version of ABA Model Rule 1.11, except that Virginia adds the following language drawn from DR 8-101 of the ABA Model Code of Professional Responsibility as Rule 1.11(a):

> (a) A lawyer who holds public office shall not:
>
> (1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;
>
> (2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or
>
> (3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

Proposed Rule 1.17 [2-300]
"Purchase and Sale of a Law Practice"

(**Draft #5.1, 12/16/09**)

Summary: Proposed Rule 1.17 regulates the sale of a law practice. It includes provisions recently added by the ABA to Model Rule 1.17 that permit the sale not only of an entire law practice, but also of a substantive field of the practice or a geographic area of the practice. However, the Model Rule provisions concerning the required notice to be given to clients whose matters are included in the sale have been substantially replaced by the counterpart provisions in current rule 2-300 to provide better protection for the interests of the clients whose matters are being transferred. Additions to the rule and changes in the comments have been made for better client protection. See Introduction and Explanation of Changes.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☑ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☑ Some material additions to ABA Model Rule	☑ Some material additions to ABA Model Rule
☑ Some material deletions from ABA Model Rule	☑ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rules	RPC 2-300.
Statute	
Case law	

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☑ Other Primary Factor(s)

The memorandum from Judy Johnson to the Board of Governors and members of the Board Committee on Member Oversight dated June 18, 2008, regarding Appointment of a Career Transition Planning Taskforce, recommended that the Commission consider whether the rule permitting the sale of an entire law practice should be changed to permit the sale of a part of a law practice, to offer greater options for a lawyer to make a smooth transition to retirement.

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority/Dissenting Position Included on Model Rule Comparison Chart ☑ Yes ☐ No

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☑ Moderately Controversial – Explanation:

Adopting the Model Rule provision that permits lawyers to sell a geographic area of practice or a substantive field of practice will be viewed by some members of the profession as a lessening of client protection and further commercialization of the practice of law. See Introduction and Minority Dissent, attached.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.17* Purchase and Sale of a Law Practice

December 2009
(Draft rule to be considered for public comment)

INTRODUCTION:

Proposed Rule 1.17 regulates the sale of a law practice. California was the first state in the nation to adopt a rule permitting the purchase and sale of a law practice. The American Bar Association copied some of California's rule by amendment to its Model Rules prior to 2002. The 2002 amendments to Model Rule 1.17 permit the sale not only of an entire law practice, but also of a substantive field of the practice or a geographic area of the practice. This proposed Rule adopts those changes. However, the Model Rule provisions concerning the notice required to be given to clients whose matters are included in the sale have been substantially replaced by the counterpart provisions in current Rule 2-300 to provide better protection for the interests of the clients. Further protections have been added to promote protection of the clients of the selling lawyer. For example, (1) the sale of the practice, or of a substantive field of practice, or of a geographic area of practice must include the entire practice or entire field or area of practice; lawyers will not be permitted to "cherry pick" lucrative matters and leave clients with less lucrative matters to fend for themselves; (2) the selling lawyer must cease practice if the entire practice is sold, or cease practice in the particular substantive field or geographic area of practice if only a substantive field or geographic area of practice is sold; (3) although the use of brokers to facilitate a sale is permitted, a lawyer may only sell the practice to a lawyer, not to a broker or other intermediary, ensuring continuity of representation and protection of the seller's clients; (4) fees may not be increased solely by reason of the sale, and clients are protected by requiring the purchaser to abide by pre-existing fee agreements; and (5) appropriate protections for confidentiality of the clients have been made part of the rule.

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* Proposed Rule 1.17, Draft 5.1 (12/16/09).

Originally, the Commission circulated two proposed rules for public comment, namely Rule 1.17.1 and Rule 1.17.2. They, respectively, would have dealt with sale of an entire practice and sale of a geographic area of practice or of a substantive area of practice. Those proposals received substantial criticism. In addition, there was substantial dissent within the Commission about those proposals. The current proposal is a single rule, dealing with the purchase and sale of an entire law practice, of a geographic area of a law practice, or of a substantive field of practice. This Rule moots many of the criticisms of the earlier proposals. In addition, it addresses one of the recommendations of the Executive Director of the Bar, Judy Johnson, to the Board of Governors concerning Appointment of a Career Transition Planning Taskforce. In her memorandum, Ms. Johnson suggested that the Commission consider whether the rule permitting the sale of an entire law practice should be changed to permit the sale of a part of a law practice. She pointed out that greater flexibility in the sale of a law practice would offer greater options for a lawyer to make a smooth transition to retirement. The proposed Rule addresses that subject.

Minority. A minority of the Commission strongly disagrees with proposed Rule 1.17, taking the position that adoption of the proposed Rule will unnecessarily add to the commercialization of the legal profession. The proposed Rule is unlike current California rule 2-300, which is narrowly drafted to permit a solo practitioner upon retirement to recoup through a one-time sale of his or her practice the good will developed in the practice over the practitioner's professional lifetime. By permitting the sale of a practice under strictly controlled conditions, the current rule both (i) avoids the former use of sham associations of lawyers to facilitate transfer of a practice, and (ii) provides clients with appropriate notice and protections against potential violations of confidentiality, fee increases, and abandonment of their matters. In addition, the current rule levels the playing field for solo practitioners and lawyers practicing in firms, the latter have been able before the current rule to realize upon retirement the value of the good will developed by the law firm of which they were members. The proposed Rule, on the other hand, while purporting to carry forward the client protections of current rule 2-300, permits not just the sale of a practice by a lawyer upon retirement, but also the sale of a practice by a law firm, or the sale of a "substantive field of practice" or a "geographic area of practice" by either a lawyer or a law firm. As discussed more fully in the Minority's Dissent, below, the minority sees great potential for abuse by lawyers and law firms seeking to capitalize on market perceptions of the value of their lawyer-client relationships. The vagueness of the terms "geographic area" and "substantive field" practically invite clever lawyers to use the rule in ways that will benefit them and risk injury to their clients. Unlike the current rule, which was created to address a genuine concern, no compelling reason for this change has been advanced by its proponents, other than that there might be situations where there could be a genuine special need to carve out some part of an established practice and to sell it. The minority urges that the proposed Rule not be adopted. See Minority Dissent, below.

Variations in Other Jurisdictions. Twenty-nine states have adopted a rule identical to, or substantially similar to, the Ethics 2000 version of Model Rule 1.17 (2002), which permits the sale of an area of a law practice. Seventeen states (including California) currently have rules that only permit the sale of an entire law practice. Five states have no counterpart to either the 1990 (entire practice) or the 2002 (area of practice) version of the Model Rule, (Alabama, Kansas, Louisiana, Mississippi and Texas). Of the 17 states that restrict sales to the entire practice, three (Michigan, Tennessee and West Virginia) have recommended the adoption of the 2002 version Model Rule, and two others (Georgia and Hawaii) have not yet concluded their review of the Ethics 2000 rules. A number of states (e.g., Florida, Illinois, New York, Ohio and Pennsylvania) diverge substantially from the Model Rule and include additional provisions intended to protect the clients of the selling lawyer.

ABA Model Rule Rule 1.17 Sale Of Law Practice	Commission's Proposed Rule* Rule 1.17 Purchase and Sale of a Law Practice	Explanation of Changes to the ABA Model Rule
A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:	A lawyer or a law firm may sell or purchase a law practice, a substantive field of practice, or ~~an~~a geographic area of ~~law~~ practice, including good will, only if the ~~following~~ conditions set forth in paragraphs (a) through (g) are satisfied:	The introductory paragraph of proposed Rule 1.17 is based on the introductory paragraph of Model Rule 1.17. However, the proposed paragraph makes it explicit that a lawyer or law firm may sell or purchase a substantive aspect of a practice or a geographic area of practice, and not just an entire practice, so that permission to do so is not merely inferred. In addition, the proposed paragraph adds the word "only," to make explicit that a sale other than in accordance with the provisions of the Rule is not permissible. The Commission voted to adopt the approach of the Model Rule to permit sale of a geographic area of practice or of a substantive practice area. When lawyers or law firms need to adapt their practices in anticipation of retirement, for economic reasons, for client needs, or for other reasons, allowing them to be flexible regarding what aspects of the law practice are sold gives them greater options. For example, if a lawyer finds himself or herself no longer able to practice litigation effectively, he or she could sell the litigation aspect of his or her practice and continue to practice law in non-litigation areas. Similarly, if a lawyer has a practice in both northern and southern California, he or she might choose to sell one aspect of the geographic area of practice in order not to have to commute to different parts of the state. As stated in the introduction and below, a minority of the Commission disagrees.

* Proposed Rule 1.17, Draft 5.1 (12/16/09). Redline/strikeout showing changes to the ABA Model Rule.

ABA Model Rule **Rule 1.17 Sale Of Law Practice**	**Commission's Proposed Rule*** **Rule 1.17 Purchase and Sale of a Law Practice**	**Explanation of Changes to the ABA Model Rule**
(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;	(a) The seller ceases to engage in the private practice of law entirely, or in the ~~area of practice that has been sold, [in the~~substantive field or geographic area~~] [in the jurisdiction] (a jurisdiction may elect either version)~~ in which the ~~practice has been~~seller conducted~~;~~ the portion of the practice being sold.	Paragraph (a) is based on Model Rule 1.17(a). The Commission recommends adopting both of the Model Rule's alternatives – a sale of a substantive aspect of the practice and of a geographic area of a practice. Wording changes have been made to clarify the options available to a lawyer or law firm under the proposed Rule.
(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;	(b) The seller makes the entire practice, or the entire substantive field or geographic area of the practice, ~~is sold~~available for sale to one or more lawyers or law firms~~;~~.	Paragraph (b) is based on Model Rule 1.17(b). However, the Commission recognizes that a sale of an entire practice or entire area of practice may not be possible. For example, a purchaser may have conflicts of interest that preclude the purchaser from representing some of the seller's clients. Thus, as with current Rule 2-300, the Commission recommends that the Rule only require the seller to make the entire practice, or entire substantive field or geographic area of the practice, *available for sale*, and recommends that the *actual transaction* include all or substantially all of the practice. As reflected in proposed Comment [2], if not all of the seller's clients are willing to retain the purchaser, that does not destroy the validity of the transaction. See also Explanation of Changes for paragraph (c). Paragraph (b) has also been reworded to clarify that the transaction may encompass the entire practice, the entire substantive field of practice, or the entire geographic area of the practice, consistent with the introductory paragraph and with paragraph (a).

ABA Model Rule Rule 1.17 Sale Of Law Practice	Commission's Proposed Rule* Rule 1.17 Purchase and Sale of a Law Practice	Explanation of Changes to the ABA Model Rule
	(c) The purchase and sale includes all or substantially all of the practice, or of the substantive field or geographic area of the practice.	Proposed paragraph (c) has no counterpart in the Model Rule. It has been added to complement proposed paragraph (b) and emphasize that not only must the seller make available the entire practice, or field or area of practice, but the actual transfer must include all or substantially all of the practice. This requirement is necessary to prevent a lawyer from making "available for sale" his or her practice, but selling only the most lucrative client files.
(c) The seller gives written notice to each of the seller's clients regarding:	~~(c) The seller gives written notice to each of the seller's clients regarding:~~ (d) If the purchase or sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Rule 1.6 and Business and Professions Code section 6068(e), then:	Paragraph (d) contains the same concepts as Model Rule 1.17(c), but goes much further in providing protection for the seller's clients. Model Rule 1.17(c) requires notice from the seller of merely the proposed sale, the client's right to other counsel or to take possession of the file, and the presumption that client consent to the transfer will be presumed if the client does not object within ninety days. Proposed paragraph (d), on the other hand, carries forward current California Rule 2-300, which is far more protective of client rights and contains a more robust explanation of the contents of the notice that must be given to clients. For example, current rule 2-300 recognizes that, if the seller is deceased or incapacitated, he or she may not be able to give the required notice. Accordingly, proposed paragraph (d) and its subparagraphs continue the substance of the notice requirements under current Rule 2-300, spelling out in more detail what the notice must contain and distinguishing between the circumstance in which the seller is deceased or incapacitated (in which case the purchaser gives the required notice) and all other sales (in which the case the seller gives the required notice). The Commission concluded that the California approach gives more protection for the clients of the seller.

ABA Model Rule Rule 1.17 Sale Of Law Practice	Commission's Proposed Rule* Rule 1.17 Purchase and Sale of a Law Practice	Explanation of Changes to the ABA Model Rule
(1) the proposed sale;	~~(1) the proposed sale;~~ (1) If the seller is deceased, or has a conservator or other person acting in a representative capacity, and no lawyer has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, prior to the transfer, the purchaser:	See Explanation of Changes for paragraph (d).
	(A) shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel and might have the right to act in his or her own behalf; that the client may take possession of any client papers and property in the form or format held by the lawyer as provided by Rule 1.16(e); and that, if no response is received to the notice within 90 days after it is sent or, if the client's rights would be prejudiced by a failure of the purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client; and	See Explanation of Changes for paragraph (d).
	(B) shall obtain the written consent of the client, provided that the client's consent shall be presumed until the purchaser is otherwise notified by the client if the	See Explanation of Changes for paragraph (d).

ABA Model Rule Rule 1.17 Sale Of Law Practice	Commission's Proposed Rule* Rule 1.17 Purchase and Sale of a Law Practice	Explanation of Changes to the ABA Model Rule
	purchaser receives no response to the paragraph (d)(1)(A) notification within 90 days after it is sent to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by a failure of the purchaser to act during the 90-day period.	
(2) the client's right to retain other counsel or to take possession of the file; and	(2) ~~the client's right to retain other counsel or take possession of the file; and~~ In all other circumstances, not less than 90 days prior to the transfer:	See Explanation of Changes for paragraph (d).
(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.	~~(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.~~	See Explanation of Changes for paragraph (d).
	(A) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel and might have the right to act in his or her own behalf; that the client may take possession of any	See Explanation of Changes for paragraph (d).

ABA Model Rule Rule 1.17 Sale Of Law Practice	Commission's Proposed Rule* Rule 1.17 Purchase and Sale of a Law Practice	Explanation of Changes to the ABA Model Rule
	client papers and property in the form or format held by the lawyer as provided by Rule 1.16(e); and that, if no response is received to the notice within 90 days after it is sent or, if the client's rights would be prejudiced by a failure of the purchaser to act during the 90 day period, the purchaser may act on behalf of the client until otherwise notified by the client; and	
	(B) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer, provided that the client's consent shall be presumed if the purchaser receives no response to the paragraph (d)(2)(A) notice within 90 days after it is sent to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by a failure of the purchaser to act during the 90 day period, unless the purchaser is otherwise notified by the client.	See Explanation of Changes for paragraph (d).
(d) The fees charged clients shall not be increased by reason of the sale.	(de)~~The fees~~Fees charged to clients shall not be increased solely by reason of the ~~sale~~purchase, and the purchaser assumes the seller's obligations under existing client agreements regarding fees and the scope of work.	Paragraph (e) is based on Model Rule 1.17(d), but adds a requirement that the purchaser must assume the seller's obligations under existing client agreements regarding fees and the scope of work. Therefore, a client will not be confronted with an increase in fees or fee rate solely by virtue of the sale.

ABA Model Rule Rule 1.17 Sale Of Law Practice	Commission's Proposed Rule* Rule 1.17 Purchase and Sale of a Law Practice	Explanation of Changes to the ABA Model Rule
	(f) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a lawyer shall be taken.	Paragraph (f) has no counterpart in the Model Rule. It carries forward current rule 2-300(C), and is intended to provide further protection for the seller's clients by requiring adherence to the requirements of tribunals that permit withdrawal and substitution of lawyers. The Commission concluded that this requirement should be continued in the black letter of the rule.
	(g) A lawyer shall not disclose confidential client information to a nonlawyer in connection with a purchase or sale under this Rule.	Paragraph (g) has no counterpart in the Model Rule. It carries forward current rule 2-300(E). The Commission concluded assuring that confidentiality is protected is an essential aspect of client protection if a practice is sold.
	(h) This Rule does not apply to the admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice.	Paragraph (h) is based on Model Rule 1.17, cmt. [14] and current rule 2-300(F), both of which provide that the Rule does not apply to admission to or retirement from a law partnership or law corporation, retirement plans, or similar arrangements nor to the sale of tangible assets of a practice. The Commission concluded that this exclusion from the scope of the Rule should be in the black letter of the rule.

ABA Model Rule Rule 1.17 Sale of Law Practice Comment	Commission's Proposed Rule Rule 1.17 Purchase and Sale of a Law Practice Comment	Explanation of Changes to the ABA Model Rule
[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.	[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.	Comment [1] is identical to Model Rule 1.17, cmt. [1].
	[1A] As used in this Rule, a selling "lawyer" includes the personal representative of the estate of a deceased lawyer, the trustee of a trust of which a law practice is an asset, an attorney in fact under a lawyer's durable power of attorney, a conservator of the estate of a lawyer, or a lawyer appointed to act for the seller pursuant to Business and Professions Code sections 6180, 6185 and 6190.4.	Comment [1A] has no counterpart in the Model Rule. The Commission concluded that this Rule should permit and apply to sales of practices by certain fiduciaries acting for a lawyer or lawyer's estate. Current California Rule 2-300 expressly applies to sales by such fiduciaries. Rather than including an enumeration of all such fiduciaries in the introductory paragraph of the proposed Rule, the Commission elected to include them by defining the word "lawyer" in this Comment. This comment makes the proposed Rule clearer than the Model Rule. In addition, by spelling out the types of fiduciaries who may act on behalf of the lawyer or his or her estate, this Comment avoids the risk that a generic word such as "fiduciary" could be interpreted to include purchases and sales of law practices by brokers, which is not permitted under this Rule. See Comment [12A] and Explanation of Changes thereto.

ABA Model Rule Rule 1.17 Sale of Law Practice Comment	Commission's Proposed Rule Rule 1.17 Purchase and Sale of a Law Practice Comment	Explanation of Changes to the ABA Model Rule
Termination of Practice by the Seller [2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.	**Termination of Practice by the Seller** [2] The requirement that all of the private practice, or all of a~~n~~ substantive field or geographic area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the entire substantive field or geographic area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, or refuse to discharge the selling lawyer, therefore~~,~~ does not result in a violation. If a client does not agree to retain the purchaser, the selling lawyer is not relieved from responsibility for the representation unless the seller is permitted to withdraw from the representation. See Rule 1.16.	Comments [2] and [2A] are based on Model Rule 1.17, cmt. [2]. However, the Model Rule comment has been divided into two parts for clarity. Proposed Comment [2] is substantially the same as the first part of the Model Rule comment. The phrase "substantive field or geographic" has been added to modify the phrase "area of practice" to make explicit that the comment applies to the sale of the entire practice or to sales of substantive fields of practice or to sales of geographic areas of practice. In addition, proposed Comment [2] recognizes that clients have the right to refuse to discharge the selling lawyer, by adding that concept to the second sentence. The last sentence has been added to highlight that the selling lawyer is not relieved from responsibility unless he or she is substituted out, or has permission to withdraw, in accordance with Rule 1.16.
	[2A] Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold ~~the~~ a practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns or retires from a ~~judiciary~~judicial position.	Comment [2A] is the second half of Model Rule Comment [2], which addresses the kinds of situations under which a return to private practice is permitted after a lawyer has availed himself or herself of the benefits of the Rule. The word "the" has been changed to the word "a," because, in the second sentence, a sale of a specific practice is not at issue. The words "or retires" have been added in the last sentence because a judge may elect to retire and return to private practice. The word "judiciary" has been changed to "judicial" because that is the appropriate adjective to modify "position."

ABA Model Rule Rule 1.17 Sale of Law Practice Comment	Commission's Proposed Rule Rule 1.17 Purchase and Sale of a Law Practice Comment	Explanation of Changes to the ABA Model Rule
[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.	[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.	Comment [3] is identical to Model Rule 1.17, cmt. [3].
[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice on the occasion of moving to another state. Some states are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate lawyers so situated, states may permit the sale of the practice when the lawyer leaves the geographical area rather than the jurisdiction. The alternative desired should be indicated by selecting one of the two provided for in Rule 1.17(a).	[4] ~~The~~This Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within this state or within a defined geographic area of this state. ~~the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice on the occasion of moving to another state. Some states are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate lawyers so situated, states may permit the sale of the practice when the lawyer leaves the geographical area rather than the jurisdiction. The alternative desired should be indicated by selecting one of the two provided for in Rule 1.17.~~A seller does not violate this Rule by either (i) selling a California practice but continuing to practice in other jurisdictions; or (ii) selling a practice in one geographic area of this state but continuing to practice in another geographic area of this state, as agreed to by seller and purchaser.	Comment [4] is based on Model Rule 1.17, cmt. [4], but has been revised extensively to provide guidance on the application of the Rule. Much of the Model Rule Comment [4] is a form of "use note" for guidance to states that choose to follow the Model Rule. Irrelevant parts of that "use note" have been deleted and explicit language added to explain the rights of a seller who sells a part of a practice located in a defined geographic area. Once this Rule is adopted in this state, much of the use note would not be needed, but guidance about the rights of a seller in a sale of a geographic aspect of a practice would be appropriate.

ABA Model Rule Rule 1.17 Sale of Law Practice Comment	Commission's Proposed Rule Rule 1.17 Purchase and Sale of a Law Practice Comment	Explanation of Changes to the ABA Model Rule
[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.	[5] This Rule also permits a lawyer or law firm to sell ~~an area~~a substantive field of practice. If ~~an area~~a substantive field of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the ~~area~~substantive field of practice that has been sold, either as counsel or co-counsel, or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule ~~1.5(e)~~1.5.1. For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer ~~who leaves a jurisdiction~~ or ~~geographical~~law firm that sells the practice in this state or in a geographic area ~~typically would sell~~of this state must make the entire practice in this state or in the geographic area available for purchase, this Rule permits the ~~lawyer~~seller to limit the sale to one or more ~~areas~~substantive fields of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.	Comment [5] is substantially the same as Model Rule 1.17, cmt. [5]. "Substantive field" has been substituted for the word "area" because the Commission concluded that there could be confusion between the word "area" in reference to a geographic location of the practice and the word "area" in the sense of a substantive aspect of the practice. As a result, the Commission concluded that the recommended wording provides greater clarity. The reference to Rule 1.5(e) has been changed to Rule 1.5.1 because that is the number of the counterpart to Model Rule 1.5(e) in the proposed new California Rules. The Commission revised the third sentence for clarity and to conform it with the California approach to this Rule. If a lawyer makes the entire practice in this state or in a geographic area available for purchase, he or she will have complied with this Rule, even if purchasers cannot be found for the entire practice or entire practice in this state or in a geographic area.

ABA Model Rule Rule 1.17 Sale of Law Practice Comment	Commission's Proposed Rule Rule 1.17 Purchase and Sale of a Law Practice Comment	Explanation of Changes to the ABA Model Rule
Sale of Entire Practice or Entire Area of Practice [6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.	**Sale of Entire Practice or Entire Area of Practice** [6] ~~The~~ This Rule requires that the seller's entire law practice, or an entire geographic or substantive area of practice, be sold. The prohibition against sale of less than an entire law practice, entire geographic area of practice or entire substantive field of practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the law practice ~~or practice~~, geographic area of practice, or substantive field of practice, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest or because one or more clients refuse to retain the purchasers.	Comment [6] is based on Model Rule 1.17, cmt. [6]. However, sentences within it have been expanded to clarify that it applies regardless of whether the sale is of an entire practice, of an entire geographic area of practice, or of an entire substantive field of practice. The last phrase has been added to the last sentence of this Comment because a conflict of interest is not the only circumstance under which the purchaser may not be able to undertake a particular client matter. Clients always have the option to refuse to retain the purchaser.
Client Confidences, Consent and Notice [7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information	**Client Confidences, Consent and Notice** [7] ~~Negotiations~~Disclosures in confidence of client identities and matters during negotiations between seller and prospective purchaser ~~prior to disclosure~~ for the purpose of ~~information relating to a specific representation~~ascertaining actual or potential conflicts of ~~an identifiable client~~interest no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers	Comment [7] is based on Model Rule 1.17, cmt. [7]. However, the first sentence has been reworded for clarity. Not all aspects of negotiations between seller and prospective purchaser are necessarily confidential. In preliminary discussions, the seller should be able to disclose in confidence client identities and matters, so the purchaser has an understanding of the scope of the practice and can check for conflicts of interest. However, the seller should not at that stage disclose specific confidential information relating to the representation nor give the purchaser

ABA Model Rule Rule 1.17 Sale of Law Practice Comment	Commission's Proposed Rule Rule 1.17 Purchase and Sale of a Law Practice Comment	Explanation of Changes to the ABA Model Rule
relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.	between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific confidential information relating to the representation ~~and~~or to the file, however, requires client consent. ~~The~~ This Rule provides that, before such information can be disclosed by the seller to the purchaser, the client must be given actual written notice of the contemplated sale, including the identity of the ~~purchaser~~purchasing lawyer or law firm, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed. However, confidential information may be disclosed to the purchaser if necessary to protect a client from harm, damage or loss of rights, unless the client has made known that the client does not want to retain the purchaser or unless the seller and purchaser have ascertained that the purchaser has actual or potential conflicts of interest that preclude the purchaser from representing the client.	access to the file. Those should only be provided by the seller with the consent of the client. The first sentence has been reworded to make those concepts explicit, and the word "confidential" has been added to the second sentence for that same reason. The third sentence has been modified – "purchaser" deleted and "purchasing lawyer or law firm" substituted for it – in order to make explicit that the concept applies regardless of whether the purchaser is an individual lawyer or law firm. In an emergency situation, it may be necessary for the seller to disclose confidential information to the purchaser, in order for the purchaser to protect a client from harm, damage, or loss of rights. The last sentence has been added to this Comment in order to permit a purchaser to obtain access to confidential information if necessary to protect a client in such an emergency.
[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to	[8] [RESERVED] ~~A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to~~	The Commission recommends that Model Rule Comment [8] not be adopted because it is substantively wrong. Under California law and rules, a seller may not withdraw from representation unless he, she, or it has first complied with Rule 1.16 or the client has agreed to the discharge or has substituted the seller with new counsel. In addition, a lawyer may not disclose confidential information to a tribunal, even *in camera*, because that may waive confidentiality of the information.

ABA Model Rule Rule 1.17 Sale of Law Practice Comment	Commission's Proposed Rule Rule 1.17 Purchase and Sale of a Law Practice Comment	Explanation of Changes to the ABA Model Rule
locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist).	~~locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist).~~	
[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.	[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the law practice ~~or~~, a geographic area of the practice, or a substantive field of practice.	Comment [9] is based on Model Rule 1.17, cmt. [9]. The revisions are intended to make explicit that clients have autonomy in choosing their lawyer regardless of whether the sale is a sale of an entire practice, of a geographic area of practice, or of a substantive field of practice.
Fee Arrangements Between Client and Purchaser [10] The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.	**Fee Arrangements Between Client and Purchaser** [10] ~~The~~Paragraph (e) provides that the sale may not be financed solely by increases in fees charged the clients of the law practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser. The purchaser may be required to enter into new fee agreements with each client. See, *e.g.*, Business and Professions Code sections 6147 & 6148.	Comment [10] is based on Model Rule 1.17, cmt. [10]. However, the first sentence has been modified so that it expressly calls the reader's attention to paragraph (e). The word "solely" has been added because that is contained in the black letter rule. The word "law" has been added to make explicit that this Rule applies to the sale of a law practice, not of other lines of business. The last sentence has been added to the Model Rule comment to remind purchasers that under this Rule, they must comply with California requirements regarding fee agreements, such as Business & Professions Code sections 6147 and 6148.

ABA Model Rule Rule 1.17 Sale of Law Practice Comment	Commission's Proposed Rule Rule 1.17 Purchase and Sale of a Law Practice Comment	Explanation of Changes to the ABA Model Rule
Other Applicable Ethical Standards [11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).	**Other Applicable Ethical Standards** [11] ~~Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).~~ Lawyers participating in the sale of a law practice, a geographic area of practice, or a substantive field of practice must act in accordance with all applicable ethical standards. These include, for example, the following: The purchaser is obligated to check for potential conflicts of interest so as to avoid conflicts of interest (see, *e.g.*, Rule 1.7 regarding concurrent conflicts and Rule 1.9 regarding conflicts arising from past representations) and thereafter to provide legal services competently (see Rule 1.1). Following a sale, the seller is obligated to continue to protect confidential client information (see Rule 1.6 and Business & Professions Code section 6068(e)(1)) and to avoid new representations that are in conflict with continuing duties to former clients (see Rule 1.9).	Comment [11] is based on Model Rule 1.17, cmt. [11], but has been substantially revised to correct an apparent error in the Model Rule comment. The examples in the Model Rule comment focus on the seller's ethical duties in connection with the sale of a law practice. The Commission concluded, however, that most of the examples described duties that a purchaser incurs in connection with a sale. The Commission has clarified which duties a purchaser has and which duties a seller has in its revision of the Comment.

ABA Model Rule Rule 1.17 Sale of Law Practice Comment	Commission's Proposed Rule Rule 1.17 Purchase and Sale of a Law Practice Comment	Explanation of Changes to the ABA Model Rule
[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).	[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, ~~such approval must be obtained before~~ the matter ~~can~~may be included in the sale, but the approval of the tribunal must be obtained before the seller is relieved of responsibility for the matter. (See Rule 1.16).	Comment [12] is based on Model Rule 1.17, cmt. [12]. However, it has been revised to clarify the contractual realities of selling a practice and obtaining a tribunal's permission to withdraw. A sale may contemplate including a given matter within the scope of the sale, and the parties will have to enter into a contract for sale before they can implement it. Nevertheless, if the approval of a tribunal is required before the purchaser may be substituted for the seller, both paragraph (f) of this proposed Rule and this comment now make explicit that the tribunal's approval must be obtained before the seller is relieved of responsibility for the matter.
	[12A] Although the services of a broker may be used to assist in a purchase and sale under this Rule, the Rule does not permit such a sale to a broker or other intermediary. Whether a fee may be paid to a nonlawyer broker for arranging a sale or purchase of a law practice under this Rule is governed by the terms of the sale agreement and other law. Other Rules may also apply. See, *e.g.*, Rule 5.4(a) (prohibiting sharing legal fees with a nonlawyer), and Rule 7.2(b) (prohibiting a lawyer from giving anything of value to a person for recommending the lawyer's services).	Comment [12A] has no counterpart in the Model Rule. The Commission concluded that a sale to a broker should not be permitted. A seller or a purchaser may utilize the services of a broker, if permitted by other law. However, this Rule does not permit a sale to a broker or other intermediary. In addition, other rules and other law govern whether a fee may be paid to a nonlawyer broker for arranging a sale or purchase of a law practice or any aspect of it. For example, proposed Rule 5.4(a) prohibits sharing legal fees with a nonlawyer, and proposed Rule 7.2(b) prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services. Lawyers and the public should be made aware of these restrictions. Therefore, they are spelled out in this Comment.

ABA Model Rule Rule 1.17 Sale of Law Practice Comment	Commission's Proposed Rule Rule 1.17 Purchase and Sale of a Law Practice Comment	Explanation of Changes to the ABA Model Rule
Applicability of the Rule [13] This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.	**Applicability of the Rule** [13] This Rule applies to the sale of a law practice of a deceased, ~~disabled~~impaired or disappeared lawyer, or by a trustee. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules~~. Since~~, ~~however,~~or the seller may be a lawyer acting in a fiduciary capacity. Because no lawyer may ~~participate~~assist in a sale of a law practice ~~which~~that does not ~~conform to the requirements of~~comply with this Rule, ~~the representatives of the seller as well as~~a nonlawyer fiduciary who is represented by counsel, a lawyer selling in a fiduciary capacity, and the purchasing lawyer ~~can be expected to see to it that they are met~~must all comply with this Rule. See, *e.g.*, Rule 8.4(a).	Comment [13] is based on Model Rule 1.17, cmt. [13]. The word "impaired" has been substituted for "disabled" because the selling lawyer may be physically disabled but still able to participate in the sale, and the intent is to apply this Rule to a sale on behalf of a selling lawyer who is incapacitated. In addition, the phrase "or by a trustee" has been added because a lawyer, for estate and tax planning purposes, may hold the ownership of his or her practice in a trust. In the second sentence, the alternative of a seller being a lawyer acting in a fiduciary capacity has been added because a lawyer may be the attorney-in-fact, conservator, or trustee for another lawyer. In the third sentence, the word "because" has been substituted for "since, however," to rectify the temporal implication. The phrase "assist in" has been substituted for "participate in" in order to clarify that a lawyer need not be a purchaser or seller in order to violate this Rule. A lawyer for a purchaser or seller must assure that the sale of the practice complies with this Rule. Accordingly, the balance of the third sentence has been revised to make these concepts explicit.
[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.	[14] [RESERVED] ~~Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.~~	Model Rule 1.17, cmt. [14] has been deleted because the substance of it has been moved into paragraph (h) of the black letter rule. An exception to a rule should appear in the rule itself. Because this exception appears in the proposed Rule, repeating it in the comment is not necessary.

ABA Model Rule Rule 1.17 Sale of Law Practice Comment	Commission's Proposed Rule Rule 1.17 Purchase and Sale of a Law Practice Comment	Explanation of Changes to the ABA Model Rule
[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.	[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice ~~or an~~, a geographic area of practice, or a substantive field of practice.	Comment [15] is based on Model Rule 1.17, cmt. [15]. Language has been added to clarify that the Rule only applies to the sale of an entire practice, of a geographic area of practice, or of a substantive field of practice.
	[15A] Lawyers who engage in a transaction described in this Rule also must comply with Rules 1.5.1 and 5.4 when applicable.	Comment [15A] has no counterpart in the Model Rule. This Comment has been added to help assure that lawyers who engage in a transaction under this Rule are alerted to the requirement of complying with proposed Rules 1.5.1 and 5.4.
	[15B] If a lawyer whose practice is sold is deceased, his or her estate must also comply with Business and Professions Code section 6180, et seq., including but not limited to the notice requirements therein.	Comment [15A] has no counterpart in the Model Rule. The Commission recommends addition of this Comment so that people who endeavor to conduct a sale of a practice of a deceased lawyer are alerted of the necessity of complying with the State Bar Act.

Proposed Rule 1.17 Purchase and Sale of a Law Practice
Minority Dissent

A minority of the Commission strongly disagrees with this proposed Rule. The proposed rule will create a sea change in the practice of law, commercializing it beyond anyone's prior imagination.

The current rule was created by this Commission in the 1980s and adopted by the Supreme Court of California on recommendation of the Board of Governors for the specific purpose of allowing senior lawyers in solo practice, facing retirement or appointment to a public position such as a judgeship, or their estates after their deaths, to realize the value of their practices by the sale of those practices without the use of transparent devices such as pretended last minute "partnerships;" see *Geffen v. Moss* (1975) 53 Cal.App.3d 215, 125 Cal.Rptr. 687. To avoid the use of these pretend relationships and to give single practitioners the same opportunity to realize the value of what they created over a lifetime – as was routinely provided where lawyers had been practicing in legal groups such as partnerships (see Howard v. Babcock [citation]), the State Bar proposed the current rule, which was the first authority ever that allowed the one-time sale of such a practice -- under stringent conditions which protect the clients of that practice through provisions for confidentiality during the sale negotiations and against fee increases by reason of the transfer.

The American Bar Association later adopted a version of this Rule at the instance of the California State Bar delegation. It was promoted on the floor of the ABA House of Delegates by the then President of the State Bar, Terry Anderlini.

But the current proposal has transformed this modest and reasonable provision into one which will permit and cause the commercial exploitation of a law practice in ways heretofore undreamed of. Under the proposed rule, a lawyer (and thus, a law firm as well) may sell a substantive field of practice or a geographic area of practice. And unlike the current rule, there is the anticipation that the selling lawyer may even return to the practice he or she has merchandised. See proposed comment 2: "Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation."

The dissenters can see a sea change in the practice if this rule is adopted. Since the rule contains no definition of either the concept of "geographic area" or "substantive field" of practice and since probably no limiting definition is possible, an imaginative or greedy lawyer can sell a case or matter, or a set of a few cases or matters, by describing the sales package in a way which excludes the lawyer's other cases in the field, or in other geographic areas of the state or nation.

As some examples, suppose that a lawyer is consulted about a major personal injury case, beyond the lawyer's normal skills and capacities. Can the lawyer sell his or

her “major personal injuries” practice instead of handling the case him- or herself or associating a more skilled lawyer with client consent per current rule 2-200? Suppose that the lawyer has no background in intellectual property law but is consulted by a current client about a major patent infringement case which may well produce a contingent fee in 7 or even 8 figures? Instead of finding a lawyer competent in the field and referring the matter to that lawyer, can the lawyer now sell his or her “intellectual property practice,” consisting of a single matter, to the highest bidder, as long as the confidentiality provisions of this proposed rule are observed? Why would the temptation to sell be any less if the “big winner” case was one of several, where the seller might be quite willing to give up the others in order to cash in on the one “big deal”?

Or consider the case of a “national” law firm which opened a California office with considerable fanfare, spent a fair amount on the facility, on recruitment of lawyers and on promotion of the practice, but found the branch unprofitable. There have been such instances in the past, and the offices were simply closed. If this rule is adopted, the law firm could hire a marketer and would probably succeed in selling the unprofitable practice to another law firm, since its days in California were numbered in any event.

And what is a geographic area of practice? A county? A region? A neighborhood? And why are we proposing to limit the restrictions on reentry only to those which apply to all businesses, i.e., Business & Professions Code sections 16601 et seq.? What is to preclude the seller from claiming extraordinary circumstances and coming back to the old neighborhood after cashing in on the prize case, except B&P Code section 16601?

We stop the iteration of possibilities here; but the potential changes which this rule will bring about in the merchantization of the practice of law, at all levels of size and activity of any practice, are endless. We are seeing a major evolution in the practice of law, particularly in the larger law firms, where the business element of the law practice has become the driving force and professional services are simply the commodities which such a business produces and sells. No compelling reason for this change has been advanced by its proponents, other than that there might be situations where there could be a genuine special need to carve out some part of an established practice and to sell it. Where these changes will eventually lead is unknown and there is considerable division as to whether the changes are good or bad for the profession and for the public it serves; but it seems clear that the proposed rule will create an enormous change in the business side of the law practice and will encourage the further commercialization of our profession, without any known necessity other than the weak thought that an older litigator might want to maintain a small estate planning practice (in which he/she presumably had little experience) while giving up on the pressure of a litigation practice.

Rule 1.17: Purchase and Sale of a Law Practice
(Commission's Proposed Rule - Clean Version)

A lawyer or a law firm may sell or purchase a law practice, a substantive field of practice, or a geographic area of practice, including good will, only if the conditions set forth in paragraphs (a) through (g) are satisfied:

(a) The seller ceases to engage in the private practice of law entirely, or in the substantive field or geographic area in which the seller conducted the portion of the practice being sold.

(b) The seller makes the entire practice, or the entire substantive field or geographic area of the practice, available for sale to one or more lawyers or law firms.

(c) The purchase and sale includes all or substantially all of the practice, or of the substantive field or geographic area of the practice.

(d) If the purchase or sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Rule 1.6 and Business and Professions Code section 6068(e), then:

(1) If the seller is deceased, or has a conservator or other person acting in a representative capacity, and no lawyer has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, prior to the transfer, the purchaser:

(A) shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel and might have the right to act in his or her own behalf; that the client may take possession of any client papers and property in the form or format held by the lawyer as provided by Rule 1.16(e); and that, if no response is received to the notice within 90 days after it is sent or, if the client's rights would be prejudiced by a failure of the purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client; and

(B) shall obtain the written consent of the client, provided that the client's consent shall be presumed until the purchaser is otherwise notified by the client if the purchaser receives no response to the paragraph (d)(1)(A) notification within 90 days after it is sent to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by a failure of the purchaser to act during the 90-day period.

(2) In all other circumstances, not less than 90 days prior to the transfer:

(A) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel and might have the right to act in his or her own behalf; that the client may take possession

of any client papers and property in the form or format held by the lawyer as provided by Rule 1.16(e); and that, if no response is received to the notice within 90 days after it is sent or, if the client's rights would be prejudiced by a failure of the purchaser to act during the 90 day period, the purchaser may act on behalf of the client until otherwise notified by the client; and

(B) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer, provided that the client's consent shall be presumed if the purchaser receives no response to the paragraph (d)(2)(A) notice within 90 days after it is sent to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by a failure of the purchaser to act during the 90 day period, unless the purchaser is otherwise notified by the client.

(e) Fees charged to clients shall not be increased solely by reason of the purchase, and the purchaser assumes the seller's obligations under existing client agreements regarding fees and the scope of work.

(f) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a lawyer shall be taken.

(g) A lawyer shall not disclose confidential client information to a nonlawyer in connection with a purchase or sale under this Rule.

(h) This Rule does not apply to the admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice.

COMMENT

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

[1A] As used in this Rule, a selling "lawyer" includes the personal representative of the estate of a deceased lawyer, the trustee of a trust of which a law practice is an asset, an attorney in fact under a lawyer's durable power of attorney, a conservator of the estate of a lawyer, or a lawyer appointed to act for the seller pursuant to Business and Professions Code sections 6180, 6185 and 6190.4.

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of a substantive field or geographic area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the entire substantive field or geographic area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, or refuse to discharge the selling lawyer, therefore, does not result in a violation. If a client does not agree to retain the purchaser, the selling lawyer is not relieved from responsibility for the representation unless the seller is permitted to withdraw from the representation. See Rule 1.16.

[2A] Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example,

a lawyer who has sold a practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns or retires from a judicial position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] This Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within this state or within a defined geographic area of this state. A seller does not violate this Rule by either (i) selling a California practice but continuing to practice in other jurisdictions; or (ii) selling a practice in one geographic area of this state but continuing to practice in another geographic area of this state, as agreed to by seller and purchaser.

[5] This Rule also permits a lawyer or law firm to sell a substantive field of practice. If a substantive field of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the substantive field of practice that has been sold, either as counsel or co-counsel, or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule1.5.1. For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer or law firm that sells the practice in this state or in a geographic area of this state must make the entire practice in this state or in the geographic area available for purchase, this Rule permits the seller to limit the sale to one or more substantive fields of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

[6] This Rule requires that the seller's entire law practice, or an entire geographic or substantive area of practice, be sold. The prohibition against sale of less than an entire law practice, entire geographic area of practice or entire substantive field of practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the law practice, geographic area of practice, or substantive field of practice, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest or because one or more clients refuse to retain the purchasers.

Client Confidences, Consent and Notice

[7] Disclosures in confidence of client identities and matters during negotiations between seller and prospective purchaser for the purpose of ascertaining actual or potential conflicts of interest no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific confidential information relating to the representation or to the file, however, requires client consent. This Rule provides that, before such information can be disclosed by the seller to the purchaser, the client must be given actual written notice of the contemplated sale, including the identity of the purchasing lawyer or law firm, and must be

told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed. However, confidential information may be disclosed to the purchaser if necessary to protect a client from harm, damage or loss of rights, unless the client has made known that the client does not want to retain the purchaser or unless the seller and purchaser have ascertained that the purchaser has actual or potential conflicts of interest that preclude the purchaser from representing the client.

[8] [RESERVED]

[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the law practice, a geographic area of the practice, or a substantive field of practice.

Fee Arrangements Between Client and Purchaser

[10] Paragraph (e) provides that the sale may not be financed solely by increases in fees charged the clients of the law practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser. The purchaser may be required to enter into new fee agreements with each client. See, e.g., Business and Professions Code sections 6147 & 6148.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice, a geographic area of practice, or a substantive field of practice must act in accordance with all applicable ethical standards. These include, for example, the following: The purchaser is obligated to check for potential conflicts of interest so as to avoid conflicts of interest (see, e.g., Rule 1.7 regarding concurrent conflicts and Rule 1.9 regarding conflicts arising from past representations) and thereafter to provide legal services competently (see Rule 1.1). Following a sale, the seller is obligated to continue to protect confidential client information (see Rule 1.6 and Business & Professions Code section 6068(e)(1)) and to avoid new representations that are in conflict with continuing duties to former clients (see Rule 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, the matter may be included in the sale, but the approval of the tribunal must be obtained before the seller is relieved of responsibility for the matter. (See Rule 1.16).

[12A] Although the services of a broker may be used to assist in a purchase and sale under this Rule, the Rule does not permit such a sale to a broker or other intermediary. Whether a fee may be paid to a nonlawyer broker for arranging a sale or purchase of a law practice under this Rule is governed by the terms of the sale agreement and other law. Other Rules may also apply. See, e.g., Rule 5.4(a) (prohibiting sharing legal fees with a nonlawyer), and Rule 7.2(b) (prohibiting a lawyer from giving anything of value to a person for recommending the lawyer's services).

Applicability of the Rule

[13] This Rule applies to the sale of a law practice of a deceased, impaired or disappeared lawyer, or by a trustee. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules, or the seller may be a lawyer acting in a fiduciary capacity. Because no lawyer may assist in a sale of a law practice that does not comply with this Rule, a nonlawyer fiduciary who is represented by counsel, a lawyer selling in a fiduciary capacity, and the purchasing lawyer must all comply with this Rule. See, e.g., Rule 8.4(a).

[14] [RESERVED]

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice, a geographic area of practice, or a substantive field of practice.

[15A] Lawyers who engage in a transaction described in this Rule also must comply with Rules 1.5.1 and 5.4 when applicable.

[15B] If a lawyer whose practice is sold is deceased, his or her estate must also comply with Business and Professions Code section 6180, et seq., including but not limited to the notice requirements therein.

Rule 1.17: Purchase and Sale of a Law Practice

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Arkansas adds Rule 1.17(e), which requires the seller to file a detailed and timely affidavit with the Committee on Professional Conduct showing that the seller has complied with the notice provisions of Rule 1.17.

California: Rule 2-300, using different language, addresses the same policy issues as Rule 1.17 and provides that "fees shall not be increased solely by reason of' the sale. "All or substantially all" of a practice may be sold.

Colorado: Rule 1.17(a) is satisfied only if the seller ceases to engage in the private practice of law "in Colorado," or in the area of practice "in Colorado" that has been sold.

Florida omits the requirement in ABA Model Rule 1.17(a) that the seller cease practicing law, and adds or modifies several provisions, including the following:

> (c) Court Approval Required. If a representation involves pending litigation, there shall be no substitution of counselor termination of representation unless authorized by the court….
>
> (d) Client Objections. If a client objects to the proposed substitution of counsel, the seller shall comply with the requirements of rule 4-1.16(d) [which governs withdrawal]…
>
> (e) Existing Fee Contracts Controlling. The purchaser shall honor the fee agreements that were entered into between the seller and the seller's clients. The fees charged clients shall not be increased by reason of the sale.

Florida's Comment to subparagraph (f) provides as follows:

> The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser. This obligation of the purchaser is a factor that can be taken into account by seller and purchaser when negotiating the sale price of the practice.

Georgia: Rule 1.17 tracks the 1990 version of ABA Model Rule 1.17 verbatim except that Georgia deletes paragraph (a) (requiring that the seller stop practicing law).

Illinois: The Illinois rule, which was not adopted until 2005, differs significantly from ABA Model Rule 1.17. It permits not only a lawyer but also "the estate of a deceased lawyer, or the guardian or authorized representative of a disabled lawyer" to "transfer" or sell a law practice if the following conditions are satisfied:

(a) The lawyer whose practice is transferred or sold ceases to engage in the private practice of law in all or part of Illinois due to:

(1) death or disability;

(2) retirement;

(3) declaration of inactive status with the ARDC;

(4) becoming a member of the judiciary;

(5) full-time government employment;

(6) moving to an in-house counsel or other position of employment not involving the private practice of law; or

(7) a decision to no longer be actively engaged in the private practice of law on a fee representation basis in the geographic area in which the practice has been conducted.

(b) The entire practice is transferred or sold to one or more lawyers or law firms....

Illinois Rule 1.17 also adds the following three new paragraphs at the end of the Rule:

(e) Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this rule.

(f) Lawyers who sell or transfer their law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example. Rule 1.1 (Competence); Rule 1.5 (Fees); Rule 1.6 (Confidentiality of Information); Rule 1.7 (Conflict of Interest: General Rule); Rule 1.9 (Conflict of Interest: Former Client).

(g) This rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of the practice.

The adoption of Rule 1.17 in 2005 marked the end of a long process in Illinois. The Illinois State Bar Association had previously recommended versions of Rule 1.17 in 1991 and 1994, but the Supreme Court had rejected both recommendations without explanation.

Kansas: Kansas omits ABA Model Rule 1.17 entirely.

Maryland: Rule 1.17 differs significantly from ABA Model Rule 1.17. Maryland Rule 1.17(a)(1) permits the sale of a law practice, upon appropriate notice, if "(1) Except in the case of death, disability, or appointment of the seller to judicial office, the entire practice that is the subject of the sale has been in existence at least five years prior to the date of sale" and "(2) The practice is sold as an entirety to another lawyer or law firm."

Michigan: Rule 1.17(a) provides that a "lawyer or a law firm may sell or purchase a private law practice, including good will, according to this rule." Michigan adds Rule 1.17(e), which permits the "sale of the good will of a law practice ... conditioned upon the seller ceasing to engage in the private practice of law for a reasonable period of time within the geographical area in which the practice has been conducted."

Minnesota: Rule 1.17(b), which is based on the 1990 version of ABA Model Rule 1.17, provides as follows:

(b) The buying lawyer or firm of lawyers shall not increase the fees charged to clients by reason of the sale for a period of at least one year from the date of the sale. The buying lawyer or firm of lawyers shall honor all existing fee agreements for at least one year from the date of the sale and shall continue to completion, on the same terms agreed to by the selling lawyer and the client, any matters that the selling lawyer has agreed to do on a pro bono publico basis or for a reduced fee.

Rule 1.17(d) provides that the notice to clients must include a "summary of the buying lawyer's or law firm's professional background, including education and experience and the length of time that the buyer lawyer or members of the buying law firm has been in practice." Minnesota also adds four paragraphs, including Rule 1.17(f), which permits the selling lawyer to promise that he or she "will not engage in the practice of law for a reasonable period of time within a reasonable geographic area and will not advertise for or solicit clients within that area for that time," and Rule 1.17(g), which provides that the selling lawyer "shall retain responsibility for the proper management and disposition of all inactive files that are not transferred as part of the sale of the law practice."

Missouri: Rule 1.17(d) adopts the ABA mandate that fees charged to clients shall not be increased by reason of the sale of the practice, but adds that the purchaser may "refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations."

New Jersey: Rule 1.17 permits a lawyer or firm to sell or purchase a law practice, including goodwill, if the seller is ceasing to engage in private law practice in New Jersey, the practice is sold as an entirety and certain notices are given to the clients of the seller and by publication in the New Jersey Law Journal and the New Jersey Lawyer at least 30 days in advance of the sale.

New York: DR 2-111 allows sale of a "law practice, including goodwill, to one or more lawyers or law firms." The parties may agree "on reasonable restrictions on the seller's private practice of law." Provisions are made for protecting confidential information and checking for conflicts.

North Carolina: Rule 1.17(d) provides that if a conflict of interest disqualifies the purchaser from representing a client, then "the seller's notice to the client shall advise the client to retain substitute counsel." In addition, Rule 1.17(g) permits the purchaser to pay the seller in installments -but the seller "shall have no say regarding the purchaser's conduct of the law practice."

Ohio: Rule 1.17 incorporates most of the substantive provisions of the Model Rule, but uses different language and adds many different provisions. For example, Ohio Rule 1.17(a) requires that a law practice must be sold "in its entirety, except where a conflict of interest is present that prevents the transfer of representation of a client or class of clients." In addition, Rule 1.17(a) prohibits the sale or purchase of a law practice "where the purchasing lawyer is buying the practice for the sole or primary purpose of reselling the practice to another lawyer or law firm," and Rule 1.17(d)(1) requires the sale agreement to include a statement that "the purchasing lawyer is purchasing the law practice in good faith and with the intention of delivering legal services to clients of the selling lawyer and others in need of legal services."

Ohio Rule 1.17 (d)(2) requires the sale agreement to provide that "the purchasing lawyer will honor any fee

agreements between the selling lawyer and the clients of the selling lawyer relative to legal representation that is ongoing at the time of the sale," but the purchasing lawyer "may negotiate fees with clients of the selling lawyer for legal representation that is commenced after the date of the sale." Rule 1.17 (d)(3) generally permits the sale agreement to include terms that "reasonably limit the ability of the selling lawyer to reenter the practice of law," but prohibits such limitations "if the selling lawyer is selling his or her law practice to enter academic, government, or public service or to serve as in-house counsel to a business."

Ohio Rule 1.17(e) specifies in considerable detail what the notice to clients must contain, and a Rule 1.17(g) allows the selling lawyer and purchasing lawyer to give notice of the sale to a missing client by publishing notice of the sale in a newspaper. A Rule 1.17(i) provides as follows:

> (i) Neither the selling lawyer nor the purchasing lawyer shall attempt to exonerate the lawyer or law firm from or limit liability to the former or prospective client for any malpractice or other professional negligence. The provisions of Rule 1.8(h) shall be incorporated in all agreements for the sale or purchase of a law practice. The selling lawyer or the purchasing lawyer, or both, may agree to provide for the indemnification or other contribution arising from any claim or action in malpractice or other professional negligence.

Oklahoma: Rule 1.17(a) requires the selling lawyer to cease practice only "in the geographic area in Oklahoma in which the practice has been conducted," not in the entire state. Rule 1.17(b)(2) provides that matters shall not be transferred to a purchaser "unless the seller has reasonable basis to believe that the purchaser has the requisite knowledge and skill to handle such matters, or reasonable assurances are obtained that such purchaser will either acquire such knowledge and skill or associate with another lawyer having such competence." Rule 1.17(c) requires the "signed written consent of each client whose representation is proposed to be transferred" unless the client takes no action within 90 days of the notice. Rule 1.17(d) permits the purchaser to "refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations."

Pennsylvania: Rule 1.17 differs significantly from ABA Model Rule 1.17. For example, Pennsylvania Rule 1.17(b) requires that the seller must sell the practice "as an entirety to a single lawyer," and explains that a practice is sold as an entirety "if the purchasing lawyer assumes responsibility for all of the active files" except those specified in Rule 1.17(g). Rule 1.17(d) adds the following: "Existing agreements between the seller and the client concerning fees and the scope of work must be honored by the purchaser, unless the client gives informed consent confirmed in writing." Pennsylvania also adds Rules 1.17(e) and (g), which provide as follows:

> (e) The agreement of sale shall include a clear statement of the respective responsibilities of the parties to maintain and preserve the records and files of the sellers practice, including client files.

> (g) The sale shall not be effective as to any client for whom the proposed sale would create a conflict of interest for the purchaser or who cannot be represented by the purchaser because of other requirements of the Pennsylvania Rules of Professional Conduct or rules of the Pennsylvania Supreme Court governing the practice of law in Pennsylvania, unless such conflict, requirement

or rule can be waived by the client and the client gives informed consent.

Virginia: Virginia requires the selling lawyer, in notifying clients about the proposed sale, to disclose "any proposed change in the terms of the future representation including the fee arrangement." Nonetheless, Virginia also adopts ABA Model Rule 1.17(d).

Proposed Rule 1.18 [N/A]
"Duties to Prospective Client"

(Draft # 4.1, 12/15/09)

Summary: Proposed Rule 1.18 closely tracks Model Rule 1.18 and clarifies the duties a lawyer owes to prospective clients who consult with the lawyer to seek representation. There is no California Rule counterpart, but the duty to protect confidential information of a prospective client, even if no attorney-client relationship results, is found in Evid. Code § 951 and is discussed at length in Cal. State Bar Formal Opn. 2003-161.

Comparison with ABA Counterpart

Rule	Comment
☑ ABA Model Rule substantially adopted	☑ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☑ Some material additions to ABA Model Rule	☑ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rule	
Statute	Evid. Code § 951
Case law	*People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456].

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): ☑ Yes ☐ No

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☑ Moderately Controversial – Explanation:

A number of lawyers in California reject the concept of non-consensual screening, which is provided for in paragraph (d)(2), in the private law firm context. See Introduction.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.18* Duties to Prospective Client*

December 2009
(Draft rule to be considered for public comment.)

INTRODUCTION:

Proposed Rule 1.18 is based on Model Rule 1.18 and clarifies the duties a lawyer owes to prospective clients who consult with the lawyer to seek legal services or advice. Model Rule 1.18 is a new Rule that the ABA approved in 2002 to address the "concern that important events occur in the period during which a lawyer and prospective client are considering whether to form a client-lawyer relationship. For the most part, the current Model Rules do not address that pre-retention period." See Model Rule 1.18, Reporter's Explanation of Changes, ¶. 1, available at http://www.abanet.org/cpr/e2k/e2k-rule118rem.html (last visited 11/18/09).[1] Adopting Rule 1.18 will put the important duties that might arise during the pre-retention period front and center for the profession.

There is no California Rule counterpart, but the duty to protect confidential information of a prospective client, even if no attorney-client relationship results, is found in Cal. Evid. Code § 951, which does not require the formation of a lawyer-client relationship but instead defines "client" as a person who "consults" with a lawyer in the lawyer's capacity as a lawyer "for the purpose of securing legal service or advice." Section 951 is discussed at length in Cal. State Bar Formal Opn. 2003-161, available at http://www.calbar.ca.gov/calbar/pdfs/ethics/OPN_2003_161.pdf [last visited 11/18/09].

The proposed Rule closely tracks Model Rule 1.18, with a number of changes that are intended to: (i) conform the Rule to the language of the Evidence Code [see Explanation of Changes to paragraph (a)]; (ii) limit the scope of a prospective client's protected information by requiring it that be "confidential," while at the same time broadening the scope to include confidential information learned not only "in" the initial consultation but also learned "as a result of" that consultation [see Explanation of Changes to paragraph (b)]; (iii) substituting the

* Proposed Rule 1.18, Draft 4.1 (12/15/09).

[1] The Reporter's Explanation of Changes for each of the Model Rules, as recommended by the Ethics 2000 Commission, is available at http://www.abanet.org/cpr/e2k/e2k-report_home.html [last visited 11/18/09].

well-settled "material to the matter" standard developed over many years in California case law for the ambiguous "significantly harmful to that in the matter" standard that is used in Model Rule 1.18 [see Explanation of Changes for paragraph (c)]; (iv) adding clarifying language and requiring a more rigorous ethical screen than is required by the Model Rule to protect the prospective client's confidential information [see Explanation of Changes for paragraph (d)].

The Comment to proposed Rule 1.18 largely tracks the comment to Model Rule 1.18. The changes made are intended primarily to conform the comment to the revisions to the black letter of the Rule.

Disagreement Over the inclusion of a provision permitting non-consensual screening of the consulted lawyer when confidential information is learned during the pre-retention period. The Commission voted 5-5 to strike from proposed Rule 1.18 the concept of non-consensual screening and so the concept, which is part of Model Rule 1.18, remains in the rule as paragraph (d)(2).

Those who favor a non-consensual screening provision note that it is available to a law firm only in limited situations – where the consulted lawyer "took reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client." Proponents of this view take the position that the proposed Rule appropriately balances the interests of the prospective client and the interests of the firm's affected client in retaining the lawyer of its choice. The lawyer who might have acquired the prospective client's information despite the lawyer's "reasonable measures" is screened to protect the information.

Those who oppose the inclusion of non-consensual screening in this Rule take the position that "[t]his unilateral power would enable lawyers to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then to appear against that person in the very matter in which representation was sought." A detailed statement of this position, with citation to authority, is provided in these materials after the Rule & Comment Comparison Chart, below. See Statement Opposing Non-Consensual Screening.

Variations in Other Jurisdictions. Every jurisdiction that has completed it Ethics 2000 review of its Rules of Professional Conduct has adopted some version of Model Rule 1.18. One of those jurisdictions (D.C.) does not permit non-consensual screening. Several jurisdictions do not require that the consulted lawyer take "reasonable measures" to avoid exposure to information not necessary to decide whether to accept the representation. (E.g., North Carolina, Oregon). Nevada moves into the black letter of the Rule Comments [2] and [5] of the Model Rule.

ABA Model Rule Rule 1.18 Duties to Prospective Client	Commission's Proposed Rule* Rule 1.18 Duties to Prospective Client	Explanation of Changes to the ABA Model Rule
(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.	(a) A person who ~~discusses with~~, directly or through an authorized representative, consults a lawyer for the ~~possibility~~purpose of ~~forming a client~~ retaining the lawyer ~~relationship with respect to a matter~~or securing legal service or advice from the lawyer in the lawyer's professional capacity, is a prospective client.	Paragraph (a) is based on Model Rule 1.18(a) but has been revised to track the language from the California Evidence Code concerning the lawyer-client privilege. The concept of "authorized representative" through whom a client may act is derived from Evid. Code §§ 951 ("Client") and 954 ("Holder of the Privilege"). The clause, "securing legal service or advice from the lawyer in the lawyer's professional capacity" is also taken from section 951. Utilizing the Evidence Code language conforms the Rule to the statutory language for the privilege, which applies even if the lawyer is not retained as counsel. See Evid. Code § 951 ("'client' means a person who … *consults* a lawyer …"). See also Cal. State Bar Formal Opn. 2003-161.
(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.	(b) Even when no ~~client~~ lawyer-client relationship ensues, a lawyer who has ~~had discussions~~communicated with a prospective client shall not use or reveal confidential information learned ~~in~~as a result of the consultation, except as Rule 1.9 would permit with respect to information of a former client.	Paragraph (b) largely tracks Model Rule 1.18(b). The term "lawyer-client" has been substituted for the Model Rule's "client-lawyer" to conform to the style of California rules and statutes. The phrase "has communicated with" has been substituted for "has had discussions with" because "discuss" is a subset of "communicate," and the Commission determined that given the wide range of communication modes available to prospective clients, the broader term is more inclusive, and so more protective, of the prospective client's communication.

* Proposed Rule 1.18, Draft 4.1 (12/16/09). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 1.18 Duties to Prospective Client	Commission's Proposed Rule* Rule 1.18 Duties to Prospective Client	Explanation of Changes to the ABA Model Rule
		The phrase "as a result of" has been substituted for "in" because a lawyer often will have to investigate further to determine whether the lawyer is willing or able to accept the representation. That information should also be protected. See Comment [3]. However, the word "confidential" has been added to narrow the scope of protection afforded a prospective client. Although a current or former client should be entitled to protection by the lawyer of all information the lawyer learned as a result of a representation, only information which is learned "as a result" of the consultation *and* which is confidential should be protected in the prospective client situation.
(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).	(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received confidential information from the prospective client that ~~could be significantly harmful~~is material to ~~that person in~~ the matter, except as provided in paragraph (d). If a lawyer is ~~disqualified~~prohibited from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).	Paragraph (c) is based on Model Rule 1.18(c). with several changes. As to the addition of "confidential" to modify "information," see Explanation of Changes for paragraph (b). The phrase "is material to the matter" has been substituted for "could be significantly harmful to that person in the matter" to track California case law on successive representation conflicts of interest, which focuses on the materiality of the information learned in the prior representation or consultation. See, e.g., *Jessen v. Hartford General Casualty Co*., 111 Cal.App.4th 698. 3 Cal.Rptr.3d 877, 884-885 (2003). See also Knight v. Ferguson, 149 Cal.App.4th 1207, 57 Cal.Rptr.3d 823 (2007); *Ochoa v. Fordel*, 146 Cal.App.4th 898, 53 Cal.Rptr.3d 277 (2007); *Faughn v. Perez*, 145 Cal.App.4th 592, 51 Cal.Rptr.3d 692 (2006); *Farris v. Fireman's Fund Ins. Co*., 119 Cal.App.4th 671, 14 Cal.Rptr.3d 618 (2004).

ABA Model Rule Rule 1.18 Duties to Prospective Client	Commission's Proposed Rule* Rule 1.18 Duties to Prospective Client	Explanation of Changes to the ABA Model Rule
		The word "prohibited" has been substituted for "disqualification" because the rule is intended as a disciplinary rule, not a civil disqualification standard.
(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:	(d) When the lawyer has received ~~disqualifying~~ information that prohibits representation as defined in paragraph (c), representation of the affected client is permissible if:	The introductory clause to paragraph (d) is based on the corresponding clause in Model Rule 1.18(d), with several changes. The phrase, "that prohibits representation" is substituted for "disqualified" because the rule is intended as a disciplinary rule, not a civil disqualification standard. The phrase "of the affected client" has been added to clarify that the issue is whether the lawyer or the lawyer's firm can represent a current client who might be affected by the consultation with the prospective client because the current client might be prohibited from retaining his or her preferred lawyer.
(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:	(1) both the affected client and the prospective client have given informed written consent, ~~confirmed in writing, or~~:	Subparagraph (d)(1) is based on Model Rule 1.18(d)(1), except that California's stricter "informed written consent" standard has been substituted for the Model Rule's "consent, confirmed in writing" standard.
(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and	(2) the lawyer who received the information took reasonable measures to avoid exposure to more ~~disqualifying~~ information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client; and	Subparagraph (d)(1) is based on Model Rule 1.18(d)(2), except that the phrase, "that prohibits representation" is substituted for "disqualified" because the rule is intended as a disciplinary rule, not a civil disqualification standard.

ABA Model Rule Rule 1.18 Duties to Prospective Client	Commission's Proposed Rule* Rule 1.18 Duties to Prospective Client	Explanation of Changes to the ABA Model Rule
(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and	(i) the ~~disqualified~~prohibited lawyer is timely and effectively screened from any participation in the matter and is apportioned no part of the fee therefrom; and	Subparagraph (d)(2)(i) is based on Model Rule 1.18(d)(2)(i), except that the word "prohibited" has been substituted for "disqualified" because the rule is intended as a disciplinary rule, not a civil standard. The phrase "and effectively" has been added to the paragraph to provide an added layer of protection to the client by requiring that an ethical screen not only be timely, but also effective. This language is taken from New York Rule 1.11.
(ii) written notice is promptly given to the prospective client.	(ii) written notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this Rule.	Subparagraph (d)(2)(ii) is based on Model Rule 1.18(d)(2)(ii), except for the addition of the clause, "to enable the prospective client to ascertain compliance with the provisions of this Rule." The addition of this clause, taken from New York Rule 1.11, apprises lawyers of what the notice is intended to accomplish.

ABA Model Rule Rule 1.18 Duties to Prospective Client Comment	Commission's Proposed Rule Rule 1.18 Duties to Prospective Client Comment	Explanation of Changes to the ABA Model Rule
[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.	[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free ~~(~~, and sometimes required~~)~~, to proceed no further. Hence, prospective clients ~~should receive~~are entitled to some but not all of the protection afforded clients. As used in this Rule, prospective client includes an authorized representative of the client.	Comment [1] is based on Model Rule 1.18, cmt. [1]. The phrase "are entitled to" has been substituted for "should receive" in recognition that prospective clients are entitled to certain protections; it is not merely a hortatory standard. See, e.g., Evid. Code § 951, which defines client for purposes of the lawyer-client privilege as persons who "consult" with a lawyer, not just those who retain the lawyer. The last sentence has been added to clarify that whether prospective client consults directly with the lawyer or through an authorized representative, the effect is the same. See also Explanation of Changes for paragraph (a).
[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).	[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who by any means communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship or to discuss the prospective client's matter in the lawyer's professional capacity, is not a "prospective client" within the meaning of paragraph (a). Similarly, a person who discloses information to a lawyer after the lawyer has stated his or her unwillingness or inability to consult with the person in the lawyer's professional capacity would not have such a reasonable expectation. See *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456].	Comment [2] is based on Model Rule 1.18, cmt. [2]. The phrase "by any means" has been added to emphasize that there are a plethora of modes by which prospective clients can communicate their interest in retaining a lawyer. See also Explanation of Changes to paragraph (b) (substitution of "communicate" for "discussion"). The addition of the clause, "or to discuss the prospective client's matter in the lawyer's professional capacity," has been added to track the language in paragraph (a), which in turn is derived from Evid. Code § 951. The last sentence is taken nearly verbatim from a seminal California Supreme Court case. It provides important guidance to clients and lawyers alike that a lawyer can expressly disclaim that a lawyer-client communication will take place.

ABA Model Rule Rule 1.18 Duties to Prospective Client Comment	Commission's Proposed Rule Rule 1.18 Duties to Prospective Client Comment	Explanation of Changes to the ABA Model Rule
	[2A]Whether a lawyer's representations or conduct evidence a willingness to participate in a consultation is examined from the viewpoint of the reasonable expectations of the prospective client. The factual circumstances relevant to the existence of a consultation include, for example: whether the parties meet by pre-arrangement or by chance; the prior relationship, if any, of the parties; whether the communications between the parties took place in a public or private place; the presence or absence of third parties; the duration of the communication; and, most important, the demeanor of the parties, particularly any conduct of the attorney encouraging or discouraging the communication and conduct of either party suggesting an understanding that the communication is or is not confidential.	Comment [2A] has no counterpart in Model Rule 1.18. It has been added to provide helpful guidance to lawyers concerning the relevant factors to analyze to determine whether a lawyer has indicated by words or conduct an interest in consulting with a prospective client in the lawyer's professional capacity. See Cal. State Bar Ethics Opn. 2003-161.
[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.	[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. ~~Paragraph~~ Sometimes the lawyer must investigate further after the initial consultation with the prospective client to determine whether the matter is one the lawyer is willing or able to undertake. Regardless of whether the lawyer has learned such information during the initial	Comment [3] is based on Model Rule 1.18, cmt. [3]. The new third sentence ("Sometimes the …") and the language added to the third Model Rule sentence "Regardless of …") have been added in recognition that information needed to determine whether a lawyer is willing or able to accept a representation might occur outside the initial client consultation, but nevertheless will be protected. See also Explanation of Changes for paragraph (b).

ABA Model Rule Rule 1.18 Duties to Prospective Client Comment	Commission's Proposed Rule Rule 1.18 Duties to Prospective Client Comment	Explanation of Changes to the ABA Model Rule
	consultation or during the subsequent investigation, paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.	
[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.	[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under ~~Rule~~Rules 1.7 and 1.9, then consent from all affected present or former clients must be obtained before accepting the representation.	Comment [4] is nearly identical to Model Rule 1.18, cmt. [4]. A reference to Rule 1.9 ("Duties to Former Clients") has been added to conform to the Model Rule comment's reference to "former clients".
[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received	[5] A lawyer may condition conversations with a prospective client on the person's informed consent that ~~no~~ information disclosed during the consultation will not prohibit the lawyer from representing a different client in the matter. See Rule 1.0.1(e) for the definition of informed consent. ~~If~~ However, the ~~agreement expressly so provides,~~ lawyer must take reasonable measures to avoid exposure to more	Comment [5] is based on Model Rule 1.18, cmt. [5]. The change to the first sentence is for clarity. No change in meaning is intended. The last sentence has been extensively modified to change the Model Rule's emphasis from a lawyer's *ability* to obtain a prospective client's consent to use of the information to the lawyer's *obligation* to limit his or her exposure to information that

ABA Model Rule Rule 1.18 Duties to Prospective Client Comment	Commission's Proposed Rule Rule 1.18 Duties to Prospective Client Comment	Explanation of Changes to the ABA Model Rule
from the prospective client.	information that prohibits representation than is reasonably necessary to determine whether to represent the prospective client ~~may also consent to the lawyer's subsequent use of information received from the prospective client~~.	would serve to prohibit the lawyer's representation of a current client. The latter approach is more in keeping with California's strong policy obligating lawyers to protect confidential information.
[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.	[6] Even in the absence of an agreement with the prospective client, under paragraph (c), the lawyer is not prohibited from ~~representing~~either continuing or accepting the representation of a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that ~~could be significantly harmful if used in~~is material to the matter. For a discussion of the meaning of "materially adverse" as used in paragraph (c), see Rule 1.9, comment [7]. For a discussion of the meaning of "substantially related" as used in paragraph (c), see Rule 1.9, comments [4] – [6].	Comment [6] is based on Model Rule 1.18, cmt. [6], with some revisions to clarify the intent of the Rule or to conform the Comment to revisions made to paragraph (c). First, the phrase "with the prospective client" has been added as a transition from the previous Comment. Second, the clause, "either continuing or accepting the representation" has been added to clarify that the concept of "representing" includes both ongoing representations and new matters. Third, as in paragraph (c), the phrase "is material to" has been substituted for "could be significantly harmful if used in" for the reasons stated in the Explanation of Changes for paragraph (c). Finally, the last two sentences have been added to provide a cross-reference to several comments to Rule 1.9, which provide guidance to lawyers on the application of the "substantially related" and "material" standards in paragraph (c).
[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and	[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed written consent~~, confirmed in writing,~~ of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all ~~disqualified~~ prohibited lawyers are	Comment [7] is nearly identical to Model Rule 1.18, cmt. [7]. For an explanation of the changes to the comment, see Explanation of Changes for subparagraphs (d)(1) and (d)(2)(i).

ABA Model Rule Rule 1.18 Duties to Prospective Client Comment	Commission's Proposed Rule Rule 1.18 Duties to Prospective Client Comment	Explanation of Changes to the ABA Model Rule
written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.	timely and effectively screened and written notice is promptly given to the prospective client. See Rule ~~1.0~~1.0.1(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.	
[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.	[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given to the prospective client as soon as practicable after the need for screening becomes apparent.	Comment [8] is based on Model Rule 1.18, cmt. [8]. The phrase "to the prospective client" has been added to clarify that the notice must be given so that the prospective client may monitor the effectiveness of the screen.
[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.	[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.	Comment [9] is identical to Model Rule 1.9, cmt. [9].

Proposed Rule 1.18 Duties to Prospective Client
Dissent from Paragraph (d)(2) – Non-consented Screening

A motion to delete Rule 1.18(d)(2) failed on a tie vote. The members of the Commission who voted for the motion dissent from proposed Rule 1.18(d)(2) because it would permit a law firm that has received a potential client's confidential information to adopt an ethical screen unilaterally and without the potential client's consent. This unilateral power would enable lawyers to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then to appear against that person in the very matter in which representation was sought. This would cause a major change in California law – a change that would be of great financial benefit to lawyers but would cause material harm to clients, causing injury to public respect for lawyers and for the legal system.

The duty of confidentiality expressed in Business & Professions Code section 6068(e)(1) and Rule 3-100 prohibits a lawyer from using or disclosing any information that a client wants the lawyer to hold inviolate or the disclosure of likely would be embarrassing or detrimental to the client. This duty exists to assure that anyone can discuss with a lawyer how the law applies to his or her most intimate problem without fear of consequence. This duty also exists because effective representation depends on open communication between lawyer and client. (*City & County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 235 (1951) ["Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. Unless he makes known to the lawyer all the facts, the advice that follows will be useless, if not misleading."].)

California law presumes that confidential information possessed by one lawyer in a law firm is shared by all other lawyers in the firm. This presumption exists because the client has no means to assure that information in the possession of a firm representing the client's adversary will not be shared and used or disclosed against the client's interests. As the Court of Appeal stated in *Adams v. Aerojet General* (2001) 86 Cal.App.4th 1324 in adopting Cal. State Bar Formal Opn. 1998-152:

> The vicarious disqualification rule has been established as a prophylactic device to protect the sanctity of former client confidences where a law firm with a member attorney who has acquired knowledge of confidential information material to the current controversy would otherwise be permitted to represent the former client's adversary. ***"No amount of assurances or screening procedures, no 'cone of silence,' could ever convince the opposing party that the confidences would not be used to its disadvantage. . . .***

> ***No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent."*** (*Cho v. Superior Court* (1995) 39 Cal. App. 4th 113, 125 [45 Cal. Rptr. 2d 863], fn. omitted.) As the State Bar Committee observes: "the absence of an effective means of oversight combined with the law firm's interest as an advocate for the current client in the adverse representation are factors that tend to undermine a former client's trust, and in turn the public's trust, in a legal system that would permit such a situation to exist without the former client's consent." (Formal Opn. No. 1998-152, supra, at p. IIA-418.) (Emphasis added.)

Screening without client consent does not protect clients because it cannot be verified by a client. A client who has not expressed confidence in a law firm by consenting to the use of an ethical screen should not be forced to accept screening by law firm fiat. A client who has shared confidential information with a lawyer, justifiably would feel a sense of betrayal to learn after the representation has ended that information the client expected would be held in confidence is in the possession of the law firm that now represents the client's adversary in a situation where that information could benefit that adversary.

These considerations apply with equal force to a prospective client, who shares confidential information with a lawyer in order to obtain representation. The legislature recognized as much when it defined “client” for purposes of the lawyer-client privilege as including “... a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer ....” The Bar cannot fulfill the purpose of the duty of confidentiality, and it cannot expect clients to trust that they can communicate with lawyers in confidence, when a law firm can harbor that confidential information behind an unconsented and unverifiable screen while the firm represents the client’s adversary.

Rule 1.18: Duties to Prospective Client
(Commission's Proposed Rule - Clean Version)

(a) A person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity, is a prospective client.

(b) Even when no lawyer-client relationship ensues, a lawyer who has communicated with a prospective client shall not use or reveal confidential information learned as a result of the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received confidential information from the prospective client that is material to the matter, except as provided in paragraph (d). If a lawyer is prohibited from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received information that prohibits representation as defined in paragraph (c), representation of the affected client is permissible if:

(1) both the affected client and the prospective client have given informed written consent, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client; and

(i) the prohibited lawyer is timely and effectively screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this Rule.

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free, and sometimes required, to proceed no further. Hence, prospective clients are entitled to some but not all of the protection afforded clients. As used in this Rule, prospective client includes an authorized representative of the client.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who by any means communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship or to discuss the prospective client's matter in the lawyer's professional capacity, is not

a "prospective client" within the meaning of paragraph (a). Similarly, a person who discloses information to a lawyer after the lawyer has stated his or her unwillingness or inability to consult with the person in the lawyer's professional capacity would not have such a reasonable expectation. See *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456].

[2A] Whether a lawyer's representations or conduct evidence a willingness to participate in a consultation is examined from the viewpoint of the reasonable expectations of the prospective client. The factual circumstances relevant to the existence of a consultation include, for example: whether the parties meet by pre-arrangement or by chance; the prior relationship, if any, of the parties; whether the communications between the parties took place in a public or private place; the presence or absence of third parties; the duration of the communication; and, most important, the demeanor of the parties, particularly any conduct of the attorney encouraging or discouraging the communication and conduct of either party suggesting an understanding that the communication is or is not confidential.

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Sometimes the lawyer must investigate further after the initial consultation with the prospective client to determine whether the matter is one the lawyer is willing or able to undertake. Regardless of whether the lawyer has learned such information during the initial consultation or during the subsequent investigation, paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rules 1.7 and 1.9, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that information disclosed during the consultation will not prohibit the lawyer from representing a different client in the matter. See Rule 1.0.1(e) for the definition of informed consent. However, the lawyer must take reasonable measures to avoid exposure to more information that prohibits representation than is reasonably necessary to determine whether to represent the prospective client.

[6] Even in the absence of an agreement with the prospective client, under paragraph (c), the lawyer is not prohibited from either continuing or accepting the representation of a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that is material to the matter. For a discussion of the meaning of "materially adverse" as used in paragraph (c), see Rule 1.9, comment

[7]. For a discussion of the meaning of "substantially related" as used in paragraph (c), see Rule 1.9, comments [4] – [6].

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

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given to the prospective client as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Rule 1.18: Duties to Prospective Client

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Connecticut: Rule 1.18(a) defines a "prospective client" as a person who discusses "or communicates" with a lawyer concerning the possibility of forming a client-lawyer relationship with respect to a matter**.**

District of Columbia adopts the essence of Rule 1.18 except that it omits Model Rule 1.18(d)(2) and (2)(ii) while retaining the language in (2)(i).

Florida omits the words "significantly harmful" from paragraph (c), so a lawyer is personally disqualified if he or she received information "that could be used to the disadvantage" of the prospective client.

Maryland deletes the introductory language in ABA Model Rule 1.18(d)(2) and all of Rule 1.18(d)(2)(ii). Thus, Maryland Rule 1.18(d) is a single sentence permitting representation if either "both the affected client and the prospective client have given informed consent, confirmed in writing, or the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom."

Missouri: Rule 1.18(d)(2) deletes the ABA Model Rule requirements that the lawyer who received the disqualifying information be apportioned no part of the fee and that written notice be promptly given to the prospective client.

Nevada: Nevada adds the following new paragraphs to Rule 1.18:

> (e) A person who communicates information to a lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, or for purposes which do not include a good faith intention to retain the lawyer in the subject matter of the consultation, is not a "prospective client" within the meaning of this Rule.
>
> (f) A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. If the agreement expressly so provides the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.
>
> (g) Whenever a prospective client shall request information regarding a lawyer or law firm for the purpose of making a decision regarding employment of the lawyer or law firm:
>
> > (1) The lawyer or law firm shall promptly furnish (by mail if requested) the written information described in Rule 1.4(c).

(2) The lawyer or law firm may furnish such additional factual information regarding the lawyer or law firm deemed valuable to assist the client.

(3) If the information furnished to the client includes a fee contract, the top of each page of the contract shall be marked "SAMPLE" in red ink in a type size one size larger than the largest type used in the contract and the words "DO NOT SIGN" shall appear on the client signature line.

New York has no counterpart to ABA Model Rule 1.18, but the first sentence of EC 4-1 provides: "Both the fiduciary relationship existing between lawyer and client and the proper function of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer."

North Carolina omits the language in Rule 1.18(d)(2) requiring "reasonable measures to avoid exposure" to unnecessary confidential information. North Carolina does not require that a disqualified lawyer be denied part of the fee.

Oregon omits the language in Rule 1.18(d)(2) requiring "reasonable measures to avoid exposure" to unnecessary confidential information.

South Carolina: Rule 1.18(a) provides that a person with whom a lawyer discusses the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client "only when there is a reasonable expectation that the lawyer is likely to form the relationship."

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Proposed Rule 3.9 [N/A]
"Non-adjudicative Proceedings"

(Draft 2.1(11/13/09)**)**

Summary: This rule addresses a lawyer's role as a client's advocate before a legislative body or administrative agency in a nonadjudicative proceeding and it requires (1) disclosure that the appearance is in a representative capacity and (2) compliance with Rule 4.1 that imposes a duty of truthfulness.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☑ Some material additions to ABA Model Rule	☑ Some material additions to ABA Model Rule
☑ Some material deletions from ABA Model Rule	☑ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☐ Existing California Law

Rules

Statute

Case law

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): ☑ Yes ☐ No

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☑ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Rule 3.9 Non-adjudicative Proceedings*

November 2009

(Draft rule to be considered for public comment.)

INTRODUCTION:

Proposed Rule 3.9 regulates a lawyer's conduct as a client advocate in a nonadjudicative proceeding, such as a proceeding before a legislative body or an administrative agency. The rule requires a lawyer to disclose that his or her appearance is in a representative capacity. The rule also requires compliance with Rule 4.1 which imposes a duty of truthfulness. Model Rule 3.9 does not incorporate Rule 4.1 and instead imposes compliance with rules applicable to representations before an adjudicative tribunal. The Commission believes this departure from the Model Rule approach is necessary because the provisions referenced in the Model Rule include concepts that are meaningful in representations before adjudicative tribunals, such as the concept of "evidence," but these same concepts are confusing, or outright incorrect, for setting clear standards in a non-adjudicative proceeding. The Commission concluded that there are material differences between the functioning of law courts and of legislative and administrative bodies that reflect on a lawyer's role in representing clients in these different settings. First Amendment protections apply in dealing with legislative and administrative bodies, involved in such things as writing statutes and administrative regulations and granting and denying governmental licenses and permits, but do not similarly apply to court proceedings. Also, a lawyer's representative work with legislative and administrative bodies involves an element of contractual and other negotiations that are not present in courts, and that role is more akin to a lawyer serving as an advocate in non-governmental negotiations. For these reasons, proposed Rule 3.9 incorporates by reference the duty of honesty under Rule 4.1 rather than the duties that lawyers have in court under Rule 3.3.

* Proposed Rule 3.9, Draft 2.1(11/13/09).

INTRODUCTION (Continued):

Minority. A minority of the Commission believes that Rule 3.9 should not be adopted in any form because it would expose lawyers to unique risks of prosecution for statements made before a legislative body or administrative agency that is contrary to the broad immunity enjoyed by all others who appear before such bodies and agencies. A detailed statement of the minority's position, with citation to authority, is provided in these materials after the Comment Comparison Chart, below. See Minority Dissent.

ABA Model Rule Rule 3.9 Advocate in Nonadjudicative Proceedings	Commission's Proposed Rule* Rule 3.9 Non-adjudicative Proceedings	Explanation of Changes to the ABA Model Rule
A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.	A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of ~~Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5~~Rule 4.1.	This language tracks the general prohibition in Model Rule 3.9 but incorporates a reference to Rule 4.1 as a substitute for the Model Rule's reference to Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5. The provisions referenced in the Model Rule include standards related to practices and policies arising in representations before adjudicative proceedings that may be confusing or incorrect in a non-adjudicative proceeding. For example, Rule 3.4(a) and (b) refers to "evidence," a concept which has a specific meaning in judicial proceedings but does not have any similar discernable meaning in the great variety of non-adjudicative proceedings. The Commission determined that a reference is Rule 4.1 is preferable to the Model Rule approach because Rule 4.1 sets a basic and indisputable standard of truthfulness by prohibiting false statements of material facts. A lawyer should be required to conform to this duty of honesty in both judicial and non-adjudicative proceedings.

* Proposed Rule 3.9, Draft 2.1(11/13/09). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 3.9 Advocate in Nonadjudicative Proceedings Comment	Commission's Proposed Rule* Rule 3.9 Non-adjudicative Proceedings Comment	Explanation of Changes to the ABA Model Rule
[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.	[1] In representation before non-judicial bodies such as legislatures, ~~municipal~~city councils, boards of supervisors, commissions, and executive and administrative agencies acting in a ~~rule-making~~legislative, administrative or ~~policy-making~~ministerial capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. Although a lawyer does not have all of the obligations owed a court under . ~~See~~ Rules 3.3(a) through (c)~~, 3.4(a) through (c) and 3.5~~ when appearing before such a body, such as correcting misrepresentations made by third parties, the lawyer nevertheless is prohibited from making a false statement of fact or law to the body.	See above explanation of the rule. The comparable Model Rule Comment [1] language has been revised to track the Commission's proposed rule that substitutes a reference to Rule 4.1 for the Model Rule's reference to Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.
[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.	[2] Lawyers, as well as nonlawyers, have ~~no exclusive~~a right to appear before nonadjudicative bodies~~, as they do before a court~~. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. ~~However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.~~	Comment [2] has been slightly revised to be a more direct and succinct statement of the foundational point that while both lawyers and nonlawyers make appearances in nonadjudicative proceedings, lawyers are held to standards that may be different from the standards imposed on nonlawyers.

* Proposed Rule 3.9, Draft 2.1 (11/13/09). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 3.9 Advocate in Nonadjudicative Proceedings Comment	Commission's Proposed Rule* Rule 3.9 Non-adjudicative Proceedings Comment	Explanation of Changes to the ABA Model Rule
[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.	[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.	Comment [3] adopts Model Rule 3.9, comment [3].

Proposed Rule 3.9 Advocate in Nonadjudicative Proceedings – Minority Dissent

A minority of the Commission dissents to the adoption of Rule 3.9, because it would expose lawyers to unique risks of prosecution for statements made before a legislative body or administrative agency that is contrary to the broad immunity enjoyed by all others who appear before such bodies and agencies. The Civil Code section 47 immunities and the extension of that protection through the SLAPP statute were established to assure that no one communicates with government at his or her peril. The Civil Code privilege and the procedural protections of the SLAPP statute remove the chilling effect that allegations of impropriety may have on a person's right to petition government. "It is well settled the First Amendment creates a privilege from civil liability for actions constituting the exercise of the right to petition the government for redress of grievances." *(Wilcox v. Superior Court (Peters)* (1994) 27 Cal.App.4th 809, 825; see also *Eastern R. Conf. v. Noerr Motors* (1961) 365 U.S. 127, 142-144.) This zone of protection exists so that people can communicate freely with government without fear of consequence.

The minority maintain that Rule 3.9 would make lawyers the only category of person who could be penalized for what they say in the process. The Rule would not touch others who speak for clients in the same proceeding, as well as individuals who speak for themselves. The history of litigation that lead to enactment of the SLAPP statute demonstrates that the potential for retaliatory claims to chill an adverse party's advocacy before a government agency is real. The issue is not whether anyone, lawyer or non-lawyer, should make a false statement of material fact in a government proceeding. The issue is whether there should be a level playing field when it comes to immunities that facilitate open and uninhibited communication with government. In the view of the minority, Rule 3.9 would expose lawyers to claims that would chill communications with government. The result is unwarranted in light of the fact that the legal profession exists, at least in part, to be a client's voice with respect to government.

Rule 3.9 Advocate in Nonadjudicative Proceedings

(Commission's Proposed Rule – Clean Version)

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rule 4.1.

COMMENT

[1] In representation before non-judicial bodies such as legislatures, city councils, boards of supervisors, commissions, and executive and administrative agencies acting in a legislative, administrative or ministerial capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. Although a lawyer does not have all of the obligations owed a court under Rules 3.3(a) through (c) when appearing before such a body, such as correcting misrepresentations made by third parties, the lawyer nevertheless is prohibited from making a false statement of fact or law to the body.

[2] Lawyers, as well as nonlawyers, have a right to appear before nonadjudicative bodies. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

Rule 3.9: Non-adjudicative Proceedings

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California has no direct counterpart to ABA Model Rule 3.9.

Colorado adds the following in lieu of the second sentence of ABA Model Rule 3.9:

> Further, in such a representation, the lawyer:
>
> (a) shall conform to the provisions of Rules 3.3(a)(1), 3.3(a)(3), 3.3(b), 3.3(c), and 3.4(a) and (b);
>
> (b) shall not engage in conduct intended to disrupt such proceeding unless such conduct is protected by law; and
>
> (c) may engage in ex parte communications, except as prohibited by law.

District of Columbia: Rule 3.9 applies to a lawyer representing a client before a "legislative or administrative body" (rather than "legislative body or administrative agency").

Florida omits the reference to Rule 3.5.

Illinois omits Rule 3.9.

New Jersey: Rule 3.9 tracks ABA Model Rule 3.9 essentially verbatim, but New Jersey's cross-references to Rules 3.3, 3.4, and 3.5 differ slightly due to differences in New Jersey's versions of those rules.

New York: ABA Model Rule 3.9 has no counterpart in New York's Disciplinary Rules.

North Carolina omits Rule 3.9**.**

North Dakota replaces the reference to Rule 3.5 with the following new sentence: "A lawyer shall also conform to the provisions of Rule 3.5, except the lawyer may participate in ex parte communications with members of a legislative body regarding legislative matters but not adjudicative matters."

Virginia omits Rule 3.9.

Proposed Rule 4.1 [N/A]
"Truthfulness in Statements to Others"

(Draft # 2.1, 11/14/09)

Summary: Proposed Rule 4.1, which largely tracks Model Rule 4.1, addresses a lawyer's duty of honesty owed to third persons in the course of representing a client. New paragraph (b), which is based on Oregon Rule 8.4(b), provides an exception for lawful covert activity in investigating violations of civil or criminal law, or constitutional rights.

Comparison with ABA Counterpart

Rule	Comment
☑ ABA Model Rule substantially adopted	☑ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☑ Some material additions to ABA Model Rule	☑ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rule	
Statute	Bus. & Prof. Code § 6068(e).
Case law	

☑ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Oregon Rule 8.4(b).

☐ Other Primary Factor(s)

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): ☑ Yes ☐ No

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☑ Moderately Controversial – Explanation:

A minority of the Commission believes that the Rule addresses nuanced concepts that are better left to the civil and criminal law, and should not be the focus of a disciplinary rule. There also are concerns that the Rule will expand a lawyer's civil liability.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 4.1* Truthfulness in Statements to Others*

December 2009
(Draft rule to be considered for public comment.)

INTRODUCTION:

Proposed Rule 4.1 is based on and largely tracks Model Rule 4.1, with some additions to conform the Rule to current California law or to provide what the Commission has concluded is a necessary exception from the rule's application. Paragraph (a) states a lawyer's duty of honesty that is owed to third persons in the course of representing a client. Paragraph (b), which is based on Oregon Rule 8.4, provides an exception for lawful covert activity in investigating violations of civil or criminal law, or constitutional rights. The exception is necessary because the activity described in paragraph (b), which is often engaged in by both government and private lawyers seeking to enforce constitutional rights, as well as civil and criminal laws, would otherwise be a violation of paragraph (a)(1). The Comment to the Rule largely tracks the Model Rule comment, with some additions intended to clarify California law.

Minority. A minority of the Commission dissents. The minority believes that, while the sentiment behind this Rule is unexceptional, the rule does not adequately capture the details of a highly complex subject. The Commission debated at length fine distinctions, such as what constitutes "incorporation" of a client's untrue statement or what is required to establish the lawyer's "knowledge" of that statement's untruth, and adopted that language by the closest vote. The phrase "generally accepted conventions in negotiation" is so abstruse that it does not belong in a disciplinary rule. None of those distinctions are in the proposed Rule. Thus, the meanings of those terms are hidden in the proposed Rule and are not clear. The minority takes the position that such subtleties do not lend themselves to disciplinary rules. Gross misconduct in respect of this subject, as in all other cases, is already subject to discipline under Business & Professions Code §§ 6068(d) and 6106. The minority suggests that there should be no new disciplinary rule on this subject because the concept of a lawyer's duty not to adopt or vouch for a client's or witness's falsehood is as old as the legal profession itself. The minority believes that the concept has been solidly established during all this time without the need for a disciplinary rule in an area where the boundaries between

* Proposed Rule 4.1, Draft 2.1 (11/14/09).

permissible and impermissible conduct are often especially difficult to determine. To the extent that this Rule is intended to assure that lawyers be candid and complete in dealing with opposing parties, the law of civil liability for incomplete statements and disclosures, and even for inexcusable silence while a client makes untrue statements, is well established and needs no assistance from the Rules of Professional Conduct. See: *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 293, 294; *Roberts v. Ball, Hunt, Hart etc.* (1976) 57 Cal.App.3d 104; *Cicone v. URS Corporation* (1986) 183 Cal.App.3d 194, 208; and *Pumphrey v. K.W.Thompson Tool Co.* (9 Cir 1995) 62 F.3d 1128.

Variations in Other Jurisdictions. Nearly every jurisdiction has adopted some version of Model Rule 4.1 (North Carolina is an exception). Some states require disclosure even if the information is otherwise protected under Rule 1.6 (e.g., Maryland, Massachusetts, Mississippi, New Jersey, Ohio, Virginia). Some jurisdictions omit Model Rule 4.1(b) (e.g., Michigan). Wisconsin adds paragraph (c), which states "a lawyer may advise or supervise others with respect to lawful investigative activities."

ABA Model Rule Rule 4.1 Truthfulness in Statements to Others	Commission's Proposed Rule* Rule 4.1 Truthfulness in Statements to Others	Explanation of Changes to the ABA Model Rule
In the course of representing a client a lawyer shall not knowingly:	(a) In the course of representing a client a lawyer shall not knowingly:	With the addition of proposed paragraph (b), below, which has no counterpart in Model Rule 4.1, the Commission recommends lettering the introductory clause of the Rule as paragraph (a), and re-lettering Model Rule 4.1(a) and (b) as subparagraphs (a)(1) and (2), respectively.
(a) make a false statement of material fact or law to a third person; or	(~~a~~1) make a false statement of material fact or law to a third person; or	The Commission recommends adoption of this paragraph.
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.	(~~b~~2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 or Business and Professions Code section 6068(e)(1).	The Commission recommends adoption of this paragraph with the additional reference to section 6068(e).

* Proposed Rule 4.1, Draft 2.1 (11/14/09). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 4.1 Truthfulness in Statements to Others	Commission's Proposed Rule* Rule 4.1 Truthfulness in Statements to Others	Explanation of Changes to the ABA Model Rule
	(b) This Rule does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules. "Covert activity," as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.	Proposed paragraph (b) has no counterpart in Model Rule 4.1. It is derived from Oregon Rule 8.4(b), which by its terms excludes from the entire set of Rules the conduct described. The Commission recommends adding this paragraph to proposed Rule 4.1 because the activity described in paragraph (b), which is often engaged in by both government and private lawyers seeking to enforce Constitutional rights, as well as civil and criminal laws, would be a violation of paragraph (a)(1). The exception is narrow, applying only to proposed Rule 4.1. However, the Commission intends to revisit this issue when it reconsiders proposed Rule 8.4 ("Misconduct") to determine whether this exception should be placed in that rule for broader application to the entire body of the Rules.

ABA Model Rule Rule 4.1 Truthfulness in Statements to Others Comment	Commission's Proposed Rule* Rule 4.1 Truthfulness in Statements to Others Comment	Explanation of Changes to the ABA Model Rule
Misrepresentation [1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.	**Misrepresentation** [1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person that the lawyer knows is false. ~~Misrepresentations can also occur~~ However, in drafting an agreement on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement. A nondisclosure can be the equivalent of a misrepresentation where a lawyer makes a partially true but misleading ~~statements~~material statement or ~~omissions~~material omission that ~~are~~is the equivalent of an affirmative false ~~statements~~statement. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.	Comment [1] is based on Model Rule 4.1, cmt. [1]. The added third sentence of proposed Comment [1] clarifies that in drafting an agreement, a lawyer does not vouch for the truthfulness of representations made by the client. The third sentence of Model Rule 4.1, cmt. [1] (fourth sentence of the proposed Comment) is modified to reflect the view in California that partially true statements are viewed as nondisclosures or concealment, not misrepresentations. (*See Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 293, 294 ["[A]ctive concealment may exist where a party 'while under no duty to speak, nevertheless does so, but does not speak honestly or makes misleading statements or suppresses facts which materially qualify those stated. . . . One who is asked for or volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud . . . ."] [citation omitted].)

* Proposed Rule 4.1, Draft 2.1 (11/14/09). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 4.1 Truthfulness in Statements to Others Comment	Commission's Proposed Rule* Rule 4.1 Truthfulness in Statements to Others Comment	Explanation of Changes to the ABA Model Rule
Statements of Fact [2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.	**Statements of Fact** [2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. ~~Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.~~	Comment [2] is based on Model Rule 4.1, cmt. [2]. The Commission does not recommend adoption of the last sentence of this comment because it does not add materially to an understanding of the Rule and is essentially a practice pointer.
Crime or Fraud by Client [3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document,	**Crime or Fraud by Client** [3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (~~b~~a)(2) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. See Rule 1.4(a)(6) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation in	Comment [3] is based on Model Rule 4.1, cmt. [3], with several changes intended to provide better guidance to lawyers. A reference to Rule 1.4(a)(6) is added to remind lawyers of their obligation under that Rule to advise clients of the limitations on their conduct. The reference to Rule 1.16 on withdrawal is added to direct lawyers to the rule governing their obligations to the client when withdrawing from representation. Finally, as in subparagraph (a)(2), the Comment includes a reference to section 6068(e).

ABA Model Rule Rule 4.1 Truthfulness in Statements to Others Comment	Commission's Proposed Rule* Rule 4.1 Truthfulness in Statements to Others Comment	Explanation of Changes to the ABA Model Rule
affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.	compliance with Rule 1.16. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (~~b~~a)(2) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6 or Business and Professions Code section 6068(e).	
	[4] Paragraph (a)(2) requires that the lawyer have actual knowledge of the client's criminal or fraudulent act.	Comment [4] has no counterpart in the Model Rule. It clarifies the scienter requirement of subparagraph (a)(2) by explaining that the lawyer must have actual knowledge of the client's fraudulent or criminal act, and not merely knowledge of the material fact that is not disclosed to the third person. This is consistent with tort and criminal law that "liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted." (*Casey v. United States Bank Nat. Assn*. (2005)127 Cal.App.4th 1138, 1145.); *see also, People v. Rogers* (1985) 172 Cal.App.3d 502, 515 and 515, fn. 17 [culpability for aiding an offense requires knowledge of the perpetrator's unlawful purpose].)

Rule 4.1: Truthfulness in Statements to Others

(Commission's Proposed Rule – Clean Version)

(a) In the course of representing a client a lawyer shall not knowingly:

(1) make a false statement of material fact or law to a third person; or

(2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 or Business and Professions Code section 6068(e)(1).

(b) This Rule does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules. "Covert activity," as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.

COMMENT

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person that the lawyer knows is false. However, in drafting an agreement on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement. A nondisclosure can be the equivalent of a misrepresentation where a lawyer makes a partially true but misleading material statement or material omission that is the equivalent of an affirmative false statement. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (a)(2) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or

fraud takes the form of a lie or misrepresentation. See Rule 1.4(a)(6) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation in compliance with Rule 1.16. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (a)(2) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6 or Business and Professions Code section 6068(e).

[4] Paragraph (a)(2) requires that the lawyer know that the client's conduct is criminal or fraudulent.

Rule 4.1: Truthfulness in Statements to Others

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California: Business & Professions Code §6128(a) provides that an attorney commits a misdemeanor if the attorney is "guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party."

District of Columbia: Rule 4.1 is identical to ABA Model Rule 4.1.

Illinois: Rule 4.1(a) prohibits a lawyer from making a statement of material fact or law to a third person which the lawyer knows "or reasonably should know" is false.

Kansas: The disclosure obligation under Rule 4.1(b) applies unless disclosure is prohibited by "or made discretionary under" Rule 1.6.

Maryland adds a separate paragraph (b) providing: "The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."

Massachusetts: Comment 3 to Massachusetts Rule 4.1 defines "assisting" to refer "to that level of assistance which would render a third party liable for another's crime or fraud, i.e., assistance sufficient to render one liable as an aider or abettor under criminal law or as a joint tortfeasor under principles of tort and agency law.

Michigan: Rule 4.1 says only: "In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person."

Mississippi: Rule 4.1(b) omits the phrase "unless disclosure is prohibited by Rule 1.6."

New Jersey adds a separate paragraph (b) stating: "The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6."

New York: DR 4-101(C)(5) permits a lawyer to reveal confidences and secrets to the extent "implicit" in withdrawing an opinion that the lawyer discovers "was based on materially inaccurate information or is being used to further a crime or fraud." DR 7-102(A)(5) provides that a lawyer representing a client shall not knowingly "make a false statement of fact or law." DR 7-102(B) provides that a lawyer who receives information "clearly establishing" that a client has, in the course of the representation, "perpetrated a fraud upon a person... shall reveal the fraud to the affected person... except when the information is protected as a confidence or secret."

North Carolina omits Rule 4.1(b).

North Dakota: Rule 4.1 provides only that "[i]n the course of representing a client a lawyer shall not make a statement to a third person of fact or law that the lawyer knows to be false."

Ohio: Rule 4.1(b) prohibits lawyers from assisting "illegal" and fraudulent acts of clients, (rather than "criminal" and fraudulent acts), and omits the phrase "unless disclosure is prohibited by Rule 1.6."

Pennsylvania: Rule 4.1(b) replaces the ABA word "assisting" with the phrase "aiding and abetting."

Texas: Rule 4.01(b) provides that a lawyer shall not fail to disclose a material fact to a third person when disclosure is necessary to "avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client."

Virginia: In both subparagraphs of Rule 4.1, Virginia deletes the words "material" and "to a third person." At the end of Rule 4.1(b), Virginia deletes the phrase unless disclosure is prohibited by Rule 1.6."

Wisconsin: Rule 4.1(c) states that notwithstanding Wisconsin Rules 5.3(c)(1) and 8.4, which address supervision of nonlegal personnel and the duty not to violate a rule through another respectively, "a lawyer may advise or supervise others with respect to lawful investigative activities."

Proposed Rule 4.4 [n/a]
"Respect for Rights of Third Persons"

(Draft #2, 11/22/09)

Summary: The Commission recommends against adoption of paragraph (a) of ABA Rule 4.4 because of concerns regarding the vagueness and overbreadth of the terms "embarrass, delay, or burden a third party," and the resulting chilling effect this part of the Rule would have on legitimate litigation activities. The Commission agrees with the principles that underlie paragraph (b), but recommends that the Rule be limited to documents that obviously appear to be privileged or confidential consistent with the Supreme Court's decision in *Rico v. Mitsubishi Motors Corp. (2007) 42 Cal.4th 807*.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☑ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☑ Some material additions to ABA Model Rule	☑ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☑ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rule	
Statute	Bus. & Prof. Code § 6128(b)
Case law	*Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): ☑ Yes ☐ No

☐ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☑ Moderately Controversial – Explanation:

Rather than following the Model Rule standard, the proposed rule codifies a Supreme Court opinion (*Rico*) concerning the issue of receipt of inadvertent documents. In addition, some lawyers believe that this is a complex area of law that is better left to case law development and is not amenable to a generalized rule.

☐ Not Controversial – Explanation:

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 4.4* Respect for Rights of Third Persons

December 2009
(Draft rule to be considered for public comment.)

INTRODUCTION:

Mode Rule 4.4(a) seeks to regulate lawyer conduct that embarrasses, delays, or burdens a third person. It also prohibits a lawyer from obtaining evidence through means that violate the rights of a third person. The Commission recommends against adoption of paragraph (a) of ABA Rule 4.4 because of concerns regarding the vagueness and overbreadth of the terms "embarrass, delay, or burden a third party," and the resulting chilling effect this part of the Rule would have on legitimate litigation activities.

Model Rule 4.4(b) provides that a lawyer who receives a document relating to the lawyer's representation of a client and "knows or reasonably should know" that the document was inadvertently sent shall promptly notify the sender. The Commission agrees with the principles that underlie paragraph (b), but recommends that the Rule be limited to documents that obviously appear to be privileged or confidential and where it is reasonably apparent the document was inadvertently sent, consistent with the Supreme Court's decision in *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807.

Minority. The greatest danger to the practice of law in Model Rule 4.4 - paragraph (a) which forbids conduct which would "embarrass, delay or burden a third person," - has been removed. That leaves only the paragraph which deals with the receipt of inadvertently produced documents. Inadvertently produced documents received little attention until a recent spate of court decisions which addressed that matter. Although the leading California case, *Rico*, clearly involved impermissible conduct (the lawyer snatched confidential documents from his opponent's seat during a deposition recess), the subject of this proposed Rule is basically a new problem of document management in litigation, and the majority of cases have arisen from mistakes that occurred in the course of production of tens or hundreds of thousands of documents. The courts are dealing adequately with this problem, which is almost universally a by-product of the explosion of electronically stored communications. There is simply no need for a disciplinary rule for this subject.

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* Proposed Rule 4.4, Draft 2 (11/21/09).

ABA Model Rule Rule 4.4 Respect for Rights of Third Persons	Commission's Proposed Rule* Rule 4.4 Respect for Rights of Third Persons	Explanation of Changes to the ABA Model Rule
(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.	~~(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.~~	The Commission recommends against adopting paragraph (a) because of a concern over the chilling effect it would have on legitimate advocacy since many proper litigation tactics may result in embarrassing opposing parties or delaying litigation. Where the lawyer engages in extreme delay of the client's case for personal gain, see Bus. & Prof. Code § 6128(b).
(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.	~~(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.~~ A lawyer who receives a writing that obviously appears to be privileged or confidential and where it is reasonably apparent that the writing was inadvertently sent shall promptly notify the sender.	The ABA's notification obligations under this paragraph are too broad in that they apply to all types of documents, not merely those that are privileged or confidential. The Rule should be limited to documents that obviously appear to be privileged or confidential, consistent with the Supreme Court's decision in *Rico v. Mitsubishi Motors Corp*. (2007) 42 Cal.4th 807, 818 [addressing duties where document obviously appears to be confidential and privileged and was produced inadvertently]. The Commission's version also uses the term "writing," rather than "document," because "writing" is used throughout the Rules and is a defined term under Rule 1.0.1

* Proposed Rule 4.4, Draft 2 (11/21/09). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 4.4 Respect for Rights of Third Persons Comment	Commission's Proposed Rule* Rule 4.4 Respect for Rights of Third Persons Comment	Explanation of Changes to the ABA Model Rule
[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.	[1] ~~Responsibility to a client requires a lawyer to subordinate the interests~~The purpose of ~~others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It~~this Rule is ~~impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and~~to prevent unwarranted intrusions into privileged or confidential relationships~~, such as the client-lawyer relationship~~.	Most of this Comment is deleted to conform to the deletion of paragraph (a).
[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For	[2]~~ Paragraph (b)~~ This Rule recognizes that lawyers sometimes receive documents that are obviously privileged or confidential and were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or where it is reasonably ~~should know~~apparent that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. See Rico v. Mitsubishi Motors Corp. (2007) 42 Cal.4th 807, 818. Similarly, this Rule does not address the legal duties of a lawyer who receives	This Comment conforms to the limitation of the Rule to writings which obviously appear to be privileged or confidential. The last sentence is substantially revised to reflect the change from "documents" to "writings" in the Rule.

ABA Model Rule Rule 4.4 Respect for Rights of Third Persons Comment	Commission's Proposed Rule* Rule 4.4 Respect for Rights of Third Persons Comment	Explanation of Changes to the ABA Model Rule
purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.	a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. ~~For purposes of~~As used in this Rule, ~~"document" includes e-mail~~"privileged or ~~other electronic modes of transmission~~confidential" refers to a writing that is subject to ~~being read~~a statutory or ~~put into readable form~~common law privilege or the work product rule.	
[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.	[[3] ~~Some lawyers~~ A lawyer may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.	

Rule 4.4: Respect for Rights of Third Persons

(Commission's Proposed Rule – Clean Version)

A lawyer who receives a writing that obviously appears to be privileged or confidential and where it is reasonably apparent that the writing was inadvertently sent shall promptly notify the sender.

COMMENT

[1] The purpose of this Rule is to prevent unwarranted intrusions into privileged or confidential relationships.

[2] This Rule recognizes that lawyers sometimes receive documents that are obviously privileged or confidential and were mistakenly sent or produced by opposing parties or their lawyers. Where it is reasonably apparent to a lawyer that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. See *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 818. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. As used in this Rule, "privileged or confidential" refers to a writing that is subject to a statutory or common law privilege or the work product rule.

[3] A lawyer may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Rule 4.4: Respect for Rights of 3rd Persons

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Arizona has adopted ABA Model Rule 4.4(b) but, in addition to requiring the lawyer who receives an inadvertently transmitted document to notify the sender Arizona Rule 4.4(b) requires the lawyer to "preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures."

California: Rule 3-200(A) provides that a member "shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is: (A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person." Rule 5-100 provides:

> (A) A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.
>
> (B) As used in paragraph (A) of this rule, the term "administrative charges" means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.
>
> (C) As used in paragraph (A) of this rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

California Business & Professions Code §§6068(c), 6068(f), and 6068(g) provide that it is the "duty" of an attorney to do all of the following:

> (c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense....
>
> (f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.
>
> (g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

Section 6128(b) provides that an attorney is guilty of a misdemeanor who "[w]illfully delays his client's suit with a view to his own gain."

Colorado adds the following additional paragraph to Rule 4.4:

> (c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender's instructions as to its disposition.

Colorado has also adopted the following Rule 4.5:

> (a) A lawyer shall not threaten criminal, administrative or disciplinary charges to obtain an advantage in a civil matter nor shall a lawyer present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter.
>
> (b) It shall not be a violation of Rule 4.5 for a lawyer to notify another person in a civil matter that the lawyer reasonably believes that the other's conduct may violate criminal, administrative or disciplinary rules or statutes.

(A version of Rule 4.5(a) is in the ABA Code of Professional Responsibility as DR 7-105 but is limited to criminal conduct.)

District of Columbia: Rule 4.4(b) provides that a lawyer who receives a "writing" relating to the representation of a client and "knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing."

Florida: Rule 4.4(a) provides that a lawyer shall not "knowingly" use methods of obtaining evidence that violate the legal rights of a third person. Florida has adopted ABA Model Rule 4.4(b) verbatim.

Idaho: Rule 4.4 provides that a lawyer, in representing a client, shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, "including conduct intended to appeal to or engender bias against a person on account of that person's gender, race, religion, national origin, or sexual preference, whether that bias is directed to other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers, or any other participants." In subparagraphs (a)(3) and (a)(4), Idaho retains the substance of DR 7-105 of the ABA Model Code of Professional Responsibility. Idaho Rule 4.4(b) deletes the phrase "relating to the representation of the lawyer's client."

Kansas and Michigan omit Rule 4.4(b).

Louisiana adopts ABA Model Rule 4.4(a) verbatim but modifies Rule 4.4(b) to provide as follows:

> (b) A lawyer who receives a writing that, on its face, appears to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the writing was not intended for the receiving lawyer, shall refrain from examining the writing, promptly notify the sending lawyer, and return the writing.

Maryland adds the following paragraph (b) to Rule 4.1(a):

> (b) In communicating with third persons, a lawyer representing a client in a matter shall not seek information relating to the matter that the lawyer knows or reasonably should know is protected from disclosure by statute or by an established evidentiary privilege, unless the protection has been waived. The lawyer who receives information

that is protected from disclosure shall (1) terminate the communication immediately and (2) give notice of the disclosure to any tribunal in which the matter is pending and to the person entitled to enforce the protection against disclosure.

New Jersey adopts ABA Model Rule 4.4(a) verbatim but modifies Rule 4.4(b) to provide as follows:

> (b) A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender.

New York has no direct counterpart to ABA Model Rule 4.4(a) or (b), but New York prohibits various forms of misconduct toward witnesses, jurors, and others in DR 7-102(A)(1), DR 7-106(C)(2), and DR 7-108(D) and (E).

North Carolina: Rule 4.4(b) replaces the ABA phrase "document relating to the representation of the lawyer's client" with the single word "writing."

North Dakota adds a new Rule 4.5(a) that is identical to ABA Model Rule 4.4(b), and adds a new Rule 4.5(b) providing that a lawyer who receives a document under the circumstances specified in Rule 4.5(a) "does not violate Rule 1.2 or Rule 1.4 by not communicating to or consulting with the client regarding the receipt or the return of the document."

Ohio: Rule 4.4(a) adds the word "harass" to the list of forbidden purposes

South Carolina adds a new Rule 4.5, which says a lawyer "shall not present, participate in presenting, or threaten to present criminal or professional disciplinary charges solely to obtain an advantage in a civil matter."

Texas: Rule 4.04(b) forbids lawyers to present or threaten disciplinary or criminal charges "solely to gain an advantage in a civil matter" or civil, criminal, or disciplinary charges "solely" to prevent participation by a complainant or witness in a disciplinary matter.

Virginia: Rule 4.4(a) deletes the word "substantial" before the word "purpose." Virginia has not adopted Rule 4.4(b).

Wyoming adds Rule 4.4(c), which provides that a lawyer "shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

Proposed Rule 6.1 [n/a]
"Voluntary Pro Bono Publico Service"

(Draft #2, 11/28/09)

Summary: Proposed Rule 6.1, which encourages lawyers to provide *pro bono publico* services to persons of limited means, largely tracks Model Rule 6.1, except that it incorporates some language from the Board of Governors Pro Bono Resolution (2002) and includes specific references to California statutory law. See Introduction and Explanation of Changes.

Comparison with ABA Counterpart

Rule	Comment
☑ ABA Model Rule substantially adopted	☑ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rule	
Statute	Bus. & Prof. Code § 6068(h).
Case law	

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☑ Other Primary Factor(s)

State Bar of California Board of Governors Pro Bono Resolution (2002).

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): ☑ Yes ☐ No

☐ No Known Stakeholders

☑ The Following Stakeholders Are Known:

Commission on Access to Justice.

☐ Very Controversial – Explanation:

☑ Moderately Controversial – Explanation:

A number of Commission members have expressed their belief that the delivery of pro bono services is not an appropriate subject for a disciplinary rule. See Introduction.

☐ Not Controversial – Explanation:

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 6.1* Voluntary Pro Bono Publico Service

November 2009
(Draft rule to be considered for public comment.)

INTRODUCTION:

Proposed Rule 6.1, which encourages lawyers to provide or enable the direct delivery of pro bono publico services to persons of limited means, tracks Model Rule 6.1, except that it incorporates some language from the Board of Governors Pro Bono Resolution (2002) ("Board Resolution") and includes specific references to California statutory law. Paragraph (a) primarily concerns the direct or indirect delivery of uncompensated legal services. Paragraph (b) addresses a lawyers delivery of legal services at a reduced fee to social service, medical research, etc., organizations, or to persons of limited means, or a lawyer's participation in activities to improve the law or access to justice. The Comment largely tracks the Model Rule.

Minority. A minority of the Commission agrees that lawyers should be encouraged to provide pro bono legal services, and as the legislature stated in Business & Professions Code section 6073, this is "the tradition" of the Bar. The minority, however, takes the position that the Rule's statement of this aspiration is not intended to be the basis for discipline (this is said in Comment [12]), and thus placing the aspiration in the disciplinary rules therefore has no legal purpose. The minority further states that this Rule adds nothing meaningful to what the legislature has fully and carefully stated in section 6073, but placing the statement in the Rules muddles the disciplinary purpose of the Rules. Finally, the minority argues that while all lawyers should aspire to meet the pro bono goal, not all lawyers can do so. The current economic crisis highlights only the most obvious of the reasons for this as thousands of lawyers are unemployed and countless others struggle to pay their rent and keep the lights on. No lawyer should be subject to arm twisting or ridicule for an inability to meet the goal.

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* Proposed Rule 6.1, Draft #2 (11/28/09).

Variations in other jurisdictions. Nearly every jurisdiction has adopted some version of Model Rule 6.1. Illinois, North Carolina, Ohio, Oregon and Texas are notable exceptions, though all but North Carolina either mandate or encourage that lawyers report their pro bono activities to the bar. Of the remaining jurisdictions, there is a wide range of variation in their adoption of Model Rule 6.1, with some retaining the 1983 version, some adopting the 2002 version, and others implementing unique provisions, ranging from D.C.'s relatively short rule to Florida's rule, which establishes an elaborate pro bono framework.

ABA Model Rule **Rule 6.1 Voluntary Pro Bono Publico Service**	**Commission's Proposed Rule*** **Rule 6.1 Voluntary Pro Bono Publico Service**	**Explanation of Changes to the ABA Model Rule**
Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:	Every lawyer ~~has~~, as a matter of professional responsibility ~~to~~, should provide legal services to those unable to pay. A lawyer should ~~aspire to render~~provide or enable the direct delivery of at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:	The introductory clause to proposed Rule 6.1 is based on its Model Rule counterpart. The first sentence has been revised to emphasize that the proposed Rule is hortatory, and not mandatory. The second sentence has been revised to track the language of the Board of Governors Pro Bono Resolution (2002) ("Board Resolution").
(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:	(a) provide a substantial majority of the (50) hours of legal services without ~~fee or~~ expectation of ~~fee~~compensation other than reimbursement of expenses to:	Paragraph (a) is based Model Rule 6.1(a). It has been revised to track language in the Board Resolution.
(1) persons of limited means or	(1) persons of limited means or	Subparagraph (a)(1) is identical to Model Rule 6.1(a)(1). Although paragraph (1) of the Board Resolution refers to "indigent persons," it appears that "persons of limited means" and "indigent persons" mean the same thing, see Comment [3], so the Model Rule language is used.
(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and	(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and	Subparagraph (a)(2) is identical to Model Rule 6.1(a)(2). This subparagraph incorporates the concept of Board Resolution, paragraph (1), which urges lawyers "[to provide or enable the direct delivery of legal services] to not for profit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged."

* Proposed Rule 6.1, Draft 2 (11/28/09). Redline/strikeout showing changes to the ABA Model Rule.

ABA Model Rule Rule 6.1 Voluntary Pro Bono Publico Service	Commission's Proposed Rule* Rule 6.1 Voluntary Pro Bono Publico Service	Explanation of Changes to the ABA Model Rule
(b) provide any additional services through: (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;	(b) provide any additional services through: (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;	Subparagraph (b)(1) is identical to Model Rule 6.1(b)(1).
(2) delivery of legal services at a substantially reduced fee to persons of limited means; or	(2) delivery of legal services at a substantially reduced fee to persons of limited means; or	Subparagraph (b)(2) is identical to Model Rule 6.1(b)(2).
(3) participation in activities for improving the law, the legal system or the legal profession.	(3) participation in activities for improving the law, the legal system or the legal profession, or increasing access to justice.	Subparagraph (b)(3) is identical to Model Rule 6.1(b)(3). The additional language at the end of the subparagraph is taken from the Board Resolution, paragraph (1).

ABA Model Rule **Rule 6.1 Voluntary Pro Bono Publico Service**	**Commission's Proposed Rule*** **Rule 6.1 Voluntary Pro Bono Publico Service**	**Explanation of Changes to the ABA Model Rule**
In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.	In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.	The last clause of the Rule is identical to its Model Rule counterpart. A similar concept is found in paragraph (4) of the Board Resolution.

ABA Model Rule Rule 6.1 Voluntary Pro Bono Publico Service Comment	Commission's Proposed Rule* Rule 6.1 Voluntary Pro Bono Publico Service Comment	Explanation of Changes to the ABA Model Rule
[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.	[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. ~~The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in~~ In some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.	Comment [1] is identical to Model Rule 6.1, cmt. [1], except that the second and third sentences have been deleted as unnecessary exposition that does not add to an understanding of the Rule.
[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the	[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the	Comment [2] is identical to Model Rule 6.1, cmt. [2].

* Proposed Rule 4.1, Draft 1 (XX/XX/09). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 6.1 Voluntary Pro Bono Publico Service Comment	Commission's Proposed Rule* Rule 6.1 Voluntary Pro Bono Publico Service Comment	Explanation of Changes to the ABA Model Rule
disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.	disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.	
[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.	[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in ~~programs funded by the Legal Services Corporation~~a qualified legal services program under Business and Professions Code section 6213 and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals under paragraph (a)(1) or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means under paragraph (a)(2). The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.	Comment [3] is based on Model Rule 6.1, cmt. [3]. Rather than use the generalized Model Rule definition of individuals the Rule is intended to benefit, a more precise definition based on California law has been substituted. Language has been added to the second sentence of the Comment to clarify the scope of conduct addressed in each of the subparagraphs of paragraph (a).

ABA Model Rule Rule 6.1 Voluntary Pro Bono Publico Service Comment	Commission's Proposed Rule* Rule 6.1 Voluntary Pro Bono Publico Service Comment	Explanation of Changes to the ABA Model Rule
[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.	[4] Because service must be provided without ~~fee or expectation of fee~~compensation, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. ~~Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.~~	Comment [4] is based on Model Rule 6.1, cmt. [4]. The word "compensation" has been substituted for "fee or expectation of fee" to conform to the proposed language of the introductory clause. See Explanation of Changes for the introductory clause. The last sentence has been deleted because the adoption of Model Rule 5.4(a)(4), which permits sharing of "court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer," has not been recommended. Thus, such fee sharing would violate proposed Rule 5.4.
[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).	[5] While it is ~~possible for~~preferable that a lawyer ~~to~~ fulfill ~~the~~his or her annual responsibility to perform pro bono services ~~exclusively~~ through activities described in paragraphs (a)(1) and (2), ~~to~~ the ~~extent that any hours of service remained unfulfilled, the remaining~~lawyer's commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).	Comment [5] is based on Model Rule 6.1, cmt. [5], which explains that the activities describe in paragraph (b) are an alternative to providing direct legal services. The word "preferable" has been substituted for "possible" to emphasize the preference, in conformance with the Board Resolution, that a lawyer devote most of his or her 50 hours to the direct delivery of legal services.

ABA Model Rule Rule 6.1 Voluntary Pro Bono Publico Service Comment	Commission's Proposed Rule* Rule 6.1 Voluntary Pro Bono Publico Service Comment	Explanation of Changes to the ABA Model Rule
[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.	[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims, claims under the California Fair Employment and Housing Act, and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.	Comment [6] is based on Model Rule 6.1, cmt. [6]. A reference to claims brought under the California Fair Employment and Housing Act has been added to avoid suggesting that the services described in the Comment are limited to those arising under the U.S. Constitution or federal statutes.
[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.	[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. ~~Participation in judicare programs and acceptance~~ Acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.	Comment [7] is based on Model Rule 6.1, cmt. [7]. The reference to "judicare programs" has been deleted because there are few such programs in California.
[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal	[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession, or that are designed to increase access to justice. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging	Comment [8] is based on Model Rule 6.1, cmt. [8]. The references to programs designed to increase access to justice has been added because of the California's well-documented needs in this area. See also Explanation of Changes for paragraph (b)(3).

ABA Model Rule Rule 6.1 Voluntary Pro Bono Publico Service Comment	Commission's Proposed Rule* Rule 6.1 Voluntary Pro Bono Publico Service Comment	Explanation of Changes to the ABA Model Rule
system or the profession are a few examples of the many activities that fall within this paragraph.	in legislative lobbying to improve the law, the legal system or the profession, or to increase access to justice are a few examples of the many activities that fall within this paragraph.	
[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.	[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.	Comment [9] is identical to Model Rule 6.1, cmt. [9].
[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.	[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.	Comment [10] is identical to Model Rule 6.1, cmt. [10].

ABA Model Rule Rule 6.1 Voluntary Pro Bono Publico Service Comment	Commission's Proposed Rule* Rule 6.1 Voluntary Pro Bono Publico Service Comment	Explanation of Changes to the ABA Model Rule
[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.	[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.	Comment [11] is identical to Model Rule 6.1, cmt. [11].
[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.	[12] The responsibility set forth in this Rule is not ~~intended to be enforced~~enforceable through disciplinary process.	Comment [12] is based on Model Rule 6.1, cmt. [12]. The word "enforceable" has been substituted for "intended to be enforced" to emphasize that a lawyer's failure to achieve the number of hours of service suggested by the Rule is not a basis for discipline.

Rule 6.1: Voluntary Pro Bono Publico Service

(Commission's Proposed Rule – Clean Version)

Every lawyer, as a matter of professional responsibility, should provide legal services to those unable to pay. A lawyer should provide or enable the direct delivery of at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without expectation of compensation other than reimbursement of expenses to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession, or increasing access to justice.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

COMMENT

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. In some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons

of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in a qualified legal services program under Business and Professions Code section 6213 and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals under paragraph (a)(1) or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means under paragraph (a)(2). The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without compensation, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section.

[5] While it is preferable that a lawyer fulfill his or her annual responsibility to perform pro bono services through activities described in paragraphs (a)(1) and (2), the lawyer's commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims, claims under the California Fair Employment and Housing Act, and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession, or that are designed to increase access to justice. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession, or to increase access to justice are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not enforceable through disciplinary process.

Rule 6.1: Public Service

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Arizona: Rule 6.1 contains the following key provisions:

(a) A lawyer should voluntarily render public interest legal service. A lawyer may discharge this responsibility by rendering a minimum of fifty hours of service per calendar year....

(c) A law firm or other group of lawyers may satisfy their responsibility under this Rule, if they desire, collectively. For example, the designation of one or more lawyers to work on pro bono public matters may be attributed to other lawyers within the firm or group who support the representation. . . .

(d) The efforts of individual lawyers are not enough to meet the needs of the poor. The profession and government have instituted programs to provide direct delivery of legal services to the poor. The direct support of such programs is an alternative expression of support to provide law in the public interest, and a lawyer is encouraged to provide financial support for organizations that provide legal services to persons of limited means or to the Arizona Bar Foundation for the direct delivery of legal services to the poor.

California has no rule of professional conduct comparable to ABA Model Rule 6.1, but California Business and Professions Code §6068(h) makes it the duty of a lawyer "[n]ever to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." In addition, the California State Bar's Board of Governors has adopted a Pro Bono Resolution that echoes the substance of ABA Model Rule 6.1. It provides as follows:

> (3) Urges all law schools to promote and encourage the participation of law students in pro bono activities. including requiring any law firm wishing to recruit on campus to provide a written statement of its policy, if any, concerning the involvement of its attorneys in public service and pro bono activities. …

Colorado: Colorado adds the following paragraph at the end of the rule:

Where constitutional, statutory or regulatory restrictions prohibit government and public sector lawyers or judges from performing the pro bono services outlined in paragraphs (a)(1) and (2), those individuals should fulfill their pro bono responsibility by performing services or participating in activities outlined in paragraph (b).

In 1999, the Colorado Supreme Court rejected a recommendation by the state's Judicial Advisory Council to institute mandatory pro bono reporting. The court said that

mandatory reporting was a step toward mandatory pro bono, and “[s]ince we are unwilling to arrive at that destination, we are also unwilling to take the first step." However, the Colorado Supreme Court has adopted a detailed "recommended Model Pro Bono Policy" for law firms, which is reprinted in the Colorado Rules of Professional Conduct immediately after Rule 6.1. Among other things, the Model Pro Bono Policy urges firms to include "a statement that the .firm will value at least 50 hours of such pro bono service per year by each Colorado licensed attorney in the firm, for all purposes of attorney evaluation, advancement, and compensation in the firm as the firm values compensated client representation." In addition, the Colorado Supreme Court will annually recognize Colorado law firms that "voluntarily advise the Court ... that their attorneys, on average, during the previous calendar year, performed 50 hours of pro bono legal service, primarily for persons of limited means or organizations serving persons of limited means. ..."

Connecticut, Georgia, Indiana, Kansas, Michigan, Missouri, Pennsylvania, and South Carolina have retained the 1983 version of ABA Model Rule 6.1, which provides as follows:

> A lawyer should render public interest service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

District of Columbia: D.C. Rule 6.1 provides as follows:

> A lawyer should participate in serving those persons, or groups of persons, who are unable to pay all or a portion of reasonable attorneys' fees or who are otherwise unable to obtain counsel. A lawyer may discharge this responsibility by providing professional services at no fee, or at a substantially reduced fee, to persons and groups who are unable to afford or obtain counsel) or by active participation in the work of organizations that provide legal services to them. When personal representation is not feasible, a lawyer may discharge this responsibility by providing financial support for organizations that provide legal representation to those unable to obtain counsel.

Florida: In 1993, in a divided opinion, the Florida Supreme Court adopted an elaborate pro bono rule requiring lawyers to report their pro bono hours. See 630 So. 2d 501 (Fla. 1993). The Florida Bar subsequently sought to eliminate mandatory reporting, but the Florida Supreme Court refused to do so at 696 So. 2d 734 (1997). In Schwarz v. Kogan, 132 F.3d 1387 (11th Cir. 1998), the Court upheld Florida's mandatory reporting provisions against a federal constitutional challenge. The full rule provides as follows:

> *4-6.1 Pro Bono Public Service*
>
> (a) *Professional Responsibility*. Each member of The Florida Bar in good standing, as part of that member's professional responsibility, should (1) render pro bono legal services to the poor or (2) participate) to the extent possible, in other pro bono service activities that directly relate to the legal needs of the poor. This professional responsibility does not apply to members of the judiciary or their staffs or to government lawyers who are prohibited from performing legal services by constitutional, statutory, rule, or regulatory prohibitions. Neither does this professional responsibility apply to those members of The Bar who are retired, inactive, or suspended. or who have been placed on the inactive list for incapacity not related to discipline.

(b) *Discharge of the Professional Responsibility to Provide Pro Bono Legal Service to the Poor*. The professional responsibility to provide pro bono legal services as established under this rule is aspirational rather than mandatory in nature. The failure to fulfill ones professional responsibility under this rule will not subject a lawyer to discipline. The professional responsibility to provide pro bono legal service to the poor may be discharged by:

(1) annually providing at least 20 hours of pro bono legal service to the poor; or

(2) making an annual contribution of at least $350 to a legal aid organization.

(c) *Collective Discharge of the Professional Responsibility to Provide Pro Bono Legal Service to the Poor*. Each member of the bar should strive to individually satisfy the member's professional responsibility to provide pro bono legal service to the poor. Collective satisfaction of this professional responsibility is permitted by law firms only under a collective satisfaction plan that has been filed previously with the circuit pro bono committee and only when providing pro bono legal service to the poor:

(1) in a major case or matter involving a substantial expenditure of time and resources; or

(2) through a full-time community or public service staff; or

(3) in any other manner that has been approved by the circuit pro bono committee in the circuit in which the firm practices.

(d) *Reporting Requirement*. Each member of the bar shall annually report whether the member has satisfied the member's professional responsibility to provide pro bono legal services to the poor. Each member shall report this information through a simplified reporting form that is made a part of the member's annual dues statement.... The failure to report this information shall constitute a disciplinary offense under these rules....

Florida also adds a lengthy Rule 6.5 (Voluntary Pro Bono Plan). Rule 6.5(c)(2) instructs every judicial circuit to H(a) prepare in written form a circuit pro bono plan after evaluating the needs of the circuit and making a determination of present available pro bono services; (b) implement the plan and monitor its results; [and] (c) submit an annual report to The Florida Bar standing committee…. Rule 6.5(d) provides as follows:

The following are suggested pro bono service opportunities that should be included in each circuit plan:

(1) representation of clients through case referral;

(2) interviewing of prospective clients;

(3) participation in pro se clinics and other clinics in which lawyers provide advice and counsel;

(4) acting as co-counsel on cases or matters with legal assistance providers and other pro bono lawyers; (5) providing consultation services to legal assistance providers for case reviews and evaluations; (6) participation in policy advocacy;

(7) providing training to the staff of legal assistance providers and other volunteer pro bono attorneys;

(8) making presentations to groups of poor persons regarding their rights and obligations under the law;

(9) providing legal research;

(10) providing guardian ad litem services;

(11) providing assistance in the formation and operation of legal entities for groups of poor persons; and

(12) serving as a mediator or arbitrator at no fee to the client-eligible party.

Georgia: Rule 6.1 tracks the pre-2002 version of ABA Model Rule 6.1, but Georgia adds the following: "No reporting rules or requirements may be imposed without specific permission of the Supreme Court granted through amendments to these Rules. There is no disciplinary penalty for a violation of this Rule."

Illinois omits Rule 6.1 and explains why in its Preamble:

> It is the responsibility of those licensed as officers of the court to use their training, experience and skills to provide services in the public interest for which compensation may not be available. It is the responsibility of those who manage law firms to create an environment that is hospitable to the rendering of a reasonable amount of uncompensated service by lawyers practicing in that firm.
>
> Service in the public interest may take many forms. These include but are not limited to *pro bono* representation of persons unable to pay for legal services and assistance in the organized bar's efforts at law reform. An individual lawyer's efforts in these areas is evidence of the lawyer's good character and fitness to practice law, and the efforts of the bar as a whole are essential to the bar's maintenance of professionalism.
>
> [T]his concept is not appropriate for a disciplinary code, because an appropriate disciplinary standard regarding pro bono and public service is difficult, if not impossible, to articulate. That ABA Model Rule 6.1 itself uses the word "should" instead of "shall" in describing this duty reflects the uncertainty of the ABA on this issue .

However, in 2006 the Illinois Supreme Court amended Supreme Court Rule 756 to require lawyers to report their pro bono work. The amended rule provides, in part, as follows:

> (f) *Disclosure of Voluntary Pro Bono Service*. As part of registering under this rule, each lawyer shall report the approximate amount of his or her pro bono legal service and the amount of qualified monetary contributions made during the preceding 12 months....

Rule 756(f) then defines the term "Pro bono legal service," stating explicitly that legal services for which payment "was expected, but is uncollectible, do not qualify as *pro bono* legal service." The rule also sets out the precise contents of the form for reporting such service on the annual registration statement. Information provided pursuant to Rule 756(f) is considered "confidential," but the information may be reported "in the aggregate." Rule 756(g) instructs the Bar's Administrator to "remove from the master roll" any attorney who has failed to provide the information on voluntary pro bono service required by Rule .756(f). A person whose name is not on the master roll and who practices law in Illinois "is engaged in the unauthorized practice of law and may also be held in contempt of the court."

Kentucky: Rule 6.1, entitled "Donated Legal Services," encourages lawyers to render voluntary public interest legal service and permits lawyers to report donated legal services on the Bar's annual dues statem.ent. "Lawyers rendering a minimum of fifty (50) hours of donated legal service shall

receive a recognition award for such service from the Kentucky Bar Association."

Maryland adds that a lawyer "in part-time practice" should aspire to render at least "a pro rata number of hours." Maryland also makes an exception for lawyers who are "prohibited by law" from rendering certain types of pro bono legal services. Maryland allows a substantial majority of pro bono services to be rendered to "individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights...." Maryland Rule 6.1 concludes: "This Rule is aspirational, not mandatory. Noncompliance with this Rule shall not be grounds for disciplinary action or other sanctions."

Massachusetts: Rule 6.1 states that a lawyer "should provide annually at least 25 hours of pro bono publico legal services for the benefit of persons of limited means." Alternatively, the lawyer should "contribute from $250 to 1 percent of the lawyer's annual taxable, professional income to one or more organizations that provide or support legal services to persons of limited means,"

Michigan essentially retains the 1983 version of ABA Model Rule 6.1.

New Jersey: Rule 6.1 tracks the original (1983) version of ABA Model Rule 6.1 except that the first sentence reads: "Every lawyer has a professional responsibility to render public interest legal service."

New York has no equivalent to ABA Model Rule 6.1 in its Disciplinary Rules, but EC 2-34 (formerly EC 2-25) provides as follows:

> A lawyer has a professional obligation to render public interest and pro bono legal service.
>
> Each lawyer should aspire to provide at least 20 hours of pro bono services annually by providing legal services at no fee and without expectation of fee to: (l) persons of limited financial means, or (2) not for profit, governmental or public service organizations, where the legal services are designed primarily to address the legal and other basic needs of persons of limited financial means, or (3) organizations specifically designed to increase the availability of legal services to persons of limited financial means.
>
> Each lawyer also should provide financial support for such organizations, to assist in providing legal services to persons of limited financial means.
>
> In addition to meeting the aspirational goals set forth above, a lawyer also should render public interest and pro bono legal service:
>
> (1) where the payment of standard legal fees would significantly deplete the recipient's economic resources or would be otherwise inappropriate, by providing legal services at no fee or substantially reduced fees to individuals, organizations seeking to secure or protect civil rights, civil liberties or public rights, or to not for profit, government or public service organizations in matters in furtherance of their organization purposes; or
>
> (2) by providing legal services at a substantially reduced fee to persons of limited financial means; or
>
> (3) by participating without compensation in activities for improving the law, the legal system or the legal profession; or
>
> (4) by providing legal services without compensation or at substantially reduced compensation in aid or

support of the judicial system (including services as an arbitrator, mediator or neutral in court-annexed alternative dispute resolution).

North Carolina omits Rule 6.1, but Paragraph 6 of North Carolina's Preamble states that "all lawyers should devote professional time and resources arid use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure' adequate legal counsel," and Paragraph 7 of the Preamble contains language almost identical to the 1983 version of ABA Model Rule 6.1.

Ohio omits ABA Model Rule 6.1. The Supreme Court of Ohio explains that it "deferred consideration of Model Rule 6.1 in light of recommendations contained in the final report of the Supreme Court Task Force on Pro Se & Indigent Representation and recommendations from the Ohio Legal Assistance Foundation." (The Task Force on Pro Se & Indigent Representation, which was appointed by the Supreme Court of Ohio in 2004, recommended in its April 2006 final report that Ohio attorneys be required to report their pro bono activities. The report is available at www.sconet.state.oh.us/publications/prose/report_apriL06.pdf.)

Texas omits Rule 6.1, but Paragraph 6 of the Texas Preamble addresses pro bono services by stating, among other things: "The provision of free legal services to those unable to pay reasonable fees is a moral obligation of each lawyer as well as the profession generally."

Virginia: Rule 6.1 says that a lawyer "should render at least 2 percent per year of the lawyer's professional time to pro bono publico legal services." The Rule also defines pro bono services and allows a law firm or group of lawyers to satisfy their responsibility under the Rule collectively. Further, "direct financial support of programs that provide direct delivery of legal services to meet the need described" in the Rule "is an alternative method for fulfilling a lawyer's responsibility."

Proposed Rule 6.2 [n/a]
"Accepting Appointments"

(Draft #2, 11/28/09)

Summary: Proposed Rule 6.2 is based on Model Rule 6.2, which sets forth a lawyer's duties when a tribunal seeks to appoint the lawyer to represent a person. The Rule is identical to the Model Rule, except for some changes to conform language to California rule style and statutes. See Introduction and Explanation of Changes.

Comparison with ABA Counterpart

Rule	Comment
☑ ABA Model Rule substantially adopted	☑ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rule	
Statute	Bus. & Prof. Code § 6068(h).
Case law	

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☑ Other Primary Factor(s)

State Bar of California Board of Governors Pro Bono Resolution (2002).

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): ☑ Yes ☐ No

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☑ Not Controversial – Explanation:

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 6.2* Accepting Appointments

December 2009
(Draft rule to be considered for public comment.)

INTRODUCTION:

Proposed Rule 6.2 is based on Model Rule 6.2, which sets forth a lawyer's duties when a tribunal seeks to appoint the lawyer to represent a person. The Rule is identical to the Model Rule, except for some changes to conform language to California rule style and statutes. In addition, a cross-reference to Business & Professions Code § 6068(h), which provides it is the duty of a lawyer, "Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed," has been added.

Minority. A minority of the Commission declines to recommend the Rule because it would allow a lawyer to reject an appointment to represent a client the lawyer considers "repugnant" or who is unpopular. The minority notes that lawyers are traditionally obliged to represent people they consider "repugnant." A client accused of a crime, a philandering spouse, and a protester arrested in a mass demonstration are all entitled to representation, even if the lawyer considers them "repugnant" or unpopular because of their acts or for other reasons. The unpopularity of a client should not permit a lawyer to refuse appointment by a tribunal. An appointed lawyer does not espouse the client or the client's cause.

Variations in other jurisdictions. Nearly every jurisdiction has adopted some version of Model Rule 6.2, with little variation. New York and Oregon have declined to adopt the Rule, and Georgia has reduced the rule to a single sentence.

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* Proposed Rule 6.2, Draft #2 (11/28/09).

ABA Model Rule Rule 6.2 Accepting Appointments	Commission's Proposed Rule* Rule 6.2 Accepting Appointments	Explanation of Changes to the ABA Model Rule
A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:	A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:	The introductory clause is identical to its Model Rule counterpart.
(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;	(a) representing the client is likely to result in violation of ~~the~~these Rules~~ of Professional Conduct~~, the State Bar Act, or other law;	Paragraph (a) is identical to Model Rule 6.2(a), except that "these Rules" has been substituted for "the Rules of Professional Conduct" to conform with the Rules style, and "the State Bar Act" has been added consistent with other Rules.
(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or	(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or	Paragraph (b) is identical to Model Rule 6.2(b).
(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.	(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the ~~client-~~lawyer-client relationship or the lawyer's ability to represent the client.	Paragraph (c) is identical to Model Rule 6.2(c), except that "lawyer-client" has been substituted for "client-lawyer," consistent with California rules and statute style.

* Proposed Rule 6.2, Draft 2 (11/28/09). Redline/strikeout showing changes to the ABA Model Rule.

ABA Model Rule Rule 6.2 Accepting Appointments Comment	Commission's Proposed Rule* Rule 6.2 Accepting Appointments Comment	Explanation of Changes to the ABA Model Rule
[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.	[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. See Business & Professions Code section 6068(h). All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a ~~court~~tribunal to serve unpopular clients or persons unable to afford legal services.	Comment [1] is based on Model Rule 6.2, cmt. [1], except: (i) a reference to Business & Professions Code § 6068(h), which provides it is the duty of a lawyer, "Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed," has been added; and (ii) "tribunal" has been substituted for "court" to conform to the black letter of the introductory clause.
Appointed Counsel [2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example,	**Appointed Counsel** [2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause ~~exists if~~includes situations where the lawyer ~~could~~would not be able to handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the ~~client~~ lawyer-client relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would	Comment [2] is based on Model Rule 6.2, cmt. [2], except that "includes situations where" has been substituted for "exists if" to emphasize that the situations described are examples only; (ii) "would" has been substituted for "could" to create an appropriate parallel construction with the following clause; and (iii) "lawyer-client" has been substituted for "client-lawyer" as explained above.

* Proposed Rule 6.2, Draft 2 (11/28/09). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 6.2 Accepting Appointments Comment	Commission's Proposed Rule* Rule 6.2 Accepting Appointments Comment	Explanation of Changes to the ABA Model Rule
when it would impose a financial sacrifice so great as to be unjust.	be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.	
[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.	[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty ~~and~~, confidentiality, and competence, and is subject to the same limitations on the ~~client~~ lawyer-client relationship, such as the obligation to refrain from assisting the client in violation of ~~the~~these Rules or the State Bar Act. See Rule 1.2(d).	Comment [3] is based on Model Rule 6.2, cmt. [3], except that "competence" has been added to emphasize that an appointed lawyer owes the same duty of competence as is owed when retained. In addition, a reference to Rule 1.2(d), which prohibits a lawyer from assisting a client to engage in criminal or fraudulent conduct, has been added to provide further guidance on the limits of a representation.

Rule 6.2: Accepting Appointments
(Commission's Proposed Rule - Clean Version)

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of these Rules, the State Bar Act, or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the lawyer-client relationship or the lawyer's ability to represent the client.

COMMENT

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. See Business & Professions Code section 6068(h). All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a tribunal to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause includes situations where the lawyer would not be able to handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the lawyer-client relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty, confidentiality, and competence, and is subject to the same limitations on the lawyer-client relationship, such as the obligation to refrain from assisting the client in violation of these Rules or the State Bar Act. See Rule 1.2(d).

Rule 6.2: Accepting Appointments

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California has no comparable provision in its Rules of Professional Conduct.

Georgia shortens ABA Model Rule 6.2 to a single sentence: "For good cause a lawyer may seek to avoid appointment by a tribunal to represent a person."

New York has no comparable provision in its Disciplinary Rules, but ECs 2-38 and 2-39 (formerly ECs 2-29 and 2-30) address the issues addressed in ABA Model Rule 6.2.

North Carolina omits Rule 6.2.

Ohio substitutes the word "court" for "tribunal" in the first line of the rule to reflect the Ohio Supreme Court's view that "the inherent authority to make appointments is limited to courts and does not extend to other bodies" included within the definition of "tribunal." Ohio also omits ABA Model Rule 6.2(c) because "the substance... is addressed in Rule 1.1, which mandates that a lawyer shall provide competent representation to a client."

Proposed Rule 6.5 [1-650]
"Limited Legal Services Programs"

(Post-Adoption Draft 3 [#6], 11/28/09)

Summary: Proposed Rule 6.5 is based upon recently approved rule 1-650, which in turn was based on Model Rule 6.5, and facilitates lawyer's participation in limited legal services programs such as call-in hotlines. Most of the changes from rule 1-650 are non-substantive, and have been made to conform the language of the proposed Rule to that of the other proposed rules, e.g., changing "member" to "lawyer" and substituting proposed new rule numbers for existing rule numbers. See Introduction.

Comparison with ABA Counterpart

Rule	Comment
☑ ABA Model Rule substantially adopted	☑ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☑ Some material additions to ABA Model Rule	☑ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rules	RPC 1-650
Statute	
Case law	

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): ☐ Yes ☑ No

☐ No Known Stakeholders

☑ The Following Stakeholders Are Known:

California Commission on Access to Justice.

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☑ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 6.5* Limited Legal Services Programs

November 2009
(Draft rule to be considered for public comment.)

INTRODUCTION:

Proposed Rule 6.5 is based upon recently approved rule 1-650, which in turn was based on Model Rule 6.5. Most of the changes from rule 1-650 are non-substantive, and have been made to conform the language of the proposed Rule to that of the other proposed rules, e.g., changing "member" to "lawyer" and substituting proposed new rule numbers for existing rule numbers. Most of the rest of the changes are for purposes of clarifying the language of the proposed Rule. In addition, the Commission recommends two other language changes intended to conform the Rule to well-settled California law and to provide guidance to lawyers on protecting confidential information they might have acquired under the auspices of a program governed under the Rule. See Explanation of Changes for paragraph (a) and Comment [4], respectively.

Variations in other jurisdictions. Nearly every jurisdiction has adopted some version of Model Rule 6.5, with little variation.

* Proposed Rule 6.5, Post-Adoption Draft 3 [#6] (11/28/09).

ABA Model Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs	Commission's Proposed Rule* Rule 6.5 ~~Nonprofit And Court-Annexed~~ Limited Legal Services Programs	Explanation of Changes to the ABA Model Rule
(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:	(a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization ~~or court~~, provides short-term limited legal services to a client without reasonable expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:	Note that the title of the Rule has been shortened because, unlike the Model Rule, proposed Rule 6.5 is not limited to nonprofit organizations. The changes to paragraph (a) were first made in rule 1-650 to expand the list of organizations covered by the Rule. The word "reasonable" has been added as a modifier of "expectation" to comport with current California law on the formation of a lawyer-client relationship. See, e.g., *Zenith Insurance v. Cozen O'Connor* (2009)148 Cal. App.4th 998, 1010; Cal. State Bar Formal Ethics Opn. 2003-161.
(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and	(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and	Subparagraph (a)(1) is identical to Model Rule 6.5(a)(1).
(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.	(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is ~~disqualified~~prohibited from representation by Rule 1.7 or 1.9(a) with respect to the matter.	Subparagraph (a)(2) is based on Model Rule 6.5(a)(2). The phrase, "prohibited from representation" has been carried forward from current rule 1-650(A)(2); it is a more accurate statement than "disqualified" in the rule context.

* Proposed Rule 6.5, Draft 3 [6] (11/28/09). Redline/strikeout showing changes to the ABA Model Rule.

ABA Model Rule **Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs**	**Commission's Proposed Rule*** **Rule 6.5 ~~Nonprofit And Court-Annexed~~ Limited Legal Services Programs**	**Explanation of Changes to the ABA Model Rule**
(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.	(b) Except as provided in paragraph (a)(2),Rule 1.10 is inapplicable to a representation governed by this Rule.	Paragraph (b) is identical to Model Rule 6.5(b).
	(c) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.	Paragraph (c) has no counterpart in Model Rule 6.5. The California Supreme Court added this paragraph to proposed rule 1-650, which the Board of Governors had adopted and sent to the Supreme Court. Paragraph (c), which is taken from the last sentence of Model Rule 6.5, cmt. [4], is identical to current rule 1-650(C).

ABA Model Rule **Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs** **Comment**	Commission's Proposed Rule* **Rule 6.5 ~~Nonprofit And Court-Annexed~~ Limited Legal Services Programs** **Comment**	Explanation of Changes to the ABA Model Rule
[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services — such as advice or the completion of legal forms - that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.	[1] ~~Legal services organizations~~Courts, ~~courts~~government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services ~~—~~ – such as advice or the completion of legal forms – that will assist persons ~~to address~~in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a ~~client~~ lawyer-client relationship is established, ~~but~~ there usually is no expectation that the lawyer's representation of the client will continue beyond ~~the~~that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically ~~screen~~check for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.	Comment [1] is based on Model Rule 6.5, cmt. [1]. Changes were made in the first sentence to conform to the changes in paragraph (a). See Explanation of Changes for paragraph (a) and carry forward revisions made by the Supreme Court in approving rule 1-650. This is the language approved by the Supreme Court in rule 1-650. There was some controversy concerning the issue of the formation of an attorney client relationship when lawyers assist others who have legal problems; it appears that the Court inserted "whenever" to avoid specifying that such a relationship is always formed. The word "check" has been substituted for "screen" to avoid confusion that an ethical screen is required when a lawyer participates in a program governed by this Rule.

* Proposed Rule 4.1, Draft 1 (XX/XX/09). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment	Commission's Proposed Rule* Rule 6.5 ~~Nonprofit And Court-Annexed~~ Limited Legal Services Programs Comment	Explanation of Changes to the ABA Model Rule
[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.	[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, ~~the~~these Rules ~~of Professional Conduct~~and the State Bar Act, including ~~Rules~~the lawyer's duty of confidentiality under Business and Professions Code section 6068(e)(1), Rule 1.6 and Rule 1.9~~(c)~~, are applicable to the limited representation.	Comment [2] is based on Model Rule 6.5, cmt. [2]. References have been added to the State Bar Act, which also regulates lawyer conduct in California, and Bus. & Prof. Code § 6068(e)(1), which in California also governs a lawyer's duty of confidentiality. Finally, because the duty of confidentiality is also relevant in proposed Rule 1.9(a) and (b), the limitation of Rule 1.9's applicability to 1.9(c) has been stricken.
[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.	[3] ~~Because a~~A lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (a)(1) requires compliance with Rules 1.7 ~~or~~and 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer. In addition, ~~and~~paragraph (a)(2) requires compliance with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's law firm ~~is~~would be disqualified by Rules 1.7 or 1.9(a) in the matter.	Comment [3] is based on Model Rule 6.5, cmt. [3]. Changes have been made to specifically clarify what is required by each subparagraph of paragraph (a) and to carry forward revisions the California Supreme Court made to rule 1-650.

ABA Model Rule **Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs** **Comment**	Commission's Proposed Rule* **Rule 6.5 ~~Nonprofit And Court-Annexed~~ Limited Legal Services Programs** **Comment**	Explanation of Changes to the ABA Model Rule
[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.	[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's law firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that any lawyer in the lawyer's firm is ~~disqualified~~prohibited from representation by Rules 1.7 or 1.9(a). By virtue of paragraph (b), ~~however~~moreover, a lawyer's participation in a short-term limited legal services program will not be imputed to the lawyer's law firm or preclude the lawyer's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program. However, once the conflict is identified, the member should be screened from the member's firm's representation of a client with interests adverse to a client that the member previously represented under the program's auspices.	Comment [4] is based on Model Rule 6.5, cmt. [4]. Changes to the Comment carry forward changes the Supreme Court approved in rule 1-650. The last sentence of Comment [4] has been added at the suggestion of COPRAC to clarify the actions a law firm should take once a conflict has been identified.

ABA Model Rule **Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs** **Comment**	Commission's Proposed Rule* **Rule 6.5 ~~Nonprofit And Court-Annexed~~ Limited Legal Services Programs** **Comment**	Explanation of Changes to the ABA Model Rule
[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.	[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.	Comment [5] is identical to Model Rule 6.5, cmt. [5].

Rule 6.5: Limited Legal Services Programs
(Commission's Proposed Rule – Clean Version)

(a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without reasonable expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is prohibited from representation by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2),Rule 1.10 is inapplicable to a representation governed by this Rule.

(c) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

COMMENT

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there usually is no expectation that the lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically check for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, these Rules and the State Bar Act, including the lawyer's duty of confidentiality under Business and Professions Code section 6068(e)(1), Rule 1.6 and Rule 1.9, are applicable to the limited representation.

[3] A lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (a)(1) requires compliance with Rules 1.7 and 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer. In addition, paragraph (a)(2) requires compliance with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's law firm would be disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's

law firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that any lawyer in the lawyer's firm is prohibited from representation by Rules 1.7 or 1.9(a). By virtue of paragraph (b), moreover, a lawyer's participation in a short-term limited legal services program will not be imputed to the lawyer's law firm or preclude the lawyer's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program. However, once the conflict is identified, the member should be screened from the member's firm's representation of a client with interests adverse to a client that the member previously represented under the program's auspices.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Rule 6.5: Nonprofit and Court-Annexed Limited Legal Services Program

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California has no counterpart to ABA Model Rule 6.5. Connecticut adds the following paragraph that is identical to Comment 2 to ABA Rule 6.5:

> (b) A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to, the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

New Hampshire: Rule 6.5(a) applies only to a "one time consultation with a client" instead of the ABA's version "short-term limited legal services to a client." Also, echoing ABA Comment 2 to Rule 6.5, New Hampshire's Rule 6.5(c) provides that "Rules 1.6 and 1.9(c) are applicable to a representation governed by this Rule." Finally, a special New Hampshire Comment states as follows:

> Should a lawyer participating in a one-time consultation under this Rule later discover that the lawyer's firm was representing or later undertook the representation of an adverse client, the prior participation of the attorney will not preclude the lawyer's firm from continuing or undertaking representation of such adverse client. But the participating lawyer will be disqualified and must be screened from any involvement with the firm's adverse client. See ABA Comment [4].

New York: On November 9, 2007, effective immediately, New York's courts adopted a new DR 5-101-a (22 NYCRR §1220-a) that generally parallels ABA Model Rule 6.5 but adds the following three paragraphs:

> (c) Short-term limited legal services are services providing legal advice or representation free of charge as part of a program described in subdivision (a) with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance.
>
> (d) The lawyer providing short-term limited legal services must secure the client's informed consent to the limited scope of the representation, and such representation shall be subject to the provisions of DR 4-101.
>
> (e) The provisions of this section shall not apply where the court before which the representation is pending determines that a conflict of interest exists or, if during the

course of the representation, the attorney providing the services become aware of the existence of a conflict of interest precluding continued representation.

Wisconsin: Rule 6.5(a) also applies to a program sponsored by “a bar association” or “an accredited law school.”

Model Rule 7.6 [1-400]

RECOMMENDATION: NO ADOPTION

"Political Contributions to Obtain Legal Engagements or Appointments by Judges"

(Draft # -- N/A)

Summary: Model Rule 7.6 is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge. The Commission does not recommend its adoption for the reasons stated in the Introduction.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☑ ABA Model Rule substantially rejected	☑ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rules

Statute

Case law

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☑

Favor Rule for Adoption __1___
Opposed Rule for Adoption __10___
Abstain __0___

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority Position Included. (See Introduction): ☐ Yes ☑ No

Stakeholders and Level of Controversy

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☑ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges

December 2009
(Draft rule following initial round of public comment)

INTRODUCTION:

1. The Commission has determined that the ability of California lawyers and lawyers from other states to analyze issues concerning legal advertising and solicitation in this state would be enhanced by restating what is currently a single rule, California Rule 1-400, as five separate rules, numbered 7.1 through 7.5, that follow the organization of their ABA Model Rule counterparts. Nationally, there is marked variation among the jurisdictions in this area of lawyer regulation. The Commission believes that advertising of legal services and the solicitation of prospective clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts in light of the current widespread use of the Internet by lawyers and law firms to market their services and the trend in many states toward allowing some form of multijurisdictional practice. However, the Commission has recommended departures from the Model Rules, in part to address Constitutional concerns.

2. Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services. Rule 7.2 specifically addresses advertising, a subset of communication, and typically involves communications directed at the general public. Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client. Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization. Rule 7.5 does the same for the use of firm names and letterheads. **The Commission, however, declines to recommend any rule analogous to Model Rule 7.6, which is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge.**

3. The Commission recommends that Model Rule 7.6 not be adopted because its substance is addressed by Business & Professions Code § 6106, a catchall for corruption, and other criminal prohibitions relative to bribery and attempts to influence the conduct of elected officials. A lawyer who violates these statutory prohibitions would be in violation of other rules the Commission has proposed, such as Rules 3.5 and 8.4. In addition the Commission is concerned with uneven application of the Rule. Further, the Rule would be ineffective. The Rule does not reach the improper conduct itself. It does not prohibit a lawyer from contributing money to a political campaign to get an appointment or engagement, but rather prohibits the lawyer from accepting the appointment or engagement.

4. Variation in Other Jurisdictions. Model Rule 7.6 is the least adopted of the Model Rules. As of December 1, 2009, only seven jurisdictions have adopted the Rule (Colorado, Delaware, Idaho, Iowa, Maine, Missouri, Washington).

ABA Model Rule **Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges**	Commission's Proposed Rule* **Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges**	Explanation of Changes to the ABA Model Rule
A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.	~~A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.~~	Please refer to Introduction for this Rule.

* Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges Comment	Commission's Proposed Rule Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges Comment	Explanation of Changes to the ABA Model Rule
[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.	~~[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.~~	Please refer to Introduction for this Rule.
[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.	~~[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.~~	Please refer to Introduction for this Rule.

ABA Model Rule Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges Comment	Commission's Proposed Rule Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges Comment	Explanation of Changes to the ABA Model Rule
[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.	~~[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.~~	Please refer to Introduction for this Rule.
[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.	~~[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.~~	Please refer to Introduction for this Rule.
[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the	~~[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the~~	Please refer to Introduction for this Rule.

ABA Model Rule Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges Comment	Commission's Proposed Rule Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges Comment	Explanation of Changes to the ABA Model Rule
circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the 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.	~~circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the 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.	~~[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.~~	Please refer to Introduction for this Rule.

Rule 7.6: Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Arizona, California, the District of Columbia, Illinois, Michigan, New Jersey, Ohio, Pennsylvania, Texas, and Virginia (among others) have no rule equivalent to ABA Model Rule 7.6.

New York has no Disciplinary Rule like ABA Model Rule 7.6, but EC 2-37 provides as follows:

> Campaign contributions by lawyers to government officials or candidates for public office who are, or may be, in a position to influence the award of a legal engagement may threaten governmental integrity by subjecting the recipient to a conflict of interest. Correspondingly, when a lawyer makes a significant contribution to a public official or an election campaign for a candidate for public office and is later engaged by the official to perform legal services for the official's agency, it may appear that the official has been improperly influenced in selecting the lawyer, whether or not this is so. This appearance of influence reflects poorly on the integrity of the legal profession and government as a whole. For these reasons, just as the Code prohibits a lawyer from compensating or giving anything of value to a person or organization to recommend or obtain employment by a client, the Code prohibits a lawyer from making or soliciting a political contribution to any candidate for government office, government official, political campaign committee or political party, if a disinterested person would conclude that the contribution is being made or solicited for the purpose of obtaining or being considered eligible to obtain a government legal engagement. This would be true even in the absence of an understanding between the lawyer and any government official or candidate that special consideration will be given in return for the political contribution or solicitation.
>
> [J]ust as the Code prohibits a lawyer from compensating or giving anything of value to a person or organization to recommend or obtain employment by a client, the Code prohibits a lawyer from making or soliciting a political contribution to any candidate for government office, government official, political campaign committee or political party, if a disinterested person would conclude that the contribution is being made or solicited for the purpose of obtaining or being considered eligible to obtain a government legal engagement. This would be true even in the absence of an understanding between the lawyer and any government official or candidate that special consideration will be given in return for the political contribution or solicitation.

EC 2-38 complements EC 2-37 by setting forth seven factors to consider in determining "whether a disinterested person would conclude that a contribution to a candidate for government office, government official, political campaign committee or political party is or has been made for the purpose of obtaining or being considered eligible to obtain a government legal engagement...." For example, the factors include "(a) whether legal work awarded to the contributor or solicitor, if any, was awarded pursuant to a process that was insulated from political influence, such as a 'Request for Proposal' process" and "(c) whether the contributor or any law firm with which the lawyer is associated has sought or plans to seek government legal work from the official or candidate."

Ohio omits ABA Model Rule 7.6, explaining as follows: "The substance of Model Rule 7.6 is addressed by provisions of the Ohio Ethics Law... and other criminal prohibitions relative to bribery and attempts to influence the conduct of elected officials. A lawyer or law firm that violates these statutory prohibitions would be in violation of other provisions of the Ohio Rules of Professional Conduct, such as Rule 8.4."

Proposed Rule 8.2 [1-700]
"Judicial and Legal Officials"

(**Draft #2, 12/15/09**)

Summary: Proposed Rule which imposes duties on lawyers with respect to judicial and legal officials, and when a lawyer is a candidate for judicial office, closely tracks Model Rule 8.2, but also carries forward provisions in current California Rule 1-700 ("Member as Candidate for Judicial Office"). See Introduction.

Comparison with ABA Counterpart

Rule	Comment
☑ ABA Model Rule substantially adopted	☑ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☑ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rule	RPC 1-700.
Statute	Bus. & Prof. Code § 6068(b).
Case law	

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): ☐ Yes ☑ No

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☑ Not Controversial – Explanation:

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.2* Judicial and Legal Officials

December 2009
(Draft rule to be considered for public comment.)

INTRODUCTION:

Proposed Rule 8.2, which imposes duties on lawyers with respect to judicial and legal officials, and when a lawyer is a candidate for judicial office, closely tracks Model Rule 8.2, but also carries forward provisions in current California Rule 1-700 ("Member as Candidate for Judicial Office"). Paragraph (a) incorporates the concept of respect for the judiciary more generally stated in Bus. & Prof. Code § 6068(b), but also adds an obligation not to make false statements concerning candidates for judicial office. Paragraphs (b) through (d) provide a means by which the State Bar can discipline lawyers who violate ethical duties imposed by Canons 5 and 5B of the California Code of Judicial Ethics when seeking appointment or election to judicial office.

The Comment to the Rule largely tracks the comment to Model Rule 8.2.

Previously, the Board of Governors approved circulation of proposed Rule 2.4.2, which is based on current rule 1-700, for public comment. Paragraph (b) and (d) are carried forward from that Rule, which in turn carried forward the provisions of current rule 1-700. The concept of paragraph (c), which concerns lawyers seeking appointment to judicial office, is also carried forward from proposed Rule 2.4.2, but has been separated out as a separate paragraph for clarity.

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* Proposed Rule 8.2, Draft 2 (12/15/2009).

ABA Model Rule Rule 8.2 Judicial and Legal Officials	Commission's Proposed Rule* Rule 8.2 Judicial and Legal Officials	Explanation of Changes to the ABA Model Rule
(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.	(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.	Paragraph (a) is identical to Model Rule 8.2(a).
(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.	(b) A lawyer who is a candidate for judicial office in California shall comply with ~~the applicable provisions~~Canon 5 of the California Code of Judicial ~~Conduct~~Ethics.	Paragraph (b) substantially follows Model Rule 8.2(b). It has been modified only to reference the applicable California Code of Judicial Ethics when a lawyer seeks office in California.
	(c) A lawyer who seeks appointment to judicial office shall comply with Canon 5B of the California Code of Judicial Ethics. A lawyer commences to become an applicant seeking judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A lawyer's duty to comply with this Rule shall end when the lawyer advises the appointing authority of the withdrawal of the lawyer's application.	There is no counterpart in the Model Rules to paragraph (c). It is included to provide a disciplinary path for lawyers who violate their duty as applicants for appointment to judicial office by requiring that those lawyers comply with Canon 5B, as currently provided in the California Code of Judicial Ethics. This paragraph also sets forth when a lawyer is deemed to have commenced or terminated his or her status as an applicant for appointment.

* Proposed Rule 8.2, Draft 2 (12/15/09). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 8.2 Judicial and Legal Officials	Commission's Proposed Rule* Rule 8.2 Judicial and Legal Officials	Explanation of Changes to the ABA Model Rule
	(d) For purposes of this Rule, "candidate for judicial office" means a lawyer seeking judicial office by election. The determination of when a lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A lawyer's duty to comply with this Rule shall end when the lawyer announces withdrawal of the lawyer's candidacy or when the results of the election are final, whichever occurs first.	There is no counterpart in the Model Rules to paragraph (d). It references the terminology used in the Code of Judicial Ethics, and expands on the Code section's explanation as to when a candidacy for election or retention to judicial office ends.

ABA Model Rule **Rule 8.2 Judicial and Legal Officials** **Comment**	**Commission's Proposed Rule** **Rule 8.2 Judicial and Legal Officials** **Comment**	**Explanation of Changes to the ABA Model Rule**
[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.	[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.	Comment [1] is identical to Model Rule 8.2, cmt. [1].
[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.	[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.	Comment [2] is identical to Model Rule 8.2, cmt. [2].
[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.	[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized. See Business and Professions Code section 6068(b).	Comment [3] is identical to Model Rule 8.2, cmt. [3], except for the inclusion of a cross-reference to Bus. & Prof. Code § 6068(b), which provides it is the duty of a lawyer: "To maintain the respect due to the courts of justice and judicial officers".
	[4] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.	Comment [4] has no counterpart in the Model Rule. It carries forward Discussion paragraph 1 of current rule 1-700.

Rule 8.2: Judicial and Legal Officials
(Commission's Proposed Rule - Clean Version)

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office in California shall comply with Canon 5 of the California Code of Judicial Ethics.

(c) A lawyer who seeks appointment to judicial office shall comply with Canon 5B of the California Code of Judicial Ethics. A lawyer commences to become an applicant seeking judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A lawyer's duty to comply with this Rule shall end when the lawyer advises the appointing authority of the withdrawal of the lawyer's application.

(d) For purposes of this Rule, "candidate for judicial office" means a lawyer seeking judicial office by election. The determination of when a lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A lawyer's duty to comply with this Rule shall end when the lawyer announces withdrawal of the lawyer's candidacy or when the results of the election are final, whichever occurs first.

COMMENT

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized. See Business and Professions Code section 6068(b).

[4] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.

Rule 8.2: Judicial and Legal Officials

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California: The California Rules of Professional Conduct have no comparable provision, but California Business & Professions Code §6068(b) provides that it is the duty of an attorney to "maintain the respect due to the courts of justice and judicial officers."

District of Columbia omits ABA Model Rule 8.2.

Florida: Rule 8.2(a) also applies to statements about a mediator, arbitrator, juror or member of the venire.

Georgia omits ABA Model Rule 8.2(a) but adopts Rule 8.2(b) verbatim.

Maryland: Rule 8.2(b)(2) provides that a lawyer who is a candidate for judicial office "with respect to a case, controversy or issue that is likely to come before the court, shall not make a commitment, pledge, or promise that is inconsistent with the impartial performance of the adjudicative duties of the office."

New Jersey: Rule 8.2(b) provides that a lawyer who "has been confirmed for judicial office" shall comply with the applicable provisions of the Code of Judicial Conduct. The rule does not apply to lawyers who are only candidates for judicial office.

New York: DR 8-102 provides as follows:

> A. A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.
>
> B. A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

DR 8-103(A) provides that a lawyer who is a candidate for judicial office shall comply with §100.5 of the Chief Administrator's Rules Governing Judicial Conduct and Canon 5 of the New York Code of Judicial Conduct.

Ohio: Rule 8.2(a) omits the ABA reference to an "adjudicatory officer or public legal officer."

Pennsylvania: Rule 8.2 replaces all of ABA Model Rule 8.2(a) with language taken verbatim from DR 8-102(A) and (B) and 8-103(A) of the ABA Model Code of Professional Responsibility (see New York entry above).

Virginia: Rule 8.2 provides, in its entirety as follows: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer."