

Selected E-

**June 10, 2010 McCurdy E-mail to Vapnek, cc Chair, Vice-Chairs & Staff:**

Paul,

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

**ASSIGNMENT SUBMISSION DEADLINE:** The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synopsising all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15<sup>th</sup> has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15<sup>th</sup> comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

**LIST OF ASSIGNED RULES** (As explained above, these are rules that presently have received a comment in opposition or a comment stating an "Agree if Modified" position):

**RRC – Rule 8.4 [1-120X]  
Selected E-mails – Revised (6/21/2010)**

- 1.5 (Agenda Item III.G)
- 6.4 (Agenda Item III.KKK)
- 6.5 (Agenda Item III.LLL)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

[www.calbar.org/proposedrules](http://www.calbar.org/proposedrules)

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

**Attached:**

- RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - VAPNEK - DFT1 (06-09-10).pdf
- RRC - 1-650 [6-5] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - [6-4] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 4-200 [1-5] - Public Comment Chart - By Commenter - XDFT1 (04-22-10)2.doc
- RRC - [6-4] - Rule - PCD [4] (12-13-09) - CLEAN-LAND.pdf
- RRC - [6-4] - Rule - PCD [4] (12-13-09) - CLEAN-LAND.doc
- RRC - 4-200 [1-5] - Rule - PCD [11] (12-14-09) - CLEAN-LAND.pdf
- RRC - 4-200 [1-5] - Rule - PCD [11] (12-14-09) - CLEAN-LAND.doc
- RRC - 1-650 [6-5] - Rule - PCD [5] (04-01-10) - CLEAN-LAND.pdf
- RRC - 1-650 [6-5] - Rule - PCD [5] (04-01-10) - CLEAN-LAND.doc

**June 10, 2010 KEM E-mail to Difuntorum, cc McCurdy & Lee:**

As I've been going through the e-mails circulated yesterday, I realized that we need to circulate 8.4 [1-120X] for approval by the Commission -- or at least the drafters -- notwithstanding that there has been no negative public comment.

As you recall, at the 3/26-27/10 meeting, the RRC voted to move 4.1(b) into a comment to 8.4. That was done, but only you and I reviewed the actual language. We haven't circulated it to either the drafters or the Commission. See Comment [2C] to attached draft 10.2 (4/6/10).

I've attached the following to help move this forward:

- RRC - 1-120X [8-4] - Rule - DFT10.2 (04-06-10) - CLEAN.doc
- RRC - 1-120X [8-4] - Rule - DFT10.2 (04-06-10) - ANNOT.doc
- RRC - 1-120X [8-4] - Rule - DFT10.2 (04-06-10) - Cf. to FPCD [10.1].doc

Please let me know if you have any questions.

**June 11, 2010 Difuntorum E-mail to McCurdy, cc Lee & KEM:**

Please supplement the assignments that you have sent to lead drafters with Rule 8.4, per Kevin's request in his 6/10/10 email to you, me and Mimi. The Rule 8.4 co-leads are Vapnek/Peck with Tuft as the only other codrafter. In the assignment, you should refer to my 4/7/10 email message below and include the attached documents. For Rule 8.4, the drafters will need to integrate the attached latest draft with whatever other revisions they may recommend. However, at present, there are no opposition or amend comment letters/testimony, so the rule itself might be done as is. If so, then the remaining documents (Dashboard, Introduction, etc...) would be needed and staff could help them with that as soon as they confirm that they are not contemplating any other revisions to the rule itself.

See **April 7, 2010 Difuntorum E-mail to Drafters, cc Chair, Vice-Chairs & Staff:**

**Attached:**

RRC - 1-120X [8-4] - Rule - DFT10.2 (04-06-10) - CLEAN.doc  
RRC - 1-120X [8-4] - Rule - DFT10.2 (04-06-10) - ANNOT.doc  
RRC - 1-120X [8-4] - Rule - DFT10.2 (04-06-10) - Cf. to FPCD [10.1].doc

**June 14, 2010 McCurdy E-mail to Peck & Vapnek, cc Chair, Vice-Chairs & Staff:**

Ellen & Paul (Rule 8.4 Codrafters):

Please see the general description for all rule assignments in my June 9<sup>th</sup> message below, however, also read the information in Randy's 4-7-10 e-mail message pasted directly below and review the attached rule drafts, which capture changes to the rule language as discussed at the Commission's March meeting.

For this assignment you will need to integrate the attached latest draft with whatever other revisions you may recommend. However, at present, there are no opposition or amend comment letters/testimony, so the rule itself might be done as is. If further changes to the rule are recommended by you, then the remaining documents (Dashboard, Introduction, etc...) will need to be updated and we are available to carry out those updates once you submit your final recommended revisions to the rule itself.

I've also included a copy of the Word soft copies of the Dashboard, Introduction and Rule & Comment Comparison table.

Please note that the assignment deadline for this rule is the same as that for your other assignments: **5:00 pm on Wednesday, June, 16, 2010.**

**Attached:**

RRC - 1-120X [8-4] - Rule - DFT10.2 (04-06-10) - CLEAN2.doc  
RRC - 1-120X [8-4] - Rule - DFT10.2 (04-06-10) - ANNOT2.doc  
RRC - 1-120X [8-4] - Rule - DFT10.2 (04-06-10) - Cf. to FPCD [10.1]2.doc  
RRC - 1-120X [8-4] - Dashboard - ADOPT - DFT3 (10-17-09)PV-KEM-LM.doc  
RRC - 1-120X [8-4] - Compare - Introduction - DFT6.1 (10-17-09)PV-KEM-LM.doc  
RRC - 1-120X [8-4] - Compare - Rule & Comment Explanation - DFT6.1 (10-17-09)PV-KEM-LM.doc

**April 7, 2010 Difuntorum E-mail to Drafters, cc Chair, Vice-Chairs & Staff:**

Attached is a revised draft of Rule 8.4 (Word file) implementing the Commission's action at the March meeting to add the Commission's proposed Rule 4.1(b) as a new comment in 8.4 that explains the scope of Rule 8.4(c). It is a redline version showing changes to the current public comment version of Rule 8.4. Please review to confirm that the revisions appropriately reflect your understanding of the Commission's action. If this draft is fine, then Kevin and I will make the conforming edits to the other Rule 8.4 materials (Dashboard, Introduction, etc. . .). Thanks.

**June 15, 2010 Difuntorum E-mail to RRC:**

More public comments keep arriving. Here's another one that you can begin addressing. It is from the DOJ. The four rules addressed in the letter and the responsible lead drafters and codrafters are listed below. As previously emphasized, the question we need you to answer by the assignment deadline is whether the codrafters will be recommending rule revisions. Rules for which there are no recommended revisions will be placed on consent. –Randy D.

1.11 = **SAPIRO** (Kehr, Melchior, Mohr)  
3.8 = **FOY** (Peck, Tuft)  
8.4 = **VAPNEK/PECK** (Tuft)  
8.5 = **MELCHIOR** (Lampert, Peck)

**Attached:**

RRC - 3-310 [1-11] - 06-14-10 DOJ [Cardona] Comment.pdf  
RRC - 5-110 [3-8] - 06-14-10 DOJ [Cardona] Comment.pdf  
RRC - 1-120X [8-4] - 06-14-10 DOJ [Cardona] Comment.pdf  
RRC - 1-100 [8-5] - 06-14-10 DOJ [Cardona] Comment.pdf

**June 16, 2010 McCurdy E-mail to Peck, cc Chair, Vice-Chairs & Staff:**

Ellen,

Additional comments in opposition or recommending modifications have been received for the following rules, and those **comments not previously sent to you** are attached here for your review. The Google site is also up-to-date (<http://sites.google.com/site/commentsrrc/byrule>).

**1.15** (Agenda Item III.CC) – 2 Comments: Zitrin/Law Professors; and OCTC (sent with Randy's 6/15/10 e-mail)  
**3.4** (Agenda Item III.NN) - OCTC (sent with Randy's 6/15/10 e-mail)  
**3.7** (Agenda Item III.QQ) 3 Comments: **COPRAC (attached)**; OCTC; and Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)  
**5.5** (Agenda Item III.EEE)- OCTC (sent with Randy's 6/15/10 e-mail)  
**8.4** (Agenda Item III.WWW) – Co-Lead with/Vapnek - OCTC (sent with Randy's 6/15/10 e-mail)=  
**8.4.1** (Agenda Item III.XXX) - OCTC (sent with Randy's 6/15/10 e-mail)

**NOTE:** As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a

**RRC – Rule 8.4 [1-120X]  
Selected E-mails – Revised (6/21/2010)**

rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

***Attached:***

RRC - 5-210 [3-7] - 06-15-10 COPRAC Comment.pdf

**June 16, 2010 McCurdy E-mail to Vapnek, cc Chair, Vice-Chairs & Staff:**

Paul,

Additional comments in opposition or recommending modifications have been received for the following rules, and those **comments not previously sent to you** are attached here for your review. The Google site is also up-to-date (<http://sites.google.com/site/commentstrrc/byrule>).

**1.1** (Agenda Item III.C) 4 Comments: **Balin/Dilworth (attached)**; OCTC; Law Practice Management & Technology Section; and, Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

**1.5** (Agenda Item III.G) – 5 Comments: **LA Public Defender-Michael Judge (attached)**; OCTC; Law Practice Management & Technology Section; Zitrin/Law Professors; and, HALT (sent with Randy's 6/15/10 e-mail)

**1.8.8** (Agenda Item III.R) - OCTC (sent with Randy's 6/15/10 e-mail)

**6.4** (Agenda Item III.KKK) - OCTC (sent with Randy's 6/15/10 e-mail)

**6.5** (Agenda Item III.LLL) - OCTC (sent with Randy's 6/15/10 e-mail)

**8.4** (Agenda Item III.WWW) Co-Lead w/Peck – 2 Comments: OCTC; and, DOJ (sent with Randy's 6/15/10 e-mail)

**NOTE:** As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

**RRC – Rule 8.4 [1-120X]  
Selected E-mails – Revised (6/21/2010)**

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

***Attached:***

RRC - 4-200 [1-5] - 06-14-10 LAPD (Judge) Comment.pdf

**June 16, 2010 Vapnek E-mail to McCurdy, cc Sondheim, Co-Drafters (Tuft, Peck, Ruvolo, Kehr, Martinez, Lamport, Sapiro), Difuntorum & KEM re Rules 1.1, 1.5, 1.8.8, 6.4, 6.5, 8.4:**

Pardon the massive email, but there was little time to review all the comments, figure out what they were saying, and then trying to figure out if any warranted any changes in the proposed rule. My lead assignment was for the following rules: 1.1, 1.5, 1.8.8, 2.3, 3.2, 6.4, 6.5, and 8.4. There was no time that I had within which I could consult with my co-drafters, so I take full responsibility if anyone disagrees with me. The only rule change that should be discussed is the proposed changes to rule 1.5 that Randy, Kevin and I have been working on post our last meeting. I have tried to review all the comments that have been made, but none persuade me that we should propose any modification of any RULE except for 1.5. There may very well be some proposed changes to some of the comments, but I understand that these will be done between now and the next meeting on the 25th.

**June 21, 2010 McCurdy E-mail to Peck, cc Chair, Vice-Chairs & Staff:**

Ellen,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

**If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22<sup>nd</sup>.**

***Attached:***

RRC - 2-400 [8-4-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 4-100 [1-15] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 5-210 [3-7] - Public Comment Chart - By Commenter - XDFT1 (06-21-10)-LC.doc  
RRC - 5-220 [3-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc  
RRC - 1-120X [8-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc

**RRC – Rule 8.4 [1-120X]  
Selected E-mails – Revised (6/21/2010)**

**June 21, 2010 McCurdy E-mail to Vapnek, cc Chair, Vice-Chairs & Staff:**

Paul,

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***Attached:***

RRC - 3-400 [1-8-8] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 4-200 [1-5] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10)KEM.doc  
RRC - [6-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 1-120X [8-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 1-650 [6-5] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc  
RRC - 3-110 [1-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc

**Rule 8.4 Misconduct.  
[Sorted by Commenter]**

**TOTAL = 4**    **Agree = 1**  
**Disagree = 0**  
**Modify = 3**  
**NI =**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	San Diego County Bar Association	A	Yes		Support as drafted.	No action needed.
2	COPRAC	M	Yes		<p>We generally support the adoption of Proposed Rule 8.4 and the Comments to the Rule. Further, COPRAC disagrees with the minority position expressed in the Explanation to paragraph (d) of the Rule, and agrees that the addition of the phrase “in connection with the practice of law” is appropriate.</p> <p>However, with respect to Comment [3], COPRAC agrees with the minority position expressed in the Introduction to the Rule: this comment may have the effect of chilling protected speech under both the First Amendment and the California Constitution. Further, the language of the Comment goes beyond the black letter rule of paragraph (d) and, by implication, suggests that such protected speech (and related conduct) could be the basis for attorney discipline. COPRAC submits that discipline for such conduct is more appropriately addressed in Proposed Rule 8.4.1, where discipline may be imposed only after a separate tribunal has found that the attorney has engaged in discriminatory</p>	

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



**Rule 8.4 Misconduct.  
[Sorted by Commenter]**

**TOTAL = 4**    **Agree = 1**  
**Disagree = 0**  
**Modify = 3**  
**NI =**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [3]	OCTC has concerns about Comment 3. It seems overly broad and the last sentence is confusing. It appears to venture into an area of evidence and may incorrectly state the law. If the finding is made by clear and convincing evidence or beyond a reasonable doubt, collateral estoppel would appear to apply. If the finding is not by those standards, then the decision is given great weight but is rebuttable. (See <i>Rosenthal v. State Bar</i> (1987) 43 Cal.3d 612, 634; <i>In the Matter of Lais</i> (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112.) OCTC recommends that this Comment be stricken or clarified.	
				Comment [6]	OCTC is very concerned about the last sentence of Comment 6. This is beyond the scope of the Rules and Comments. This Comment invades the prosecutory discretion of OCTC and the independence of the Chief Trial Counsel. There are often very valid reasons for duplicative charging, if for no other reason than the elements of the various charges may be different and the State Bar Court is very reluctant to find a lesser included offense. In fact, the Supreme Court rejected the notion that it objected to duplicative charging. (See <i>Furey v. Commission on Judicial Performance</i> (1987) 43 Cal.3d 1297, 1307 fn. 2 ["We do not wish	

**Rule 8.4 Misconduct.  
[Sorted by Commenter]**

**TOTAL = 4**    **Agree = 1**  
**Disagree = 0**  
**Modify = 3**  
**NI =**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					to intimate that we object to the bringing of potentially overlapping charges; obviously, the Commission may make any charges justified by the evidence.”) Further, in disciplinary cases, the State Bar Court sometimes dismisses duplicative charges, but other times it does not, although it gives them no additional weight. (See <i>In the Matter of Wolf</i> (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 10-11; <i>In the Matter of Lais</i> (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 919, fn. 11; <i>In the Matter of Chesnut</i> (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 175.) OCTC asks that this sentence be stricken.	
4	US Attorney’s Office of Central, Southern, Northern, and Eastern District of California	M	Yes	8.4(c)	<p>We propose the addition of a Comment to Proposed Rule 8.4(c) to make clear that it is not misconduct for government lawyers to advise about or assist or supervise lawful covert activity that may involve misrepresentations or other subterfuge.</p> <p>We recommend adding a Comment to the Proposed Rule that incorporates the concept contained in the Oregon Rules of Professional Conduct 8.4(b). We propose the following new Comment be added in connection with Proposed Rule 8.4(c):</p> <p>“Paragraph (c) of this Rule does not apply, and it shall not be professional misconduct,</p>	

**Rule 8.4 Misconduct.  
[Sorted by Commenter]**

**TOTAL = 4    Agree = 1  
Disagree = 0  
Modify = 3  
NI =**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					where a lawyer advises clients or others about or assists 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 of Professional Conduct. 'Covert activity,' as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. 'Covert activity' may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future. This comment is not intended to broaden the areas in which covert activity by non-government lawyers is recognized as lawful."	

**Rule 8.4 Misconduct**  
**(Commission’s Proposed Rule – Clean Version)**

It is professional misconduct for a lawyer to:

- (a) knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act;
- (b) commit a criminal act that involves moral turpitude or that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer;
- (c) engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation;
- (d) engage in conduct in connection with the practice of law, including when acting in propria persona, that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

**COMMENT**

**Paragraph (a)**

[1] A lawyer is subject to discipline for knowingly assisting or inducing another to violate these Rules or the State Bar Act, or to do so through the

acts of another, as when a lawyer requests or instructs an agent to do so on the lawyer’s behalf.

**Paragraph (b)**

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

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

[2B] In addition to being subject to discipline under paragraph (b), a lawyer may be disciplined under Business and Professions Code section 6106 for acts of moral turpitude that constitute gross negligence. (*Gassman v. State Bar* (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]; *Jackson v. State Bar* (1979) 23

Cal.3d 509 [153 Cal.Rptr. 24]; *In the Matter of Myrdall* (Rev. Dept. 1995 ) 3 Cal. State Bar Ct. Rptr. 363 [habitual disregard of clients' interests]; *Grove v. State Bar* (1967) 66 Cal.2d 680 [58 Cal.Rptr. 564]. See also *Martin v. State Bar* (1978) 20 Cal.3d 717 [144 Cal.Rptr. 214]; *Selznick v. State Bar* (1976) 16 Cal.3d 704 [129 Cal.Rptr. 108]; *In the Matter of Varakin* (Rev. Dept. 1994) 3 Cal State Bar Rptr 179 [pattern of misconduct]; *In re Calloway* (1977) 20 Cal.3d 165 [141 Cal.Rptr. 805 [act of baseness, vileness or depravity in the private and social duties which a man or woman owes to fellow human beings or to society in general, contrary to the accepted and customary rule of right and duty between human beings]; *In re Craig* (1938) 12 Cal.2d 93 [82 P.2d 442].)

#### **Paragraph (d)**

[2C] Paragraph (d) is not intended to prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution. See, e.g., *Ramirez v. State Bar* (1980) 28 Cal 3d 402, 411 [169 Cal. Rptr 206] (a statement impugning the honesty or integrity of a judge will not result in discipline unless it is shown that the statement is false and was made knowingly or with reckless disregard for truth); *In the Matter of Anderson* (Rev. Dept 1997) 3 Cal. State Bar Ct. Rptr. 775 (disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1443 (a lawyer's statement unrelated to a matter pending before the court may be sanctioned only if the statement poses a clear and present danger to the administration of justice).

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age or sexual orientation, violates

paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (b).

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

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

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