

**Rule 1.0 [1-100] Purpose and Function of the Rules ~~Of~~ Professional Conduct,
In-General
(Redline Comparison of the Proposed Rule to Current California Rule)**

~~(a)~~(A) Purpose ~~and Function.~~

The following rules are intended to regulate professional conduct of ~~members of the State Bar~~lawyers through discipline. They have been adopted by the Board of ~~Governors~~Trustees of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code ~~sections~~§§ 6076 and 6077 to protect the public ~~and to, the courts, and the legal profession; protect the integrity of the legal system; and~~ promote ~~respect~~the administration of justice and confidence in the legal profession. These ~~rules~~Rules together with any standards adopted by the Board of ~~Governors~~Trustees pursuant to these ~~rules~~Rules shall be binding upon all ~~members of the State Bar~~lawyers.

(b) Function.

- (1) For ~~a~~A willful ~~breach~~violation of any of these rules, ~~the Board of Governors has the power to~~ is a basis for discipline ~~members as provided by law.~~
- (2) The prohibition of certain conduct in these rules is not exclusive. ~~Members~~Lawyers are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California courts. ~~Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.~~
- (3) A violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule. Nothing in these Rules or the Comments to the Rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.

~~These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.~~

~~(B) Definitions.~~

- ~~(1) “Law Firm” means:~~
 - ~~(a) two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or~~
 - ~~(b) a law corporation which employs more than one lawyer; or~~

~~(c) a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or~~

~~(d) a publicly funded entity which employs more than one lawyer to perform legal services.~~

~~(2) “Member” means a member of the State Bar of California.~~

~~(3) “Lawyer” means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof.~~

~~(4) “Associate” means an employee or fellow employee who is employed as a lawyer.~~

~~(5) “Shareholder” means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.~~

~~(c)~~(C) Purpose of ~~Discussions~~Comments.

The comments are not a basis for imposing discipline but are intended only to provide guidance for interpreting and practicing in compliance with the Rules.

~~Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them.~~

~~(D)~~ Geographic Scope of Rules.

~~(1) As to members:~~

~~These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.~~

~~(2) As to lawyers from other jurisdictions who are not members:~~

~~These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.~~

~~(d)~~(E) These ~~rules~~Rules may be cited and referred to as the “California Rules of Professional Conduct of the State Bar of California.”

Discussion:Comment

[1] The Rules of Professional Conduct are intended to establish the standards for ~~members~~lawyers for purposes of discipline. (See *Ames v. State Bar* (1973) 8 Cal.3d 910, 917 [106 Cal.Rptr. 489].) ~~The fact that a member has engaged in conduct that may be contrary to these rules does not automatically give rise to a civil cause of action. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654 [109 Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324 [109 Cal.Rptr. 269].) Therefore, failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. Because the Rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]. Nevertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. *Id.*; *Mirabito v. Liccardo* (1992) 4 Cal.App.3d 1324 [109 Cal.Rptr. 269].) ~~These rules are not intended to supercede existing law relating to members in 2d 571]. A violation of a rule may have other non-disciplinary contexts consequences. (See, e.g., *Klemm Fletcher v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (motion for disqualification of counsel due to a conflict of interest); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (disqualification of member appropriate remedy for improper communication with adverse party).) *Davis* (2004) 33 Cal.4th 61, 71-72 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); *Chambers v. Kay* (2002) 29 Cal.4th 142, 161 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement).~~~~

~~Law firm, as defined by subparagraph (B)(1), is not intended to include an association of lawyers who do not share profits, expenses, and liabilities. The subparagraph is not intended to imply that a law firm may include a person who is not a member in violation of the law governing the unauthorized practice of law.~~

[2] While the rules are intended to regulate professional conduct of lawyers*, a violation of a rule can occur when a lawyer* is not practicing law or acting in a professional capacity.

[3] A willful violation of a rule does not require that the lawyer intend to violate the rule. *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952 [264 Cal.Rptr. 346]; and see Business and Professions Code § 6077.

[4] In addition to the sources of guidance identified in paragraph (b)(2), opinions of ethics committees in California, although not binding, should be consulted for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

[5] The disciplinary standards created by these Rules are not intended to address all aspects of a lawyer's professional obligations. A lawyer, as a member of the legal profession, is a representative and advisor of clients, an officer of the legal system and a public citizen having special responsibilities for the quality of justice. A lawyer should be aware of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons* who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers are encouraged to devote professional time and resources and use civic influence to ensure equal access to the system of justice for those who because of economic or social barriers cannot afford or secure adequate legal counsel. In meeting this responsibility, every lawyer should aspire to render at least fifty hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should provide a substantial* majority of such hours to indigent individuals or to nonprofit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged. See Business and Professions Code § 6073 (financial support for programs providing pro bono legal services).

Rule 1.0.1 [1-100(B)] ~~Rules of Professional Conduct, in General~~ Terminology
(Redline Comparison of the Proposed Rule to Current California Rule)

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- (a) “Belief” or “believes” means that the person involved actually supposes the fact in question to be true. A person’s belief may be inferred from circumstances.
- (B) ~~Definitions.~~
- (1) ~~“Law Firm” means:~~
- (a) ~~two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or~~
- (b) ~~a law corporation which employs more than one lawyer; or~~ [Reserved]
- (c) ~~a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or~~ “Firm” or “law firm” means a law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.
- (d) ~~a publicly funded entity which employs more than one lawyer to perform legal services~~ “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 and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.
- (e-1) “Informed written consent” means that the disclosures and the 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.
- (2g) “MemberPartner” means a member of ~~the State Bar of California~~ a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
- (3) ~~“Lawyer” means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to~~

~~practice before the bar of the highest court of, a foreign country or any political subdivision thereof.~~

- (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.
- (4j) ~~“Associate” means an employee or fellow employee who is employed as~~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.
- (5) ~~“Shareholder” means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.~~
- (k) “Screened” means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law 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 nonlawyer 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, an administrative law judge, or an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.
- (n) “Writing” or “written” has the meaning stated in Evidence Code § 250. A “signed” writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person with the intent to sign the writing.

Comment

Firm* or Law Firm*

[1] Practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a law firm. However, if they present themselves to the public in a way that suggests that they are a law firm* or conduct

themselves as a law 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.

[2] The term “of counsel” implies that the lawyer so designated has a relationship with the law firm,* other than as a partner* or associate, or officer or shareholder, that is close, personal, continuous, and regular. Whether a lawyer who is denominated as “of counsel” or by a similar term should be deemed a member of a law firm* for purposes of these Rules will also depend on the specific facts. Compare *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816] with *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].

Fraud*

[3] When the terms “fraud”* or “fraudulent”* are used in these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform because requiring the proof of those elements of fraud would impede the purpose of certain rules to prevent fraud* or avoid a lawyer assisting in the perpetration of a fraud,* or otherwise frustrate the imposition of discipline on lawyers who engage in fraudulent* conduct. The term “fraud”* or “fraudulent”* when used in these Rules does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information.

Informed Consent* and Informed Written Consent*

[4] The communication necessary to obtain informed consent* or informed written consent* will vary according to the rule involved and the circumstances giving rise to the need to obtain consent.

[Screened*]

[5] 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 nonlawyer 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 nonlawyer personnel in the law firm* with respect to the matter. Similarly, other lawyers and nonlawyer personnel in the law 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 law firm* personnel of the presence of the screening, it may be appropriate for the law firm* to undertake such procedures as a written* undertaking by the personally prohibited lawyer to avoid any communication with other law firm* personnel and any contact with any law firm* files or other materials relating to the matter, written* notice and

instructions to all other law firm* personnel forbidding any communication with the personally prohibited lawyer relating to the matter, denial of access by that lawyer to law firm* files or other materials relating to the matter, and periodic reminders of the screen to the personally prohibited lawyer and all other law firm* personnel.

[6] 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.

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Discussion:

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~~Law firm, as defined by subparagraph (B)(1), is not intended to include an association of lawyers who do not share profits, expenses, and liabilities. The subparagraph is not intended to imply that a law firm may include a person who is not a member in violation of the law governing the unauthorized practice of law.~~

Rule 1.1 [3-110] ~~Failing to Act Competently~~ Competence
(Redline Comparison of the Proposed Rule to Current California Rule)

- (Aa) A ~~member~~lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
- (Bb) For purposes of this ~~rule~~, "Rule, "competence"" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably* necessary for the performance of such service.
- (Cc) If a ~~member~~lawyer does not have sufficient learning and skill when the legal ~~service~~ is services are undertaken, the ~~member may~~lawyer nonetheless ~~perform such services competently~~may provide competent representation by (1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably ~~believed~~believes* to be competent, ~~or~~ (2) by acquiring sufficient learning and skill before performance is required, or 3) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.
- (d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required ~~where~~if referral to, or association or consultation with, another lawyer would be impractical. ~~Even~~ Assistance in an emergency, ~~however, assistance should~~ must be limited to that reasonably* necessary in the circumstances.

Discussion ~~Comment~~

~~The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)~~

[1] This Rule addresses only a lawyer's responsibility for his or her own professional competence. See Rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[2] See Rule 1.3 with respect to a lawyer's duty to act with reasonable* diligence.

**Rule 1.2 [3-210] ~~Advising the Violation of Law~~ Scope of Representation and Allocation of Authority
(Redline Comparison of the Proposed Rule to Current California Rule)**

~~A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.~~

- (a) Subject to Rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall reasonably* consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code § 6068(e)(1) and Rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer may limit the scope of the representation if the limitation is reasonable* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.

Discussion Comment

~~Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client from the member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See *People v. Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)~~

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g., Cal. Constitution Article I, § 16; Penal Code § 1018. A lawyer retained to represent a client is authorized to act on behalf of the client, such as in procedural matters and in making certain tactical decisions. A lawyer is not authorized merely by virtue of the lawyer's retention to impair the client's substantive rights or the client's claim itself. *Blanton v. Womanicare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].

[2] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material

change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may revoke such authority at any time.

Independence from Client's Views or Activities

[3] A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

Agreements Limiting Scope of Representation

[4] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8.1 and 5.6. See also California Rules of Court 3.35-3.37 (limited scope rules applicable in civil matters generally), and 5.425 (limited scope rule applicable in family law matters).

**Rule 1.2 [3-210] Scope of Representation and
Allocation of Authority ~~Between Client and Lawyer~~
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

- (a) Subject to ~~paragraphs (c) and (d)~~Rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall reasonably* consult with the client as to the means by which they are to be pursued. A Subject to Business and Professions Code § 6068(e)(1) and Rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. ~~In~~ Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- ~~(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.~~
- ~~(c)~~ (e) A lawyer may limit the scope of the representation if the limitation is reasonable* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.
- ~~(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.~~

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. ~~The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.~~See e.g., Cal. Constitution Article I, § 16; Penal Code § 1018. A lawyer retained to represent a client is authorized to act on behalf of the client, such as in procedural matters and in making certain tactical decisions. A lawyer is not authorized merely by virtue of the lawyer's retention to impair the client's substantive rights or the client's claim itself. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].

~~[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).~~

[32] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, ~~however,~~ revoke such authority at any time.

~~[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.~~

Independence from Client's Views or Activities

[53] ~~Legal~~A lawyer's representation ~~should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client~~ of a client, including representation by appointment, does not constitute ~~approval~~an endorsement of the client's political, economic, social or moral views or activities.

Agreements Limiting Scope of Representation

~~[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.~~

~~[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the~~

~~client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.~~

[84] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, [4.81.8.1](#) and 5.6. [See also California Rules of Court 3.35-3.37 \(limited scope rules applicable in civil matters generally\), and 5.425 \(limited scope rule applicable in family law matters\).](#)

Criminal, Fraudulent and Prohibited Transactions

~~[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.~~

~~[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.~~

~~[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.~~

~~[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.~~

~~[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).~~

Rule 1.2.1 [3-210] Advising or Assisting the Violation of Law
(Redline Comparison of the Proposed Rule to ABA Model Rule)

- (a) A lawyer shall not advise or knowingly* assist a client in the violation of any law, rule, or ruling of a tribunal* unless the lawyer believes* in good faith that such law, rule, or ruling is invalid. A lawyer may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.
- ~~(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.~~
- (b) ~~A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.~~ lawyer shall not advise or knowingly* assist a client in a fraudulent* act.
- (c) ~~A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.~~ discuss the legal consequences of any proposed course of conduct with a client.
- ~~(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.~~

Comment

Allocation of Authority between Client and Lawyer

~~[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.~~

~~[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish~~

~~their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).~~

~~[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.~~

~~[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.~~

~~*Independence from Client's Views or Activities*~~

~~[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.~~

~~*Agreements Limiting Scope of Representation*~~

~~[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.~~

~~[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an~~

~~agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.~~

~~[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.~~

Criminal, Fraudulent and Prohibited Transactions

~~[91] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction under this Rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud* might be committed with impunity. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent* does not of itself make a lawyer a party to the course of action.~~

~~[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this Rule, a lawyer shall not violate the duty of confidentiality as provided in Rule 1.6 and Business and Professions Code § 6068(e)(1). In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rules 1.13 and 1.16.~~

~~[3] Determining the validity, scope, meaning or application of a law, rule, or ruling of a tribunal* in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal,* or of the meaning placed upon it by governmental authorities.~~

~~[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.~~

~~[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.~~

~~[124] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal~~

~~or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.~~ (c) authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal* that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes* to be unjust or invalid.

[~~135~~5] If a lawyer comes to know or reasonably should know* that a client expects assistance not permitted by ~~the~~these Rules ~~of Professional Conduct~~ or other law or if the lawyer intends to act contrary to the ~~client's~~client's instructions, the lawyer must ~~consult with~~advise the client regarding the limitations on the ~~lawyer's~~lawyer's conduct. See Rule 1.4(a)(~~54~~54).

Rule 1.3 Diligence
(Redline Comparison of the Proposed Rule to ABA Model Rule)

- (a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to act with reasonable* diligence ~~and promptness~~ in representing a client.
- (b) For purposes of this Rule, “reasonable diligence” shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or without just cause, unduly delay a legal matter entrusted to the lawyer.

Comment

[1] This Rule addresses only a lawyer’s responsibility for his or her own professional diligence. See Rules 5.1 and 5.3 with respect to a lawyer’s disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

~~[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.~~

~~[2] A lawyer’s work load must be controlled so that each matter can be handled competently~~See Rule 1.1 with respect to a lawyer’s duty to perform legal services with competence.

~~[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client’s interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed. Even when the client’s interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness. A lawyer’s duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer’s client.~~

~~[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer’s employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client lawyer~~

~~relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.~~

~~[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).~~

Rule 1.4 [3-500] Communication with Clients
(Redline Comparison of the Proposed Rule to Current California Rule)

- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent,* as defined in [Rule 1.0.1(e),] is required by these Rules or the State Bar Act;
 - (2) reasonably* consult with the client about the means by which to accomplish the client's objectives in the representation;
 - (3) ~~A member shall~~ keep at the client reasonably* informed about significant developments relating to the ~~employment or~~ representation, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed;;
and
 - (4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation.
- (c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes* that the client would be likely to react in a way that may cause imminent harm to the client or others.
- (d) A lawyer's obligation under this Rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or statutory limitation.

Discussion Comment

~~Rule 3-500 is not intended to change a member's duties to his or her clients. It is intended to make clear that, while a client must be informed of significant developments in the matter, a member will not be disciplined for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, §6068, subd. (m).)~~

~~A member may contract with the client in their employment agreement that the client assumes responsibility for the cost of copying significant documents. This rule is not intended to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.~~

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code §

6068(m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances.

[2] A lawyer may comply with paragraph (a)(3) by providing to the client copies of significant documents by electronic or other means. This Rule does not prohibit a lawyer from seeking recovery of the lawyer's expense in any subsequent legal proceeding.

[3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation (see Rule 1.16(e)(1)).

[4] This Rule ~~3-500~~ is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the ~~member~~lawyer to provide work product to the client shall be governed by relevant statutory and decisional law. ~~Additionally, this rule is not intended to apply to any document or correspondence that is subject to a protective order or non-disclosure agreement, or to override applicable statutory or decisional law requiring that certain information not be provided to criminal defendants who are clients of the member.~~

Rule 1.4.1 [3-510] Communication of Settlement OfferOffers
(Redline Comparison of the Proposed Rule to Current California Rule)

~~(a)~~(A) A ~~member~~ lawyer shall promptly communicate to the ~~member's~~lawyer's client:

- (1) ~~All~~all terms and conditions of ~~any~~any proposed plea bargain or other dispositive offer made to the client in a criminal matter; and
- (2) ~~All~~all amounts, terms, and conditions of any written* offer of settlement made to the client in all other matters.

~~(b)~~(B) As used in this ~~rule~~Rule, “client” includes a person* who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

CommentDiscussion

~~Rule 3-510 is intended to require that counsel in a criminal matter convey all offers, whether written or oral, to the client, as give and take negotiations are less common in criminal matters, and, even were they to occur, such negotiations should require the participation of the accused.~~

~~Any~~An oral ~~offers~~offer of settlement made to the client in a civil matter ~~should~~must also be communicated if ~~they are~~it is a “significant”~~for the purposes of rule 3-500.~~
development” under Rule 1.4.

**Rule ~~3-410~~1.4.2 Disclosure of Professional Liability Insurance
(Redline Comparison of the Proposed Rule to Current California Rule)**

- (Aa) A ~~member~~lawyer who knows* or reasonably should know* that ~~he or she~~the lawyer 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's legal representation of the client in the matter will exceed four hours.~~
- (b) If notice under paragraph (a) has not been provided at the time of a client's engagement of the lawyer, the lawyer shall inform the client in writing* within thirty days of the date the lawyer knows* or reasonably should know* that the lawyer no longer has professional liability insurance during the representation of the client.
- (c) This Rule does not apply to:
- (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.~~
- (1) a lawyer who knows* or reasonably should know* at the time of the client's engagement of the lawyer that the lawyer's legal representation of the client in the matter will not exceed four hours; provided that if the representation subsequently exceeds four hours, the lawyer must comply with paragraphs (a) and (b);
- (G2) ~~This rule does not apply to a member~~a 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.;
- (D3) ~~This rule does not apply to~~a lawyer who is rendering legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.;
- (E4) ~~This rule does not apply where the member~~a lawyer who has previously advised the client in writing* under ~~Paragraph (A)~~paragraph (a) or (Bb) that the ~~member~~lawyer does not have professional liability insurance.

CommentDiscussion

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

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[2] A ~~member~~lawyer may use the following language in making the disclosure required by ~~Rule 3-410~~paragraph (Aa), 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~~1.4.2, I am informing you in writing that I do not have professional liability insurance.”

[3] A ~~member~~lawyer may use the following language in making the disclosure required by ~~Rule 3-410~~paragraph (Bb):

“Pursuant to California Rule of Professional Conduct ~~3-410~~1.4.2, I am informing you in writing that I no longer have professional liability insurance.”

[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~~The exception in paragraph (c)(2) for government lawyers and in-house counsels is limited to situations involving direct employment and representation, and ~~de~~does not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured. If a lawyer is employed by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity is presumed to know whether the lawyer is or is not covered by professional liability insurance.

Rule 1.5 [4-200] Fees for Legal Services
(Redline Comparison of the Proposed Rule to Current California Rule)

- (Aa) A ~~member~~lawyer shall not ~~enter into~~make an agreement for, charge, or collect an ~~illegal or~~unconscionable or illegal fee.
- (Bb) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. ~~Among the~~The factors to be considered, ~~where appropriate,~~ in determining the ~~conscionability~~unconscionability of a fee ~~are~~include without limitation the following:
- (1) whether the lawyer engaged in fraud* or overreaching in negotiating or setting the fee;
 - (2) whether the lawyer has failed to disclose material facts;
 - (43) ~~The~~the amount of the fee in proportion to the value of the services performed~~;~~;
 - (24) ~~The~~the relative sophistication of the ~~member~~lawyer and the client~~;~~;
 - (35) ~~The~~the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly~~;~~;
 - (46) ~~The~~the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the ~~member~~lawyer~~;~~;
 - (57) ~~The~~the amount involved and the results obtained~~;~~;
 - (68) ~~The~~the time limitations imposed by the client or by the circumstances~~;~~;
 - (79) ~~The~~the nature and length of the professional relationship with the client~~;~~;
 - (810) ~~The~~the experience, reputation, and ability of the ~~member~~or ~~members~~lawyer or lawyers performing the services~~;~~;
 - (911) ~~Whether~~whether the fee is fixed or contingent~~;~~;
 - (4012) ~~The~~the time and labor required~~;~~;
 - (14) ~~The~~13) whether the client gave informed consent* ~~of the client~~ to the fee.
- (c) A lawyer shall not enter into an arrangement for, charge, or collect:

- (1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or
- (2) a contingent fee for representing a defendant in a criminal case.
- (d) A lawyer may make an agreement for, charge, or collect a fee that is denominated as “earned on receipt” or “non-refundable,” or in similar terms, only if the fee is a true retainer and the client agrees in writing* after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer’s availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.
- (e) A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services as long as the lawyer performs the agreed upon services. A flat fee is a fee which constitutes complete payment for legal fees to be performed in the future for a fixed sum regardless of the amount of work ultimately involved and which may be paid in whole or in part in advance of the lawyer providing those services.

Comment

Prohibited Contingent Fees

[1] Paragraph (c)(1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under child or spousal support or other financial orders.

Payment of Fees in Advance of Services

[2] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. See Rule 1.16(e)(2).

Division of Fee

[3] A division of fees among lawyers is governed by Rule 1.5.1.

**Rule 1.5.1 [2-200] Financial Arrangements Fee Divisions Among Lawyers
(Redline Comparison of the Proposed Rule to Current California Rule)**

- (Aa) ~~A member~~ Lawyers who are not in the same law firm* shall not divide a fee for legal services ~~with a lawyer who is not a partner of, associate of, or shareholder with the member~~ unless:
- (1) the lawyers enter into a written* agreement to divide the fee;
 - (12) ~~The~~ the client has consented in writing ~~thereto,*~~ either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably* practicable, after a full written* disclosure ~~has been made in writing~~ to the client of: (i) the fact that a division of fees will be made ~~and,~~ (ii) the identity of the lawyers or law firms* that are parties to the division, and (iii) the terms of ~~such~~ the division; and
 - (23) ~~The~~ the total fee charged by all lawyers is not increased solely by reason of the ~~provision for division of fees and is not unconscionable as that term is defined in rule 4-200~~ agreement to divide fees.
- (b) This Rule does not apply to a division of fees pursuant to court order.

**Rule 1.6 [3-100] Confidential Information of a Client
(Redline Comparison of the Proposed Rule to Current California Rule)**

- (a) A ~~member~~lawyer shall not reveal information protected from disclosure by Business and Professions Code ~~section~~§ 6068, ~~subdivision~~(e)(1) ~~without~~unless the client gives informed consent* ~~of the client, or as provided in, or the disclosure is permitted by~~ paragraph (b) of this Rule.
- (b) A ~~member~~lawyer may, but is not required to, reveal ~~confidential~~information ~~relating to the representation of a client to the~~protected by Business and Professions Code § 6068(e)(1) to the extent that the ~~member~~lawyer reasonably believes* the disclosure is necessary to prevent a criminal act that the ~~member~~lawyer reasonably believes* is likely to result in death of, or substantial* bodily harm to, an individual, as provided in paragraph (c).
- (c) Before revealing ~~confidential~~information protected by Business and Professions Code § 6068(e)(1) to prevent a criminal act as provided in paragraph (b), a ~~member~~lawyer shall, if reasonable* under the circumstances:
 - (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial* bodily harm; or do both (i) and (ii); and
 - (2) inform the client, at an appropriate time, of the ~~member's~~lawyer's ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1) as provided in paragraph (b).
- (d) In revealing ~~confidential~~information protected by Business and Professions Code § 6068(e)(1) as provided in paragraph (b), the ~~member's~~lawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known* to the ~~member~~lawyer at the time of the disclosure.
- (e) A ~~member~~lawyer who does not reveal information permitted by paragraph (b) does not violate this Rule.

DiscussionComment

Duty of confidentiality.

[1] ~~Duty of confidentiality.~~ Paragraph (a) relates to a ~~member's~~lawyer's obligations under Business and Professions Code ~~section~~§ 6068, ~~subdivision~~(e)(1), which provides it is a duty of a ~~member~~lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A ~~member's~~lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the ~~client-lawyer~~lawyer-client relationship. The client is thereby encouraged

to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or ~~legally damaging subject matter.~~ ~~The~~ detrimental subjects. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (a) thus recognizes a fundamental principle in the ~~client-lawyer~~ lawyer-client relationship, that, in the absence of the ~~client's~~ client's informed consent,* a ~~member~~ lawyer must not reveal information ~~relating to the representation~~ protected by Business and Professions Code § 6068(e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

[2] ~~Client-lawyer~~ Lawyer-client confidentiality encompasses the ~~attorney-client~~ lawyer-client privilege, the work-product doctrine and ethical standards of confidentiality.

[2] The principle of ~~client-lawyer~~ lawyer-client confidentiality applies to information ~~relating to a lawyer acquires by virtue of~~ the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the ~~attorney-client~~ lawyer-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal.Rptr. 253].) The ~~attorney-client~~ lawyer-client privilege and work-product doctrine apply in judicial and other proceedings in which a ~~member~~ lawyer may be called as a witness or be otherwise compelled to produce evidence concerning a client. A ~~member's~~ lawyer's ethical duty of confidentiality is not so limited in its scope of protection for the ~~client-lawyer~~ lawyer-client relationship of trust and prevents a ~~member~~ lawyer from revealing the ~~client's confidential~~ client's information even when not ~~confronted with~~ subjected to such compulsion. Thus, a ~~member~~ lawyer may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these Rules, or other law.

[3] *Narrow exception to duty of confidentiality under this Rule.*

[3] Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited ~~under~~ by Business ~~&~~ and Professions Code ~~section~~ § 6068, ~~subdivision~~ (e)(1). Paragraph (b), ~~which restates is based on~~ Business and Professions Code ~~section~~ § 6068, ~~subdivision~~ (e)(2), identifies a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual which narrowly permits a lawyer to disclose information protected by Business and Professions Code § 6068(e)(1) even without client consent. Evidence Code ~~section~~ § 956.5, which relates to the evidentiary ~~attorney-client~~ lawyer-client privilege, sets forth a similar express exception. Although a ~~member~~ lawyer is not permitted to reveal ~~confidential~~ information protected by §

6068(e)(1) concerning a ~~client's~~client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

~~[4] Member~~Lawyer not subject to discipline for revealing ~~confidential~~information protected by Business and Professions Code § 6068(e)(1) as permitted under this Rule. ~~Rule 3-100, which restates Business and Professions Code section 6068, subdivision (e)(2),~~

[4] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a ~~member~~lawyer reasonably believes* is likely to result in death or substantial* bodily harm to an individual. A ~~member~~lawyer who reveals information protected by Business and Professions Code § 6068(e)(1) as permitted under this Rule is not subject to discipline.

No duty to reveal information protected by Business and Professions Code § 6068(e)(1).

~~[5] No duty to reveal confidential information.~~ Neither Business and Professions Code ~~section § 6068, subdivision (e)(2)~~ nor ~~this rule~~paragraph (b) imposes an affirmative obligation on a ~~member~~lawyer to reveal information protected by Business and Professions Code § 6068(e)(1) in order to prevent harm. ~~(See rule 1-100(A).) A member lawyer~~ may decide not to reveal ~~confidential~~such information. Whether a ~~member~~lawyer chooses to reveal ~~confidential~~ information protected by § 6068(e)(1) as permitted under this Rule is a matter for the individual ~~member~~lawyer to decide, based on all the facts and circumstances, such as those discussed in paragraph Comment [6] of this ~~discussion~~Rule.

Whether to reveal information protected by Business and Professions Code § 6068(e) as permitted under paragraph (b).

~~[6] Deciding to reveal confidential information as permitted under paragraph (B).~~ Disclosure permitted under paragraph (b) is ordinarily a last resort, when no other available action is reasonably* likely to prevent the criminal act. Prior to revealing information protected by Business and Professions Code § 6068(e)(1) as permitted ~~under~~by paragraph (b), the ~~member~~lawyer must, if reasonable* under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose ~~confidential~~ information protected by § 6068(e)(1) are the following:

(1) the amount of time that the ~~member~~lawyer has to make a decision about disclosure;

(2) whether the client or a third-party has made similar threats before and whether they have ever acted or attempted to act upon them;

(3) whether the ~~member~~lawyer believes* the ~~member's~~lawyer's efforts to persuade the client or a third person* not to engage in the criminal conduct have or have not been successful;

(4) the extent of adverse effect to the ~~client's~~client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article I of the Constitution of the State of California that may result from disclosure contemplated by the ~~member~~lawyer;

(5) the extent of other adverse effects to the client that may result from disclosure contemplated by the ~~member~~lawyer; and

(6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A ~~member~~lawyer may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the ~~confidential~~information protected by § 6068(e)(1). However, the imminence of the harm is not a prerequisite to disclosure and a ~~member~~lawyer may disclose the information protected by § 6068(e)(1) without waiting until immediately before the harm is likely to occur.

~~[7] Counseling~~*Whether to counsel client or third person* not to commit a criminal act reasonably* likely to result in death of substantial* bodily harm.*

~~[7]~~ Subparagraph (c)(1) provides that before a ~~member~~lawyer may reveal ~~confidential~~ information, ~~the member~~ protected by Business and Professions Code § 6068(e)(1), the lawyer must, if reasonable* under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial* bodily harm, ~~or including persuading the client to take action to prevent a third person* from committing or continuing a criminal act.~~ If necessary, the client may be persuaded to do both. The interests protected by such counseling ~~is the client's interest~~ are the client's interests in limiting disclosure of ~~confidential~~information protected by § 6068(e) and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the ~~member's~~lawyer's counseling or otherwise, takes corrective action - such as by ceasing the client's own criminal act or by dissuading a third person* from committing or continuing a criminal act before harm is caused - the option for permissive disclosure by the ~~member~~lawyer would cease ~~as~~because the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the ~~member~~lawyer who contemplates making adverse disclosure of ~~confidential~~protected information may reasonably* conclude that the compelling interests of the ~~member~~lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the ~~member~~lawyer should, if reasonable* under the circumstances, first advise the client of the ~~member's~~lawyer's intended course of action. If a client or another person* has already acted but the intended harm has not yet occurred, the ~~member~~lawyer should consider, if reasonable*

under the circumstances, efforts to persuade the client or third person* to warn the victim or consider other appropriate action to prevent the harm. Even when the ~~member~~lawyer has concluded that paragraph (b) does not permit the ~~member~~lawyer to reveal ~~confidential~~ information, ~~the member~~ protected by § 6068(e)(1), the lawyer nevertheless is permitted to counsel the client as to why it may be in the ~~client's~~client's best interest to consent to the ~~attorney's~~attorney's disclosure of that information.

~~[8] Disclosure of confidential information~~ protected by Business and Professions Code § 6068(e)(1) must be no more than is reasonably* necessary to prevent the criminal act. Under

[8] Paragraph (d), requires that disclosure of ~~confidential~~ information protected by § 6068(e) as permitted by paragraph (b), when made, must be no more extensive than the ~~member~~lawyer reasonably believes* necessary to prevent the criminal act. Disclosure should allow access to the ~~confidential~~ information to only those persons* who the ~~member~~lawyer reasonably believes* can act to prevent the harm. Under some circumstances, a ~~member~~lawyer may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable* depends on the circumstances known* to the ~~member~~lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the ~~member's~~lawyer's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the ~~member~~lawyer.

Informing client pursuant to subparagraph (c)(2) of lawyer's ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1).

~~[9] Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).~~—A ~~member~~lawyer is required to keep a client reasonably* informed about significant developments regarding the employment or representation. Rule ~~3-500~~1.4; Business and Professions Code, ~~section §~~ 6068, ~~subdivision~~ (m). Paragraph (c)(2), however, recognizes that under certain circumstances, informing a client of the ~~member's~~lawyer's ability or decision to reveal ~~confidential~~ information ~~under~~protected by § 6068(e)(1) as permitted in paragraph (b) would likely increase the risk of death or substantial* bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the ~~client's~~client's family, or to the ~~member~~lawyer or the ~~member's~~lawyer's family or associates. Therefore, paragraph (c)(2) requires a ~~member~~lawyer to inform the client of the ~~member's~~lawyer's ability or decision to reveal ~~confidential~~ information ~~as provided~~protected by § 6068(e)(1) as permitted in paragraph (b) only if it is reasonable* to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the ~~member~~lawyer to inform the client may vary depending upon the circumstances. (See paragraph Comment [10] of this ~~discussion~~Rule.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

- (1) whether the client is an experienced user of legal services;

- (2) the frequency of the ~~member's~~lawyer's contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the ~~member~~lawyer and client have discussed the ~~member's~~lawyer's duty of confidentiality or any exceptions to that duty;
- (5) the likelihood that the ~~client's~~client's matter will involve information within paragraph (b);
- (6) the ~~member's~~lawyer's belief,* if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial* bodily harm to, an individual; and
- (7) the ~~member's~~lawyer's belief,* if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

Avoiding a chilling effect on the lawyer-client relationship.

[10] ~~Avoiding a chilling effect on the lawyer-client relationship.~~—The foregoing flexible approach to the ~~member's~~lawyer's informing a client of his or her ability or decision to reveal ~~confidential~~—information protected by Business and Professions Code § 6068(e)(1) recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Discussion paragraph Comment [1].) To avoid that chilling effect, one ~~member~~lawyer may choose to inform the client of the ~~member's~~lawyer's ability to reveal information protected by § 6068(e)(1) as early as the outset of the representation, while another ~~member~~lawyer may choose to inform a client only at a point when that client has imparted information that ~~may fall under~~comes within paragraph (b), or even choose not to inform a client until such time as the ~~member~~lawyer attempts to counsel the client as contemplated in Discussion paragraph Comment [7]. In each situation, the ~~member will have discharged properly the requirement under subparagraph~~lawyer will have satisfied the lawyer's obligation under paragraph (c)(2), and will not be subject to discipline.

[14] *Informing client that disclosure has been made; termination of the lawyer-client relationship.*

[11] When a ~~member~~lawyer has revealed ~~confidential~~—information underprotected by Business and Professions Code § 6068(e) as permitted in paragraph (b), in all but extraordinary cases the relationship between ~~member~~lawyer and client that is based on trust and confidence will have deteriorated so as to make the ~~member's~~lawyer's representation of the client impossible. Therefore, when the ~~member~~relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation (see Rule 1.16(ab) [~~3-700(B)~~]), unless the ~~member is able to obtain the client's~~client has given informed consent* to the ~~member's~~lawyer's continued representation. The ~~member~~lawyer normally must inform the client of the fact of the ~~member's~~lawyer's disclosure—unless. If the ~~member~~lawyer has a compelling interest in not informing the client, such as to protect the ~~member~~lawyer, the

~~member's~~lawyer's family or a third person* from the risk of death or substantial* bodily harm-, the lawyer must withdraw from the representation. (See Rule 1.16.)

Other consequences of the lawyer's disclosure.

[12] ~~Other consequences of the member's disclosure.~~—Depending upon the circumstances of a ~~member's~~lawyer's disclosure of ~~confidential~~information protected by Business and Professions Code § 6068(e)(1) as permitted by this Rule, there may be other important issues that a ~~member~~lawyer must address. For example, ~~if a member will be called~~lawyer who is likely to testify as a witness in ~~the client's~~a matter, ~~then involving a client must comply with~~ Rule ~~3.75-210 should be considered~~. Similarly, the ~~member should~~lawyer must also consider his or her duties of loyalty and ~~competency (rule 3-110~~competence. (See Rules 1.7 (Conflicts of Interest: Current Clients) and 1.1 (Competence).)

[13] *Other exceptions to confidentiality under California law.* This Rule ~~3-100~~ is not intended to augment, diminish, or preclude ~~reliance upon~~, any other exceptions to the duty to preserve ~~the confidentiality of client~~information protected by Business and Professions Code § 6068(e)(1) recognized under California law.

**Rule 1.7 [3-310] ~~Avoiding the Representation of Adverse Interests~~
Conflict of Interest: Current Clients
(Redline Comparison of the Proposed Rule to Current California Rule**

~~(A) For purposes of this rule:~~

~~(1) “Disclosure” means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;~~

~~(2) “Informed written consent” means the client’s or former client’s written agreement to the representation following written disclosure;~~

~~(3) “Written” means any writing as defined in Evidence Code section 250.~~

(a) A lawyer shall not, without informed written consent* from each client, represent a client if the representation is directly adverse to another client in the same or a separate matter.

(b) A lawyer shall not, without informed written consent* from each affected client, represent a client if there is a significant risk the lawyer’s representation of the client will be materially limited by the lawyer’s responsibilities to or relationships with another client, a former client or a third person,* or the lawyer’s own interests, including when:

~~(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:~~

~~(1) The member has~~ the lawyer has, or knows* that another lawyer in the lawyer’s firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or

~~(2) the lawyer;~~ ~~The member knows or reasonably should know that:~~

~~(a)(i)~~ knows* the ~~member~~ lawyer previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

~~(b)(ii)~~ knows* or reasonably should know* the previous relationship ~~would~~ substantially affect the member’s will materially limit the lawyer’s representation; or

~~(3) The member~~ the lawyer has or had a legal, business, financial, professional, or personal relationship with another person* or entity the ~~member~~ lawyer knows* or reasonably should know* ~~would~~ will be affected substantially by resolution of the matter; or

- (4) ~~The member~~the lawyer has or had, or knows* that another lawyer in the lawyer's firm* has or had, a legal, business, financial, or ~~professional~~personal interest in the subject matter of the representation, ~~that the lawyer knows* or reasonably should know* will materially limit the lawyer's representation; or~~
- (5) the lawyer knows* or reasonably should know* that there is a reasonable* likelihood that the interests of clients being represented by the lawyer in the same matter will conflict.

~~(C) — A member shall not, without the informed written consent of each client:~~

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

~~(d) Representation is permitted under this Rule only if:~~

~~(1) the lawyer reasonably believes* that the lawyer will be able to provide competent and diligent representation to each affected client;~~

~~(2) the representation is not prohibited by law; and~~

~~(1)(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal. — Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or~~

~~(2) — Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or~~

~~(3) — Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.~~

~~(D) — A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.~~

~~(E) — A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.~~

~~(F) — A member shall not accept compensation for representing a client from one other than the client unless:~~

- ~~(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and~~
- ~~(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and~~
- ~~(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:
 - ~~(a) such nondisclosure is otherwise authorized by law; or~~
 - ~~(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.~~~~

DiscussionComment

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent.* Thus, absent consent, a lawyer may not act as an advocate in one matter against a person* the lawyer represents in some other matter, even when the matters are wholly unrelated. See *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. A directly adverse conflict under paragraph (a) occurs when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict; or (ii) a lawyer, while representing a client, accepts in another matter the representation of a person* or organization who, in the first matter, is directly adverse to the lawyer's client. Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require informed written consent* of the respective clients.

~~Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.~~

[2] Paragraph (a) does not prohibit a lawyer from representing multiple clients having antagonistic positions on the same legal question that has arisen in different cases, unless the interests of any of the clients would be adversely affected by the resolution of the legal question. Factors relevant in determining whether the interests of one or more of the clients would be adversely affected, thus requiring that the clients provide informed written consent* under paragraph (a), include: the courts and jurisdictions where the different cases are pending, whether a ruling in one case would have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the

legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable* expectations in retaining the lawyer.

~~Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)~~

~~Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.~~

~~Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.~~

~~While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.~~

~~Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.~~

~~Subparagraphs (C)(1) [3] Paragraphs (a) and (C)(2) are intended to b) apply to all types of legal employment representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners* or a corporation for several shareholders, the preparation of ~~an ante-nuptial~~ a pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. ~~In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain~~ if a lawyer initially represents multiple clients with the informed written consent* of as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients ~~thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member, the lawyer~~ must obtain the further informed written consent* of the clients pursuant to subparagraph under paragraph (C)(2a).~~

~~Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.—~~

[4] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App. 4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) of predecessor rule 3-310 was violated when a member lawyer, retained by an insurer to defend one suit, and while that suit was still pending, filed a

direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, ~~subparagraph (C)(3) is not intended to~~ paragraph (a) does not apply with respect to the relationship between an insurer and a ~~member~~ lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[5] Even where there is no direct adversity, a conflict of interest requiring informed written consent* under paragraph (b) exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer's obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture, may materially limit the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients. The risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably* should be pursued on behalf of each client.

[6] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent* or provide the information required to permit representation under this Rule. (See, e.g., Bus. & Prof. Code § 6068(e)(1) and Rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of this Rule is likewise precluded.

[7] Paragraph (d) imposes conditions that must be satisfied even if informed written consent* is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing* as required by paragraph (c). There are some matters in which the conflicts are such that even informed written consent* may not suffice ~~for non-disciplinary purposes to permit representation~~. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

[8] This Rule does not preclude an informed written consent* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably* understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client

except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

[9] A material change in circumstances relevant to application of this Rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written consents.* In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the clients from whose representation the lawyer has withdrawn. See Rule 1.9(c).

[10] For special rules governing membership in a legal service organization, see Rule 6.3; and for work in conjunction with certain limited legal services programs, see Rule 6.5.

~~Paragraph (D) is not intended to apply to class action settlements subject to court approval.~~

~~Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) (Amended by order of Supreme Court, operative September 14, 1992; operative March 3, 2003.)~~

**Rule 1.7 [3-310] Conflict of Interest: Current Clients
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

- (a) A lawyer shall not, without informed written consent* from each client, represent a client if the representation is directly adverse to another client in the same or a separate matter.
- ~~(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:~~
- ~~(1) the representation of one client will be directly adverse to another client; or~~
- (2b) A lawyer shall not, without informed written consent* from each affected client, represent a client if there is a significant risk that the lawyer's representation of one or more clients the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by a personal interest of the lawyer. the lawyer's own interests, including when:
- (1) the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or
- (2) the lawyer:
- ~~(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:~~
- (i) knows* the lawyer previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
- (ii) knows* or reasonably should know* the previous relationship will materially limit the lawyer's representation; or
- (3) the lawyer has or had a legal, business, financial, professional, or personal relationship with another person* or entity the lawyer knows* or reasonably should know* will be affected substantially by resolution of the matter; or
- (4) the lawyer has or had, or knows* that another lawyer in the lawyer's firm* has or had, a legal, business, financial, or personal interest in the subject matter of the representation that the lawyer knows* or reasonably should know* will materially limit the lawyer's representation; or

(5) the lawyer knows* or reasonably should know* that there is a reasonable* likelihood that the interests of clients being represented by the lawyer in the same matter will conflict.

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

(d) Representation is permitted under this Rule only if:

(1) the lawyer reasonably believes* that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; ~~and.~~

~~(4) each affected client gives informed consent, confirmed in writing.~~

Comment

General Principles

~~[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).~~

~~[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).~~

~~[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-~~

~~litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.~~

~~[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].~~

~~[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).~~

~~Identifying Conflicts of Interest: Directly Adverse~~

~~[61] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent.* Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom See Flatt v. Superior Court (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. A directly adverse conflict under paragraph (a) occurs when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict; or (ii) a lawyer, while representing a client, accepts in another matter the representation of a person* or organization who, in the first matter, is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current to the lawyer's client. Similarly, a directly adverse conflict may direct adversity can arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the~~

other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require informed written consent* of the respective clients.

[2] Paragraph (a) does not prohibit a lawyer from representing multiple clients having antagonistic positions on the same legal question that has arisen in different cases, unless the interests of any of the clients would be adversely affected by the resolution of the legal question. Factors relevant in determining whether the interests of one or more of the clients would be adversely affected, thus requiring that the clients provide informed written consent* under paragraph (a), include: the courts and jurisdictions where the different cases are pending, whether a ruling in one case would have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable expectations in retaining the lawyer.

[3] Paragraphs (a) and (b) apply to all types of legal representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners* or a corporation for several shareholders, the preparation of a pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. If a lawyer initially represents multiple clients with the informed written consent* as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients, the lawyer must obtain further informed written consent* of the clients under paragraph (a).

~~[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.~~

[4] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App. 4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) of predecessor rule 3-310 was violated when a lawyer, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, paragraph (a) does not apply with respect to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

Identifying Conflicts of Interest: Material Limitation

[85] Even where there is no direct ~~adverseness~~adversity, a conflict of interest requiring informed written consent* under paragraph (b) exists if there is a significant

risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a ~~lawyer asked to represent~~ lawyer's obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture ~~is likely to be,~~ may materially ~~limited in~~ limit the ~~lawyer's~~ lawyer's ability to recommend or advocate all possible positions that each might take because of the ~~lawyer's~~ lawyer's duty of loyalty to the ~~others.~~ ~~The conflict in effect forecloses~~ other clients. The risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the ~~client~~ clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the ~~lawyer's~~ lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably* should be pursued on behalf of ~~the~~ each client.

[6] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent* or provide the information required to permit representation under this Rule. (See, e.g., Bus. & Prof. Code § 6068(e)(1) and Rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of this Rule is likewise precluded.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[7] Paragraph (d) imposes conditions that must be satisfied even if informed written consent* is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing* as required by paragraph (c). There are some matters in which the conflicts are such that even informed written consent* may not suffice to permit representation. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

~~[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.~~

Personal Interest Conflicts

~~[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules~~

~~pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).~~

~~[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may **not represent a client in a matter** where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.~~

~~[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).~~

~~*Interest of Person Paying for a Lawyer's Service*~~

~~[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.~~

~~*Prohibited Representations*~~

~~[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.~~

~~[15] Consentability is typically determined by considering whether **the interests of the clients** will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).~~

~~[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.~~

~~[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).~~

~~*Informed Consent*~~

~~[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).~~

~~[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.~~

~~*Consent Confirmed in Writing*~~

~~[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic~~

transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[228] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). This Rule does not preclude an informed written consent* to a future conflict in compliance with applicable case law. The effectiveness of ~~such waivers~~an advance consent is generally determined by the extent to which the client reasonably understands the material risks that the ~~waiver~~consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. ~~Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, An advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).d). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.~~

Conflicts in Litigation

~~[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.~~

~~[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. **Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer.** If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.~~

~~[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.~~

Nonlitigation Conflicts

~~[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with~~

~~the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].~~

~~[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.~~

~~[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.~~

Special Considerations in Common Representation

~~[29] In considering whether to represent multiple **clients in the same matter**, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.~~

~~[309] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised. material change in circumstances relevant to application of this Rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written consents.* In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the clients from whose representation the lawyer has withdrawn. See Rule 1.9(c).~~

~~[10] For special rules governing membership in a legal service organization, see Rule 6.3; and for work in conjunction with certain limited legal services programs, see Rule 6.5.~~

~~[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.~~

~~[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).~~

~~[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning~~

~~the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.~~

Organizational Clients

~~[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.~~

~~[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.~~

**Rule 1.8.1 [3-300] Business Transactions with a Client and
Avoiding Pecuniary Interests Adverse to a Client**
(Redline Comparison of the Proposed Rule to Current California Rule)

A ~~member~~lawyer shall not enter into a business transaction with a client~~;~~¹ or knowingly* acquire an ownership, possessory, security~~;~~⁷ or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

- (Aa) The transaction or acquisition and its terms are fair and reasonable* to the client and the terms and the lawyer's role in the transaction or acquisition are fully disclosed and transmitted in writing* to the client in a manner ~~which should~~that would reasonably* have been understood by the client; ~~and~~
- (Bb) The client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing* ~~that the client may~~to seek the advice of an independent lawyer of the ~~client's~~client's choice and is given a reasonable* opportunity to seek that advice; and
- (Cc) The client thereafter ~~consents in writing~~provides informed written consent* to the terms of the transaction or the terms of the acquisition~~;~~⁷ and the lawyer's role.

Discussion Comment

~~Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by rule 4-200.~~

~~Rule 3-300 is not intended to apply where the member and client each make an investment on terms offered to the general public or a significant portion thereof. For example, rule 3-300 is not intended to apply where A, a member, invests in a limited partnership syndicated by a third party. B, A's client, makes the same investment. Although A and B are each investing in the same business, A did not enter into the transaction "with" B for the purposes of the rule.~~

~~Rule 3-300 is intended to apply where the member wishes to obtain an interest in client's property in order to secure the amount of the member's past due or future fees.~~

[1] This Rule does not apply to the provisions of an agreement between a lawyer and client relating to the lawyer's hiring or compensation unless the agreement confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client. A lawyer has an "other pecuniary interest adverse to a client" within the meaning of this Rule when the lawyer possesses a legal right to significantly impair or prejudice the client's rights or interests without court action. See *Fletcher v. Davis* (2004) 33 Cal. 4th 61, 68 [14 Cal.Rptr.3d 58]. See also Business and Professions Code § 6175.3 (Sale of financial products to elder or dependent adult clients; Disclosure) and Family Code §§ 2033-2034 (Attorney lien on community real property). However, this Rule does not apply to a charging lien given to secure payment of a contingency fee. See *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38 [108 Cal.Rptr.3d 455].

[2] For purposes of this Rule, factors that can be considered in determining whether a lawyer is independent include whether the lawyer: (i) has a financial interest in the transaction or acquisition, and (ii) has a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent.

[3] Fairness and reasonableness under paragraph (a) are measured at the time of the transaction or acquisition based on the facts that then exist.

[4] This Rule does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees, or costs or other expenses, to be incurred in the future. Such agreements are governed, in part, by Rules 1.5 and 1.15.

[5] This Rule does not apply: (i) where a lawyer and client each make an investment on terms offered by a third person* to the general public or a significant portion thereof; or (ii) to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client.

**Rule 1.8.2 ~~Conflict Of Interest: Use of Current Clients:~~
~~Specific Rules~~ Client's Information**
(Redline Comparison of the Proposed Rule to ABA Model Rule)

* * * * *

~~(b)~~ A lawyer shall not use a client's information ~~relating to representation of a client~~protected by Business and Professions Code § 6068(e)(1) to the disadvantage of the client unless the client gives informed consent,* except as permitted ~~or required~~ by these Rules or the State Bar Act.

* * * * *

COMMENT

A lawyer violates the duty of loyalty by using information protected by Business and Professions Code § 6068(e)(1) to the disadvantage of a current client.

* * * * *

Use of Information Related to Representation

~~[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.~~

* * * * *

Rule 1.8.3 [4-400] Gifts From Client
(Redline Comparison of the Proposed Rule to Current California Rule)

(a) A lawyer shall not:

(1) ~~A member shall not induce~~solicit a client to make a substantial* gift, including a testamentary gift, to the ~~member or to the member's parent, child, sibling, or spouse, except where the client is~~lawyer or a person* related to the ~~member.~~lawyer, or

(2) prepare on behalf of a client an instrument giving the lawyer or a person* related to the lawyer any substantial* gift, unless (i) the lawyer or other recipient of the gift is related to the client or (ii) the client has been advised by an independent lawyer who has provided a certificate of independent review that complies with the requirements of Probate Code § 21384.

(b) For purposes of this Rule, related persons* include a person* who is "related by blood or affinity" as that term is defined in California Probate Code § 21374(a).

CommentDiscussion

[1] A ~~member~~lawyer or a person* related to a lawyer may accept a gift from ~~a member's~~the lawyer's client, subject to general standards of fairness and absence of undue influence. ~~The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline. On the other hand, where impermissible influence occurred, A~~lawyer also does not violate this Rule merely by engaging in conduct that might result in a client making a gift, such as by sending the client a wedding announcement. Discipline is appropriate. ~~(where impermissible influence occurs. See Magee v. State Bar (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)~~

[2] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner* or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Such appointments, however, will be subject to Rule 1.7(b).

**Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client
(Redline Comparison of the Proposed Rule to Current California Rule)**

- (Aa) A ~~member~~lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent, ~~or sanction a representation~~ that the ~~member or member's~~lawyer or lawyer'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.~~
- (b) Notwithstanding paragraph (a), a lawyer may:
- (1) ~~With the consent of the client, from paying or agreeing~~pay or agree to pay such expenses to third persons,* from funds collected or to be collected for the client as a result of the representation, with the consent of the client; ~~or~~
 - (2) ~~After employment, from lending~~after the lawyer is retained by the client, agree to lend money to the client ~~upon the client's~~based on the client's written* promise ~~in writing~~ to repay ~~such~~the loan; ~~or, provided the lawyer complies with Rules 1.7(b) and 1.8.1 before making the loan or agreeing to do so;~~
 - (3) ~~From advancing~~advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the ~~client's~~client's interests, the repayment of which may be contingent on the outcome of the matter. ~~Such costs; and~~
 - (4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent or pro bono client in a matter in which the lawyer represents the client.
- (c) “Costs” within the meaning of ~~this subparagraph (3) shall be limited to~~ all paragraphs (b)(3) and (b)(4) are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court but may include any reasonable* expenses of litigation ~~or, including court costs, and~~ reasonable* expenses in ~~preparation~~preparing for litigation or in providing ~~any other~~ legal services to the client.
- (Bd) Nothing in ~~rule 4-210~~this Rule shall be deemed to limit ~~rules 3-300, 3-310, and~~the application of Rule 1.8.9.

**Rule 1.8.6 [3-310(F)] ~~Avoiding the Representation of Adverse Interests~~
Compensation From One Other Than Client
(Redline Comparison of the Proposed Rule to Current California Rule)**

(F) A ~~member~~lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

(1)(a) ~~There~~ there is no interference with the ~~member's independence of~~lawyer's independent professional judgment or with the ~~client-lawyer~~lawyer-client relationship; ~~and~~

(2)(b) ~~Information relating to representation of the client~~ information is protected as required by Business and Professions Code ~~section~~§ 6068, ~~subdivision~~(e)(1) and Rule 1.6; and

(3)(c) ~~The member~~ the lawyer obtains the client's informed written consent* at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably* practicable, provided that no disclosure or consent is required if:

(a)(1) ~~such~~ nondisclosure or the compensation is otherwise authorized by law or a court order; or

(b)(2) the ~~member~~lawyer is rendering legal services on behalf of any public agency ~~which~~or nonprofit organization that provides legal services to other public agencies or the public.

Discussion Comment

[1] A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7.

[2] A lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

[3] ~~Paragraph (F)~~ This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)

[4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client or in certain commercial settings, such as when a lawyer is retained by a creditors'

committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. In such limited situations, paragraph (c) permits the lawyer to comply with this Rule as soon thereafter as is reasonably* practicable.

Rule 1.8.7 [3-310(D)] ~~Avoiding the Representation of Adverse Interests~~ Aggregate Settlements

(Redline Comparison of the Proposed Rule to Current California Rule)

~~(D)~~ A ~~member~~lawyer who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients ~~without the, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives~~ informed written consent* ~~of each client.~~

Discussion

This Rule does ~~Paragraph (D) is not intended to~~ apply to class action settlements subject to court approval.

**Rule 1.8.8 [3-400] Limiting Liability to Client
(Redline Comparison of the Proposed Rule to Current California Rule)**

A ~~member~~lawyer shall not:

- ~~(A)~~(a) Contract with a client prospectively limiting the ~~member's~~lawyer's liability to the client for the ~~member's~~lawyer's professional malpractice; or
- (b) Settle a claim or potential claim for the ~~member's~~lawyer's liability to ~~the~~a client or former client for the ~~member's~~lawyer's professional malpractice, unless the client or former client is ~~informed~~either:
- (1) represented by an independent lawyer concerning the settlement; or
- ~~(B)~~(2) advised in writing ~~that*~~by the ~~client may~~lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and ~~is~~ given a reasonable* opportunity to seek that advice.

Comment~~Discussion~~

[1] Paragraph (b) does not absolve the lawyer of the obligation to comply with other law. See, e.g., Business and Professions Code § 6090.5.

[2] This Rule ~~3-400 is~~does not ~~intended to~~ apply to customary qualifications and limitations in legal opinions and memoranda, nor ~~is it intended to~~does it prevent a ~~member~~lawyer from reasonably* limiting the scope of the ~~member's employment~~ or lawyer's representation. See Rule 1.2(b).

**Rule 1.8.9 [4-300] Purchasing Property at a Foreclosure
or a Sale Subject to Judicial Review
(Redline Comparison of the Proposed Rule to Current California Rule)**

- (Aa) A ~~member~~lawyer shall not directly or indirectly purchase property at a probate, foreclosure, ~~receiver's, trustee's~~receiver's, trustee's, or judicial sale in an action or proceeding in which such ~~member~~lawyer or any lawyer affiliated by reason of personal, business, or professional relationship with that ~~member~~lawyer or with that ~~member's~~lawyer's law firm* is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.
- (Bb) A ~~member~~lawyer shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the ~~member~~lawyer or of another lawyer in the ~~member's~~lawyer's law firm* or is an employee of the ~~member~~lawyer or the ~~member's~~lawyer's law firm.*

Rule 1.8.10 [3-120] Sexual Relations With Client
(Redline Comparison of the Proposed Rule to Current California Rule)

- (a) A lawyer shall not engage in sexual relations with a client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.
- (Ab) For purposes of this ~~rule~~Rule, “sexual relations” means sexual intercourse or the touching of an intimate part of another person* for the purpose of sexual arousal, gratification, or abuse.
- ~~(B) A member shall not:~~
- ~~(1) Require or demand sexual relations with a client 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; or~~
 - ~~(3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.~~
- ~~(C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.~~
- ~~(D) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.~~

DiscussionComment

[1] Although this Rule does not apply to a consensual sexual relationship that exists when a lawyer-client relationship commences, the lawyer nevertheless must comply with all other applicable rules. See, e.g., Rules 1.1 (Competence), 1.7 (Conflicts of Interest: Current Clients) and [2.1 (Independent Judgment)]¹.

[2] When the client is an organization, this Rule applies to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization’s legal matters. See Rule 1.13.

¹ The Rules Revision Commission has not made a recommendation to adopt or reject a counterpart to ABA Model Rule 2.1. This bracketed reference is a placeholder pending a recommendation from the Commission. Consideration of Model Rule 2.1 is anticipated for the Commission’s August 26, 2016 meeting.

[3] Business and Professions Code § 6106.9, including the requirement that the complaint be verified, applies to charges under subdivision (a) of that section. This Rule and the statute impose different obligations.

~~Rule 3-120 is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. (See, e.g., *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; *Alkow v. State Bar* (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; *Cutler v. State Bar* (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr. 172]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) The relationship between an attorney and client is a fiduciary relationship of the very highest character and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness. (See, e.g., *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472 [169 Cal.Rptr. 581]; *Benson v. State Bar* (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; *Lee v. State Bar* (1970) 2 Cal.3d 927, 939 [88 Cal.Rptr. 361]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. (See, e.g., *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]; *Lantz v. State Bar* (1931) 212 Cal. 213 [298 P. 497].) In all client matters, a member is advised to keep clients' interests paramount in the course of the member's representation.~~

~~For purposes of this rule, if **the client is an organization**, any individual overseeing the representation shall be deemed to be the client. (See rule 3-600.)~~

~~Although paragraph (C) excludes representation of certain clients from the scope of rule 3-120, such exclusion is not intended to preclude the applicability of other Rules of Professional Conduct, including rule 3-110.~~

Rule ~~1.8(k) Conflict Of Interest: Current Clients: Specific~~ 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9
(Redline Comparison of the Proposed Rule to ABA Model Rule)

~~(k)~~ While lawyers are associated in a law firm,* a prohibition in ~~the foregoing paragraphs (a) Rules 1.8.1~~ through ~~(i) 1.8.9~~ that applies to any one of them shall apply to all of them.

Comment

~~Imputation of Prohibitions~~

~~[20]~~ Under ~~paragraph (k), a~~ A prohibition on conduct by an individual lawyer in ~~paragraphs (a) Rules 1.8.1~~ through ~~(i) 1.8.9~~ also applies to all lawyers associated in a law firm* with the personally prohibited lawyer. For example, one lawyer in a law firm* may not enter into a business transaction with a client of another ~~member of lawyer associated in~~ the law firm* without complying with ~~paragraph (a) Rule 1.8.1,~~ even if the first lawyer is not personally involved in the representation of the client. ~~The~~ This Rule does not apply to Rule 1.8.10 since the prohibition ~~set forth in paragraph (j) in that Rule~~ is personal and is not applied to associated lawyers.

**Rule 1.9 [3-310(E)] ~~Avoiding the Representation of Adverse Interests~~
Duties To Former Clients**

(Redline Comparison of the Proposed Rule to Current California Rule)

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person* in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.*
- (b) A lawyer shall not knowingly* represent a person* in the same or a substantially related matter in which a firm* with which the lawyer formerly was associated had previously represented a client
- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;
- unless the former client gives informed written consent.*
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm* has formerly represented a client in a matter shall not thereafter:
- (1) use information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known;*
- (2) reveal information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules or the State Bar Act permit with respect to a current client; or
- (E3) ~~A member shall not,~~ without the informed written consent* of the ~~client or~~ former client, accept ~~employment~~representation adverse to the ~~client or~~ former client where, by ~~reason~~virtue of the representation of the ~~client or~~ former client, the ~~member has obtained confidential~~lawyer has acquired information protected by Business and Professions Code § 6068(e) and Rule 1.6 that is material to the ~~employment~~representation.

Discussion

* * * * *

~~Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.~~

~~While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.~~

Comment

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchurna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client and (ii) a lawyer who has prosecuted an accused person* could not represent the accused in a subsequent civil action against the government concerning the same matter. See also Business and Professions Code § 6131 and 18 U.S.C. § 207(a). These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

[2] Paragraph (b) addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm* that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Rules 1.6, 1.9(c), and Business and Professions Code § 6068(e). Thus, if a lawyer while with one firm* acquired no knowledge or information relating to a particular client of the firm,* and that lawyer later joined another firm,* neither the lawyer individually nor the second firm* would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm* once a lawyer has terminated association with the firm.*

[3] The fact that information can be discovered in a public record does not, by itself, render that information generally known* under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[4] With regard to the effectiveness of an advance consent, see Comment [8] to Rule 1.7. With regard to disqualification of a firm* with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

**Rule 1.9 [3-310(E)] Duties ~~to~~To Former Clients
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person* in the same or a substantially related matter in which that ~~person's~~person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent, ~~confirmed in writing.*~~
- (b) A lawyer shall not knowingly* represent a person* in the same or a substantially related matter in which a firm* with which the lawyer formerly was associated had previously represented a client
- (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;
- unless the former client gives informed written consent, ~~confirmed in writing.*~~
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm* has formerly represented a client in a matter shall not thereafter:
- (1) use information ~~relating to~~protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit ~~or require~~ with respect to a current client, or when the information has become generally known; ~~or*~~
 - (2) reveal information ~~relating to~~protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules ~~would~~or the State Bar Act permit ~~or require~~ with respect to a current client; ~~or~~
 - (3) without the informed written consent* of the former client, accept representation adverse to the former client where, by virtue of the representation of the former client, the lawyer has acquired information protected by Business and Professions Code § 6068(e) and Rule 1.6 that is material to the representation.

Comment

[1] After termination of a ~~client-lawyer~~lawyer-client relationship, ~~athe~~ lawyer ~~has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, fo~~owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the

former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. ~~So also and (ii) a lawyer who has prosecuted an accused person*~~ could not ~~properly~~ represent the accused in a subsequent civil action against the government concerning the same ~~transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.~~ matter. See also Business and Professions Code § 6131 and 18 U.S.C. § 207(a). These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

~~[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.~~

~~[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts~~

~~gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.~~

Lawyers Moving Between Firms

~~[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.~~

[52] Paragraph (b) ~~operates to disqualify the lawyer~~addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm* that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Rules 1.6 ~~and~~ 1.9(c), and Business and Professions Code § 6068(e). Thus, if a lawyer while with one firm* acquired no knowledge or information relating to a particular client of the firm,* and that lawyer later joined another firm,* neither the lawyer individually nor the second firm ~~is disqualified from~~ would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm* once a lawyer has terminated association with the firm.*

[3] The fact that information can be discovered in a public record does not, by itself, render that information generally known* under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[4] With regard to the effectiveness of an advance consent, see Comment [8] to Rule 1.7. With regard to disqualification of a firm* with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

~~[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.~~

~~[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).~~

~~[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.~~

~~[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.~~

**Rule 1.10 Imputation Of Conflicts Of Interest: General Rule
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

- (a) While lawyers are associated in a firm,* none of them shall knowingly* represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
- (1) the prohibition is based on a personal interest of the ~~disqualified~~prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm;* or
 - (2) the prohibition is based upon Rule 1.9(a)~~-or~~, (b), or (c)(3) and arises out of the ~~disqualified~~prohibited lawyer's association with a prior firm,* and
 - (i) the prohibited lawyer did not substantially participate in the same or a substantially related matter;
 - (ii) the ~~disqualified~~prohibited lawyer is timely screened* [in accordance with Rule 1.0.1(k)] from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (iii) written* notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; ~~a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal;~~ and an agreement by the firm* to respond promptly to any written* inquiries or objections by the former client about the screening procedures; ~~and~~.
 - ~~(iii)- certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.~~
- (b) When a lawyer has terminated an association with a firm,* the firm* is not prohibited from thereafter representing a person* with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm,* unless:
- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - (2) any lawyer remaining in the firm* has information protected by Rules 1.6 ~~and~~, 1.9(c), and Business and Professions Code § 6068(e) that is material to the matter.

- (c) A ~~disqualification prescribed by this rule~~prohibition under this Rule may be waived by ~~the~~each affected client under the conditions stated in Rule 1.7.
- (d) The ~~disqualification of~~imputation of a conflict of interest to lawyers associated in a firm* with former or current government lawyers is governed by Rule 1.11.

Comment

Definition of “Firm”

~~[1]— For purposes of the Rules of Professional Conduct, the term “firm” denotes 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. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend upon the specific facts. See Rule 1.10, Comments [2]–[4].~~

Principles of Imputed Disqualification

~~[2]— The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).~~

~~[3]— The rule in paragraph (a) does not prohibit representation whether neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.~~

~~[4]— The rule in paragraph~~Paragraph (a) ~~also~~ does not prohibit representation by others in the law firm* where the person* prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person* became a lawyer, for example, work that the person* did as a law student. Such persons,* however, ordinarily must be screened* from any personal participation in the matter ~~to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect.~~ See Rules ~~4.0~~1.0.1(k) and 5.3.

~~[5]— Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).~~

~~[6]— Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).~~

~~[7]— Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)–(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.~~

[82] Paragraph (a)(2)(iii) 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~~prohibited.

~~[9]— The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.~~

~~[10]— The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.~~

~~[11]— Where a lawyer has joined a private firm after having represented the government, imputation is governed under Rule 1.11(b) and (c), not this Rule. Under~~

~~Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.~~

[423] Where a lawyer is prohibited from engaging in certain transactions under ~~Rule 1.8, paragraph (k) of that Rule,~~[Rules 1.8.1 through 1.8.9, Rule 1.8.11,](#) and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm* with the personally prohibited lawyer.

[\[4\] The responsibilities of managerial and supervisory lawyers prescribed by Rules 5.1 and 5.3 apply to screening arrangements implemented under this Rule.](#)

[\[5\] Standards for disqualification, and whether in a particular matter \(1\) a lawyer's conflict will be imputed to other lawyers in the same firm or \(2\) the use of a timely screen is effective to avoid that imputation, are also the subject of statutes and case law. See, e.g., Code of Civil Procedure § 128\(a\)\(5\); Penal Code § 1424; *In re Charlisse C.* \(2008\) 45 Cal.4th 145 \[84 Cal.Rptr.3d 597\]; *Rhaburn v. Superior Court* \(2006\) 140 Cal.App.4th 1566 \[45 Cal.Rptr.3d 464\].](#)

**Rule 1.11 Special Conflicts of Interest for Former ~~&and~~ Current Government
Officers ~~&~~ Officials and Employees
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public ~~officer~~official 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~~official 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).
- (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:
- (1) the ~~disqualified~~personally prohibited lawyer is timely screened* [in accordance with Rule 1.0.1(k)] 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
- (c) Except as law may otherwise expressly permit, a lawyer ~~having~~who was a public official or employee and, during that employment, acquired 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 screened* [in accordance with Rule 1.0.1(k)] 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~~official 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~~*, confirmed in writing~~; 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) 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] Rule 1.10 is not applicable to the conflicts of interest addressed by this 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.~~

[2] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client.

~~[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.~~

[3] By requiring a former government lawyer to comply with Rule 1.9(c), paragraph (a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. 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 paragraph (a)(1).

[4] 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.

~~[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.~~

~~[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 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.~~

[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~~ Because conflicts of interest ~~is~~are governed by ~~paragraph (d)~~paragraphs (a) and (b), the latter agency is ~~not~~ required to screen the lawyer ~~as paragraph (b) requires a law firm to do.~~

~~The question of whether. 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 [96]. See also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70, 76-78 [209 Cal.Rptr. 159].

[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~~lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

~~[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.~~

~~[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.~~

[97] 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.

[8] A lawyer serving as a public official or employee of the government may participate in a matter in which the lawyer participated 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).

[9] This Rule is not intended to address whether in a particular matter: (i) a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency or (ii) the use of a timely screen will avoid that imputation. The imputation and screening rules for lawyers moving from private practice into government service under paragraph (d) are left to be addressed by case law and its development. See *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th at 847, 851-54 and *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 26-27 [18 Cal.Rptr.3d 403]. Regarding the standards for recusals of prosecutors in criminal matters, see Penal Code § 1424; *Haraguchi v. Superior Court* (2008) 43 Cal. 4th 706, 711-20 [76 Cal.Rptr.3d 250]; and *Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 727-35 [76 Cal.Rptr.3d 264]. Concerning prohibitions against former prosecutors participating in matters in which they served or participated in as prosecutor, see, e.g., Business and Professions Code § 6131 and 18 U.S.C. § 207(a).

~~[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.~~

**Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

- (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated ~~personally and~~ substantially as a judge or other adjudicative officer, judicial staff attorney or law clerk to such a person* or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed written consent, ~~confirmed in writing.~~*
- (b) A lawyer shall not ~~negotiate for~~participate in discussions regarding prospective employment with any person* who is involved as a party or as lawyer for a party, or with a law firm* for a party, in a matter in which the lawyer is participating ~~personally and~~ substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a judicial staff attorney or law clerk to a judge or other adjudicative officer may ~~negotiate for~~participate in discussions regarding prospective employment with a party, or with a lawyer involved or a law firm* for a party, in a matter in which the clerk is participating ~~personally and~~ substantially, but only ~~after the lawyer has notified the judge or other adjudicative officer~~with the approval of the court.
- (c) If a lawyer is ~~disqualified~~prohibited from representation by paragraph (a), but not by virtue of previous service as a mediator or settlement judge, no lawyer in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in the matter unless:
- (1) the ~~disqualified~~prohibited lawyer is timely screened* [in accordance with Rule 1.0.1(k)] from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written* notice is promptly given to the parties and any appropriate tribunal* to enable them to ascertain compliance with the provisions of this ~~rule~~Rule.
- (d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1]—~~This Rule generally parallels Rule 1.11. The term "personally and~~ For purposes of this Rule, the term "substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. ~~So also the,~~ or acquire material confidential information. The fact that a former judge exercised administrative responsibility in a court also does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. ~~Compare the Comment to Rule 1.11. The term "~~ , such as uncontested procedural duties

typically performed by a presiding or supervising judge or justice. The term “adjudicative officer” includes such officials as judges pro tempore, referees, and special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not “act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto.” Although phrased differently from this Rule, those Rules correspond in meaning.

~~[2]—Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.~~

~~[3]—Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.~~

~~[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) 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.~~

~~[5]—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.~~

Rule 1.13 [3-600] Organization as Client
(Redline Comparison of the Proposed Rule to Current California Rule)

- (Aa) ~~In representing~~ A lawyer employed or retained by an organization, ~~a member~~ shall conform his or her representation to the concept that the client is the organization itself, acting through its highest ~~duly~~ authorized ~~officer, employee, body, or constituent~~ directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.
- (Bb) If a ~~member acting on behalf of~~ lawyer representing an organization knows* that ~~an actual or apparent agent of the organization acts or a constituent is acting~~, intends to act or refuses to act in a matter related to the representation in a manner that ~~is or may be~~ the lawyer knows* or reasonably should know* is (i) a violation of a legal obligation to the organization or a violation of law reasonably* imputable to the organization, ~~or in a manner which is~~ and (ii) likely to result in substantial* injury to the organization, ~~the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be~~ lawyer shall proceed as is reasonably* necessary in the best lawful interest of the organization. ~~Such actions may include among others:~~ Unless the lawyer reasonably believes* that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer (1) ~~Urging reconsideration of the matter while explaining its likely consequences to the organization; or~~
- (2) ~~Referring~~ the matter to ~~the next~~ higher authority in the organization, including, if warranted by the ~~seriousness of the matter, referral~~ circumstances, to the highest ~~internal~~ authority that can act on behalf of the organization as determined by applicable law.
- (c) In taking any action pursuant to paragraph (b), the lawyer shall not violate his or her duty of protecting all information protected by Business and Professions Code § 6068(e)(1).
- (Ed) If, despite the ~~member's~~ lawyer's actions in accordance with paragraph (Bb), the highest authority that can act on behalf of the organization insists upon action, ~~or a refusal~~ fails to act, in a manner that is a violation of ~~law~~ a legal obligation to the organization or a violation of law reasonably* imputable to the organization, and is likely to result in substantial* injury to the organization, ~~the member's response is limited to the member's~~ lawyer shall continue to proceed as is reasonably* necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right, and, where appropriate, duty to resign or withdraw in accordance with ~~rule 3-700~~ Rule 1.16.
- (e) A lawyer who reasonably believes* that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws

under circumstances described in paragraph (d), shall proceed as the lawyer reasonably believes* necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

- (~~D~~f) In dealing with an organization's ~~directors, officers, employees, members, shareholders, or other~~ constituents, a ~~member~~ lawyer representing the organization shall explain the identity of the lawyer's client ~~for whom the member acts,~~ whenever ~~it is or becomes apparent~~ the lawyer knows* or reasonably should know* that the organization's interests are ~~or may become~~ adverse to those of the constituent(s) with whom the ~~member~~ lawyer is dealing. ~~The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.~~
- (Eg) A ~~member~~ lawyer representing an organization may also represent any of its ~~directors, officers, employees, members, shareholders, or other~~ constituents, subject to the provisions of ~~rule 3-310~~ Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. If the organization's consent to the dual representation is required by ~~rule 3-310~~ any of these Rules, the consent shall be given by an appropriate ~~constituent~~ official or body of the organization other than the individual ~~or constituent~~ who is to be represented, or by the ~~shareholder(s) or organization members~~ shareholders.

Discussion Comment

The Entity as the Client

[1] This Rule applies to all forms of private, public and governmental organizations. See Comment [6]. An organizational client can only act through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. Any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization for purposes of the authorized matter.

[2] A lawyer ordinarily must accept decisions an organization's constituents make on behalf of the organization, even if the lawyer questions their utility or prudence. It is not within the lawyer's province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk. A lawyer, however, has a duty to inform the client of significant developments related to the representation under Rule 1.4 and Business and Professions Code § 6068(m). Even when a lawyer is not obligated to proceed in accordance with paragraph (b), the lawyer may refer to higher authority, including the organization's highest authority, matters that the lawyer reasonably believes are sufficiently important to refer in the best interest of the organization subject to Rule 1.6 and Business and Professions Code § 6068(e).

[3] Paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of that conduct. When a lawyer knows* of the conduct, the lawyer's obligations under paragraph (b) are triggered when the lawyer knows* or reasonably should know* that the conduct is (i) a violation of a legal obligation to the organization, or a violation of law reasonably* imputable to the organization, and (ii) likely to result in substantial* injury to the organization.

[4] In determining how to proceed under paragraph (b), the lawyer should consider the seriousness of the violation and its potential consequences, the responsibility in the organization and the apparent motivation of the person* involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, the lawyer may ask the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably* conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. For the responsibility of a subordinate lawyer in representing an organization, see Rule 5.2.

[5] This Rule does not authorize a lawyer to substitute the lawyer's judgment for that of the organization or to take action on behalf of the organization independently of the direction the lawyer receives from the highest authorized constituent overseeing the particular engagement. In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.

Governmental Organizations

[6] It is beyond the scope of this Rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency. Although in some circumstances the client may be a specific agency, it may also be a branch of government or the government as a whole. In a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. In addition, a governmental organization may establish internal organizational rules and procedures that identify an official, agency, organization, or other person* to serve as the designated recipient of whistle-blower reports from the organization's lawyers, consistent with Rule 1.6 and Business and Professions Code § 6068(e). This Rule is not intended to limit that authority.

~~Rule 3-600 is not intended to enmesh members in the intricacies of the entity and aggregate theories of partnership.~~

~~Rule 3-600 is not intended to prohibit members from representing both an organization and other parties connected with it, as for instance (as simply one example) in establishing employee benefit packages for closely held corporations or professional partnerships.~~

~~Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, nor is it the purpose of the rule to deny the existence or importance of such formal distinctions. In dealing with a close corporation or small association, members commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty. (See *People ex rel Deukmejian v. Brown* (1981) 29 Cal.3d 150 [172 Cal.Rptr. 478]; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) In resolving such multiple relationships, members must rely on case law.~~

Rule 1.14 Client with Diminished Capacity
(Redline Comparison of the Proposed Rule to ABA Model Rule)

- (a) ~~When a client's~~ Duties Owed Client with Diminished Capacity. When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably* possible, maintain a normal lawyer-client relationship with the client.
- (b) Taking Protective Action on Behalf of a Client With Significantly Diminished Capacity.
- (1) Except where the lawyer represents a minor, a client in a criminal matter, or a client who is the subject of a conservatorship proceeding or who has a guardian ad litem or other person* legally entitled to act for the client, the lawyer may, but is not required to take protective action, provided the lawyer has obtained the client's consent as provided in paragraph (c) or (d), and the lawyer reasonably believes that:
- (i) there is a significant risk that the client will suffer substantial* physical, psychological, or financial harm unless protective action is taken,
- (ii) the client has significantly diminished capacity such that the client is unable to understand and make adequately considered decisions regarding the potential harm, and
- (iii) the client cannot adequately act in the client's own interest.
- (b) ~~When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.~~
- (e2) Information relating to the ~~representation of a client with~~ client's diminished capacity is protected by Business and Professions Code § 6068(e)(1) and Rule 1.6. ~~When~~ In taking protective action ~~pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.~~ as authorized by this paragraph, the lawyer must:
- (i) act in the client's best interest, and
- (ii) disclose no more information than is reasonably* necessary to protect the client from substantial* physical, psychological, or

financial harm, given the information known* to the lawyer at the time of disclosure.

(c) Obtaining Consent To Take Protective Action.

(1) Before taking protective action as authorized by paragraph (b), a lawyer must take all steps reasonably* necessary to preserve client confidentiality and decision-making authority, which includes:

(i) explaining to the client the need to take protective action, and

(ii) obtaining the client's consent to take the protective action.

(2) In seeking the consent of a client to take protective action under paragraph (b), the lawyer may obtain the assistance of an appropriate person* to assist the lawyer in communicating with the client. In obtaining such assistance, the lawyer must:

(i) act in the client's best interest;

(ii) disclose no more information than is reasonably* necessary to protect the client from substantial* physical, psychological, or financial harm, given the information known* to the lawyer at the time of disclosure; and

(iii) take all reasonable* steps to ensure that the information disclosed remains confidential.

(d) Obtaining Advance Informed Written Consent to Take Protective Action. A lawyer may obtain a client's advance informed written consent* to take protective action in the event the circumstances set forth in paragraphs (b)(1)(i) – (iii) should later occur. The advance consent must include the following written* disclosures:

(1) the authorization to take protective action is valid only when the lawyer reasonably believes* that the circumstances set forth in (b)(1)(i) – (iii) are present; and

(2) the client retains the right to revoke or modify the advance consent at any time.

(e) Restrictions on Lawyer's Actions. This Rule does not authorize the lawyer to take:

(1) any action that is adverse to the client, including the filing of a conservatorship petition or other similar action;

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- (2) any action on behalf of a person* other than the client that the lawyer would not be permitted to take under Rule 1.7 or 1.9; or
 - (3) any action that would violate the client's right to due process of law under the United States or California Constitutions, or the California Probate Code.
- (f) Definitions. For purposes of this Rule:
- (1) “Protective action” means to take action to protect the client’s interests by:
 - (i) notifying an individual or organization that has the ability to take action to protect the client, or
 - (ii) seeking to have a guardian ad litem appointed.
- (g) Discipline. Neither a lawyer who takes protective action as authorized by this Rule, nor a lawyer who chooses not to take such action, is subject to discipline.

Comment

[1] The purpose of this Rule is to allow a lawyer to act competently on behalf of a client with significantly diminished capacity, to further the client's goals in the representation, and to protect the client's interests.

~~[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.~~

[2] A client with significantly diminished capacity, such that the client cannot make adequately considered decisions regarding potential harm, often has the ability to understand, deliberate upon, express preferences concerning, and reach conclusions about matters affecting the client's own well-being, including the ability to provide consent. (See Probate Code §§ 810 – 813.)

~~[2] The fact that a client suffers a disability does not diminish the lawyer’s obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.~~

~~[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.~~In determining whether a client has significantly diminished capacity such that the client is unable to make adequately considered decisions, a lawyer may seek information or guidance from an appropriate diagnostician or other qualified medical service provider. In doing so, the lawyer may not reveal client confidential information without the client's authorization or except as otherwise permitted by these Rules. See Rule 1.6(b) and Business and Professions Code § 6068(e)(2).

~~[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest~~Where it is reasonably* foreseeable that a client may suffer from significantly diminished capacity in the future such that the client will likely be unable to make adequately considered decisions, the lawyer may have an obligation to prevent or rectify the guardian's misconductexplain to the client the need to take measures to protect the client's interests, including using voluntary surrogate decision-making tools such as durable powers of attorney and seeking assistance from family members, support groups and professional services with the client's informed written consent.* See Rule 1.2(d)1.4.

~~[5] In obtaining the assistance another person* such as a trained professional to assist in communicating with and furthering the interests of the client pursuant to paragraph (c), the lawyer must look to the client, and not the other person,* for authorization to take protective measures on the client's behalf. See Evidence Code § 952. The lawyer must advise the person* who assists the lawyer that the person* is not authorized to disclose information protected by Business and Professions Code § 6068(e)(1) to any third person.*~~

~~[6] This Rule does not apply in the case of a client who is (i) a minor, (ii) involved in a criminal matter, (iii) is the subject of a conservatorship; or (iv) has a guardian or other person* legally entitled to act for the client. The rights of such persons* are regulated under other statutory schemes. See Family Code § 3150; Welfare and Institutions Code § 1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions Code Division 5, Part 1, § 5000-5579; Probate Code, Division 4, Parts 1-8, § 1400-3803; and Code of Civil Procedure §§ 372-376].~~

Taking Protective Action

~~[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer~~

relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking **tools such as durable powers of attorney** or consulting with support groups, professional services, adult protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek **guidance from an appropriate diagnostician**.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary **to protect the client's interests**. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do **so, the lawyer may not** disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

~~[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless **the lawyer reasonably believes that the person has no other lawyer, agent or other representative available.** The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.~~

~~[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.~~

**Rule ~~4-100 Preserving Identity of~~ 1.15 Safekeeping Funds and Property of ~~a~~
Client~~Clients and Other Persons*~~**

(Redline Comparison of the Proposed Rule to Current California Rule)

- (a) All funds received or held by a lawyer or law firm* for the benefit of ~~clients by a member or law firm~~ a client, or other person* to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts ~~labeled~~ labelled “Trust ~~Account,~~” ~~“Client’s Funds~~ Account” or words of similar import, maintained in the State of California, or, with written* consent of the client, in any other jurisdiction where there is a substantial* relationship between the client or the client’s business and the other jurisdiction. ~~No funds~~
- (b) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer’s or law firm’s operating account, provided:
- (1) The lawyer or law firm* discloses to the client in writing* (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed, and
 - (2) The client’s agreement to deposit the flat fee in the lawyer’s operating account and the disclosures required by paragraph (b)(1) are set forth in a writing* signed by the client.
- (A)(c) Funds belonging to the ~~member~~ lawyer or the law firm shall not be deposited ~~therein~~ or otherwise commingled therewith with funds held in a trust account except ~~as follows:~~
- (1) ~~Funds~~ funds reasonably* sufficient to pay bank charges.
 - (2) ~~In the case of~~ funds belonging in part to a client or other person* and in part presently or potentially to the ~~member~~ lawyer or the law firm,* in which case the portion belonging to the ~~member~~ lawyer or law firm* must be withdrawn at the earliest reasonable* time after the ~~member’s~~ lawyer or law firm’s interest in that portion becomes fixed. However, ~~when the right of the member~~ if a client or other person* disputes the lawyer or law firm firm’s right to receive a portion of trust funds ~~is disputed by the client,~~ the disputed portion shall not be withdrawn until the dispute is finally resolved.
- (B)(d) A ~~member~~ lawyer shall:
- (1) ~~Promptly~~ promptly notify a client or other person of the receipt of ~~the client’s~~ funds, securities, or other ~~properties~~ property in which the lawyer

knows or reasonably should know the client or other person has an interest;

- (2) ~~Identify~~identify and label securities and properties of a client or other person* promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.;
- (3) ~~Maintain~~maintain complete records of all funds, securities, and other ~~properties~~property of a client or other person* coming into the possession of the ~~member~~lawyer or law firm* ~~and render appropriate accounts to the client regarding them;~~
- (4) promptly account in writing* to the client or other person* for whom the lawyer holds funds or property;
- (5) preserve ~~such~~-records of all funds and property held by a lawyer or law firm* under this Rule for a period of no less than five years after final appropriate distribution of such funds or ~~properties~~property; ~~and~~
- ~~(3)~~(6) comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.
- (7) promptly distribute, as requested by the client or other person,* any undisputed funds or property in the possession of the lawyer or law firm* that the client or other person* is entitled to receive.
- ~~(4)~~—~~Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.~~
- ~~(C)~~(e) The Board of ~~Governors~~Trustees of the State Bar shall have the authority to formulate and adopt standards as to what “records” shall be maintained by ~~members~~lawyers and law firms* in accordance with subparagraph(Bd)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all ~~members~~lawyers.

Standards:

Pursuant to ~~rule 4-100(C)~~this Rule, the Board of ~~Governors~~Trustees of the State Bar adopted the following standards, effective ~~January 1, [1993]~~_____, as to what “records” shall be maintained by ~~members~~lawyers and law firms* in accordance with subparagraph (Bd)(3).

- (1) A ~~member~~lawyer shall, from the date of receipt of ~~client~~-funds of the client or other person* through the period ending five years from the date of appropriate disbursement of such funds, maintain:
 - (a) a written* ledger for each client or other person* on whose behalf funds are held that sets forth:

- (i) the name of such client [or other person](#),
 - (ii) the date, amount and source of all funds received on behalf of such client [or other person](#),
 - (iii) the date, amount, payee and purpose of each disbursement made on behalf of such client [or other person](#),* and
 - (iv) the current balance for such client [or other person](#);
- (b) a written* journal for each bank account that sets forth:
- (i) the name of such account,
 - (ii) the date, amount and client affected by each debit and credit, and
 - (iii) the current balance in such account;
- (c) all bank statements and ~~canceled~~[cancelled](#) checks for each bank account; and
- (d) each monthly reconciliation (balancing) of (a), (b), and (c).
- (2) A ~~member~~[lawyer](#) shall, from the date of receipt of all securities and other properties held for the benefit of client [or other person](#)* through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written* journal that specifies:
- (a) each item of security and property held;
 - (b) the person* on whose behalf the security or property is held;
 - (c) the date of receipt of the security or property;
 - (d) the date of distribution of the security or property; and
 - (e) person* to whom the security or property was distributed.

Comment

[\[1\] Whether a lawyer owes a contractual, statutory or other legal duty under paragraph \(a\) to hold funds on behalf of a person* other than a client in situations where client funds are subject to a third-party lien will depend on the relationship between the lawyer and the third-party, whether the lawyer has assumed a contractual obligation to the third person* and whether the lawyer has an independent obligation to honor the lien under a statute or other law. In certain circumstances, a lawyer may be civilly liable when the lawyer has notice of a lien and disburses funds in contravention of the lien. See *Kaiser Foundation Health Plan, Inc. v. Aguiluz* \(1996\) 47 Cal.App.4th 302 \[54 Cal.Rptr.2d 665\]. However, civil liability by itself does not establish a violation of this Rule. Compare *Johnstone v. State Bar of California* \(1966\) 64 Cal.2d 153, 155-156 \[49 Cal.Rptr. 97\]](#)

(“When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct.”) and *Crooks v. State Bar* (1970) 3 Cal.3d 346, 358 [90 Cal.Rptr. 600] (lawyer who agrees to act as escrow or stakeholder for a client and a third-party owes a duty to the nonclient with regard to held funds).

[2] As used in this Rule, “advances for fees” means a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client’s behalf. With respect to the difference between a true retainer and a flat fee, which is one type of advance fee, see Rule 1.5(d) and (e). Subject to Rule 1.5, a lawyer or law firm* may enter into an agreement that defines when or how an advance fee is earned and may be withdrawn from the client trust account.

[3] Absent written* disclosure and the client’s agreement in a writing* signed by the client as provided in paragraph (b), a lawyer must deposit a flat fee paid in advance of legal services in the lawyer’s trust account. Paragraph (b) does not apply to advance payment for costs and expenses. Paragraph (b) does not alter the lawyer’s obligations under paragraph (d) or the lawyer’s burden to establish that the fee has been earned.

~~Rule 3-700 Termination of Employment~~
Rule 1.16 Declining Or Terminating Representation
(Redline Comparison of the Proposed Rule to Current California Rule)

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

~~(A) In General.~~

- ~~(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.~~
- ~~(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.~~

~~(B) Mandatory Withdrawal.~~

~~A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:~~

- ~~(1) The member~~the lawyer knows* or reasonably should know* that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;~~or~~
- ~~(2) The member~~the lawyer knows* or reasonably should know* that ~~continued employment~~the representation will result in violation of these ~~rules~~Rules or of the State Bar Act;~~or~~
- ~~(3) The member's~~the lawyer's mental or physical condition renders it unreasonably difficult to carry out the ~~employment~~representation effectively;~~;~~ or

~~(C) Permissive Withdrawal.~~

~~If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:~~

- ~~(4)~~ The the client discharges the lawyer.

- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
- (a1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; ~~or;~~
 - (b2) the client either seeks to pursue ~~an illegal~~ a criminal or fraudulent* course of conduct; ~~or~~ has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes* was a crime or fraud;*
 - (c3) the client insists that the ~~member~~ lawyer pursue a course of conduct that is ~~illegal or that is prohibited under these rules or the State Bar Act,~~ or criminal or fraudulent;*
 - (d4) the client by other conduct renders it unreasonably difficult for the ~~member~~ lawyer to carry out the employment effectively; ~~or;~~
 - (5) the client breaches a material term of an agreement with, or obligation, to the lawyer relating to the representation, and the lawyer has given the client a reasonable* warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;
 - (e) ~~insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or~~
 - (f6) ~~breaches an agreement or obligation to the member as to expenses or fees.~~ the client knowingly* and freely assents to termination of the representation;
 - (2) ~~The continued employment is likely to result in a violation of these rules or of the State Bar Act; or~~
 - (37) ~~The~~ the inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; ~~or~~
 - (48) ~~The member's~~ the lawyer's mental or physical condition renders it difficult for the ~~member~~ lawyer to carry out the ~~employment~~ representation effectively; ~~or~~
 - (9) a continuation of the representation is likely to result in a violation of these Rules or the State Bar Act; or

~~(5) The client knowingly and freely assents to termination of the employment;
or~~

~~(610) The member~~the lawyer believes* in good faith, in a proceeding pending before a tribunal,* that the tribunal* will find the existence of other good cause for withdrawal.

(c) If permission for termination of a representation is required by the rules of a tribunal,* a lawyer shall not terminate a representation before that tribunal* without its permission.

(d) A lawyer shall not terminate a representation until the lawyer has taken reasonable* steps to avoid reasonably* foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).

~~(De) Papers, Property, and Fees.~~Upon the termination of a representation for any reason:

~~A member whose employment has terminated shall:~~

(1) ~~Subject~~subject to any applicable protective order~~—or,~~ non-disclosure agreement, or statutory limitation, the lawyer promptly shall release to the client, at the request of the client, all ~~the client papers~~materials and property. “Client ~~papers~~materials and property” includes correspondence, pleadings, deposition transcripts, experts' reports and other writings,* exhibits, and physical evidence, ~~expert's—reports~~whether in tangible, electronic or other form, and other items reasonably* necessary to the ~~client's~~client's representation, whether the client has paid for them or not; and

(2) ~~Promptly~~the lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not ~~been~~earned or incurred. This provision is not applicable to a true retainer fee ~~which is~~ paid solely for the purpose of ensuring the availability of the ~~member~~lawyer for the matter.

Comment~~Discussion~~

[1] This Rule applies, without limitation, to a sale of a law practice under Rule 1.17. A lawyer can be subject to discipline for improperly threatening to terminate a representation. See *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837.

[2] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the

lawyer has a conflict of interest under Rule 1.7, but that conflict might not arise in other representations of the client.

[3] Lawyers must comply with their obligations to their clients under Rule 1.6 and Business and Professions Code § 6068(e), and to the courts under Rule 3.3 when seeking permission to withdraw under paragraph (c). If a tribunal* denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. See Business and Professions Code §§ 6068(b) and 6103. This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with applicable California Rules of Court concerning limited scope representation satisfies paragraph (c).

[4] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. See, e.g., Penal Code §§ 1054.2 and 1054.10.

~~Subparagraph (A)(2) provides that “a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the clients.” What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, “reasonable steps” do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied.~~

~~Paragraph (D) makes clear the member’s duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) Paragraph (D) also requires that the member “promptly” return unearned fees paid in advance. If a client disputes the amount to be returned, the member shall comply with rule 4-100(A)(2).~~

[5] Paragraph (D) ~~ise~~(1) does not ~~intended to~~ prohibit a ~~member~~lawyer from making, at the ~~member’s~~lawyer's own expense, and retaining copies of papers released to the client, ~~nor~~or to prohibit a claim for the recovery of the ~~member’s~~lawyer's expense in any subsequent legal proceeding.

**Rule 1.17 [2-300] Sale ~~or Purchase~~ of a Law Practice ~~of a Member, Living or Deceased~~—
(Redline Comparison of the Proposed Rule to Current California Rule)**

All or substantially all of the law practice of a ~~member~~lawyer, living or deceased, including goodwill, may be sold to another ~~member~~lawyer or law firm* subject to all the following conditions:

- (Aa) Fees charged to clients shall not be increased solely by reason of ~~such~~the sale.
- (Bb) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code ~~section~~§ 6068, ~~subdivision~~(e)(1), then;
- (1) if the seller is deceased, or has a conservator or other person* acting in a representative capacity, and no ~~member~~lawyer has been appointed to act for the seller pursuant to Business and Professions Code ~~section~~§ 6180.5, then prior to the transfer;
- (a) the purchaser shall cause a written* notice to be given to ~~the~~each client whose matter is included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client ~~papers~~materials and property, as required by ~~rule 3-700~~Rule 1.16(D)d); and that if no response is received to the ~~notification~~notice within 90 days ~~of the sending of such notice after it is sent~~, or ~~in~~if the ~~event the client's~~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. ~~Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements~~, and
- (b) the purchaser shall obtain the written* consent of the client ~~provided that such~~. If reasonable* efforts have been made to locate the client and no response to the paragraph (b)(1)(i) notice is received within 90 days, consent shall be presumed until otherwise notified by the client ~~if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90-day period.~~.
- (2) in all other circumstances, not less than 90 days prior to the transfer;
- (a) the seller, or the ~~member~~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~~each client whose matter

is included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client ~~papers materials~~ and property, as required by ~~rule 3-700~~ Rule 1.16(D)(e)(1); and that if no response is received to the notification notice within 90 days ~~of the sending of such notice~~ 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. ~~Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements,~~ and

- (bii) the seller, or the member 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 such. If reasonable* efforts have been made to locate the client and no response to the paragraph (b)(2)(i) notice is received within 90 days,~~ consent shall be presumed until otherwise notified by the client ~~if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller.~~
- (Cc) If substitution is required by the rules of a tribunal* in which a matter is pending, all steps necessary to substitute a member lawyer shall be taken.
- (D) ~~All activity of a purchaser or potential purchaser under this rule shall be subject to compliance with rules 3-300 and 3-310 where applicable.~~
- (d) The purchaser shall comply with the applicable requirements of Rules 1.7 and 1.9.
- (Ee) Confidential information shall not be disclosed to a ~~non-member~~ nonlawyer in connection with a sale under this ~~rule~~ Rule.
- (Ff) Admission ~~This Rule does not apply to the admission~~ to or retirement from a law ~~partnership or law corporation~~ firm,* retirement plans and similar arrangements, or sale of tangible assets of a law practice ~~shall not be deemed a sale or purchase under this rule.~~

Discussion Comment

[1] The requirement that the sale be of "all or substantially all of the law practice of a lawyer" prohibits the sale of only a field or area of practice or the seller's practice in a geographical area or in a particular jurisdiction. The prohibition against the sale of less than all or substantially all of a 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

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client matters sold in the transaction, 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.

[2] The sale may not be financed by increases in fees charged to the client of the law practice. Existing arrangements between the seller and the client as to fees and scope of work must be honored by the purchaser. Any modifications of existing fee arrangements between the purchaser and the client after the sale must comply with these Rules and the State Bar Act.

~~Paragraph (A) is intended to prohibit the purchaser from charging the former clients of the seller a higher fee than the purchaser is charging his or her existing clients.~~

~~“All or substantially all of the law practice of a member” means, for purposes of rule 2-300, that, for example, a member may retain one or two clients who have such a longstanding personal and professional relationship with the member that transfer of those clients’ files is not feasible. Conversely, rule 2-300 is not intended to authorize the sale of a law practice in a piecemeal fashion except as may be required by subparagraph (B)(1)(a) or paragraph (D).~~

[3] Transfer of individual client matters, where permitted, is governed by ~~rule 2-200~~Rule 1.5.1. Payment of a fee to a nonlawyer broker for arranging the sale or purchase of a law practice is governed by ~~rule 1-320~~Rule 5.4(a).

**Rule 2.4 Lawyer ~~Serving As~~ as Third-Party Neutral
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

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

Comment

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

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

~~[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required.~~

~~Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.~~

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

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

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

**Rule 2.4.1 [1-710] ~~Member~~ Lawyer as Temporary Judge, Referee,
or Court-Appointed Arbitrator
(Redline Comparison of the Proposed Rule to Current California Rule)**

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

Comment~~Discussion~~

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

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

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

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

(Redline Comparison of the Proposed Rule to Current California Rule)

(a) A lawyer shall not:

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

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

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

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

Rule 3.2 ~~Expediting~~Delay of Litigation
(Redline Comparison of the Proposed Rule to ABA Model Rule)

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

In representing a client, a lawyer shall not use means that have no substantial* purpose other than to delay or prolong the proceeding or to cause needless expense.

Comment

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

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

Rule 3.3 [5-200] Trial Conduct
(Redline Comparison of the Proposed Rule to Current California Rule)

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

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

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer;
- (2) fail to disclose to the tribunal* legal authority in the controlling jurisdiction known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or misquote to a tribunal* the language of a book, statute, decision or other authority; or
- (3) offer evidence that the lawyer knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable* remedial measures, including, if necessary, disclosure to the tribunal,* unless disclosure is prohibited by Rule 1.6 and Business and Professions Code § 6068(e). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes* is false.

(b) A lawyer who represents a client in a proceeding before a tribunal* and who knows* that a person* intends to engage, is engaging or has engaged in criminal or fraudulent* conduct related to the proceeding shall take reasonable* remedial measures to the extent permitted by Rule 1.6 and Business and Professions Code § 6068(e).

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.

(d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal* of all material facts known* to the lawyer that will enable the tribunal* to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer in proceedings of a tribunal,* including ancillary proceedings such as a deposition conducted pursuant to a tribunal's authority. See Rule 1.0.1(m) for the definition of "tribunal."

[2] The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal* by the lawyer.

Legal Argument

[3] Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal* sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court.

[4] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows* that a client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered and, if unsuccessful, must refuse to offer the false evidence. If a criminal defendant insists on testifying, and the lawyer knows* that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable* efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. See, e.g., *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33]. The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

Remedial Measures

[5] Reasonable* remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable* lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal.* See, e.g., Rules 1.2.1, 1.4(b)(4), 1.16(a), and 8.4; Business and Professions Code §§ 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for the lawyer's decision to seek permission from the tribunal* to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the

client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to protect under Rule 1.6 and Business and Professions Code § 6068(e).

Duration of Obligation

[6] A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. This Rule does not apply when a lawyer comes to know of a violation of paragraph (b) after the lawyer's representation has concluded. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).

Withdrawal

[7] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation. The lawyer may, however, be required by Rule 1.16 to seek permission of the tribunal* to withdraw if the lawyer's compliance with this Rule results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these Rules. A lawyer must comply with Rule 1.6 and Business and Professions Code § 6068(e) with respect to a request to withdraw that is premised on a client's misconduct.

Rule 3.3 [5-200] Candor Toward ~~the~~The Tribunal*
(Redline Comparison of the Proposed Rule to ABA Model Rule)

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer;
 - (2) fail to disclose to the tribunal* legal authority in the controlling jurisdiction known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or misquote to a tribunal* the language of a book, statute, decision or other authority; or
 - (3) offer evidence that the lawyer knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable* remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Rule 1.6 and Business and Professions Code § 6068(e). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes* is false.
- (b) A lawyer who represents a client in ~~an adjudicative~~ proceeding before a tribunal* and who knows* that a person intends to engage, is engaging or has engaged in criminal or fraudulent* conduct related to the proceeding shall take reasonable* remedial measures, ~~including, if necessary, disclosure to the tribunal~~ to the extent permitted by Rule 1.6 and Business and Professions Code § 6068(e).
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, ~~and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.~~
- (d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal* of all material facts known* to the lawyer that will enable the tribunal* to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer ~~who is representing a client in the~~ proceedings of a tribunal, including ancillary proceedings such as a deposition conducted pursuant to a tribunal's authority. See Rule ~~1.01.0.1~~(m) for the definition of "tribunal." ~~It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.~~

~~[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that~~The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal* by the lawyer~~knows to be false.~~

Representations by a Lawyer

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

Legal Argument

~~[43] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.~~may include legal authority outside the jurisdiction in which the tribunal* sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court.

Offering Evidence

~~[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled~~

~~by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.~~

~~[64] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows* that ~~the~~a client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. ~~If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer~~ and, if unsuccessful, must refuse to offer the false evidence. If ~~only a portion of a witness's~~a criminal defendant insists on testifying, and the lawyer knows* that the testimony will be false, the lawyer may ~~call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.~~offer the testimony in a narrative form if the lawyer made reasonable* efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. See, e.g., *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33]. The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.~~

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

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

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

Remedial Measures

~~[5] Reasonable* remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a~~

reasonable* lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal.* See, e.g., Rules 1.2.1, 1.4(b)(4), 1.16(a), and 8.4; Business and Professions Code §§ 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for the lawyer's decision to seek permission from the tribunal* to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to protect under Rule 1.6 and Business and Professions Code § 6068(e).

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

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

Preserving Integrity of Adjudicative Process

~~[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that~~

~~a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.~~

Duration of Obligation

~~[136] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. This Rule does not apply when a lawyer comes to know of a violation of paragraph (b) after the lawyer's representation has concluded. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).~~

Ex Parte Proceedings

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

Withdrawal

~~[157] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation ~~of a client whose interests will be or have been adversely affected by the lawyer's disclosure~~. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal* to withdraw if the lawyer's compliance with this ~~Rule's duty of candor~~Rule results in ~~such an~~ extreme deterioration of the ~~client-lawyer~~lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client. ~~Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with, or where continued employment will result in a violation of these Rules. A lawyer must comply with Rule 1.6 and Business and Professions Code § 6068(e) with respect to~~ a request ~~for permission~~ to withdraw that is premised on a client's misconduct, ~~a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.~~~~

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

(Redline Comparison of the Proposed Rule to Current California Rule)

A ~~member~~lawyer shall not:

(a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person* to do any such act;

~~Rule 5-220 Suppression of Evidence~~

(b) ~~A member shall not~~ suppress any evidence that the ~~member's~~member~~lawyer's~~lawyer client has a legal obligation to reveal or to produce.;

~~(A) Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.~~

(c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(Bd) ~~Directly~~directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the ~~witness's~~witness's testimony or the outcome of the case. Except where prohibited by law, a ~~member~~member~~lawyer~~lawyer may advance, guarantee, or acquiesce in the payment of:

(1) ~~Expenses~~expenses reasonably* incurred by a witness in attending or testifying.;

(2) ~~Reasonable~~reasonable* compensation to a witness for loss of time in attending or testifying.;

(3) ~~A~~a reasonable* fee for the professional services of an expert witness.;

(e) advise or directly or indirectly cause a person* to secrete himself or herself or to leave the jurisdiction of a tribunal* for the purpose of making that person* unavailable as a witness therein;

(f) knowingly* disobey an obligation under the rules of a tribunal* except for an open refusal based on an assertion that no valid obligation exists; or

~~Rule 5-200 Trial Conduct~~

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

Comment

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

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

**Rule 3.5 [5-300] Contact With Judges, Officials, Employees, and Jurors
(Redline Comparison of the Proposed Rule to Current California Rule)**

- (Aa) ~~A member~~Except as permitted by an applicable code of judicial ethics, code of judicial conduct, or standards governing employees of a tribunal,* a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal* ~~unless the personal or family relationship between the member and the judge, official, or employee is such that gifts are customarily given and exchanged. Nothing contained in this rule shall.~~ This Rule does not prohibit a memberlawyer from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (Bb) ~~A member~~Unless authorized to do so by law, an applicable code of judicial ethics or code of judicial conduct, a ruling of a tribunal,* or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before ~~such~~the judge or judicial officer, except:
- (1) ~~In~~in open court; or
 - (2) ~~With~~with the consent of all other counsel in ~~such~~the matter; or
 - (3) ~~In~~in the presence of all other counsel in ~~such~~the matter; or
 - (4) ~~In~~in writing* with a copy thereof furnished to ~~such~~all other counsel in the matter; or
 - (5) ~~In~~in ex parte matters.
- (Cc) As used in this ~~rule~~Rule, “judge” and “judicial officer” shall also include (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; and (iv) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

~~Rule 5-320 Contact With Jurors~~

- (Ad) A ~~member~~lawyer connected with a case shall not communicate directly or indirectly with anyone the ~~member~~lawyer knows* to be a member of the venire from which the jury will be selected for trial of that case.
- (Be) During trial a ~~member~~lawyer connected with the case shall not communicate directly or indirectly with any juror.
- (Ef) During trial a ~~member~~lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the ~~member~~lawyer knows* is a juror in the case.

- (Dg) After discharge of the jury from further consideration of a case a ~~member shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the~~ lawyer shall not communicate directly or indirectly with a juror or if:
- (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate;
 - (3) the communication involves misrepresentation, coercion, duress or harassment; or
 - (4) the communication is intended to influence the juror's actions in future jury service.
- (Eh) A ~~member~~ lawyer shall not directly or indirectly conduct an out of court investigation of a person* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person* in connection with present or future jury service.
- (Fi) All restrictions imposed by this ~~rule~~ Rule also apply to communications with, or investigations of, members of the family of a person* who is either a member of a venire or a juror.
- (Gj) A ~~member~~ lawyer shall reveal promptly to the court improper conduct by a person* who is either a member of a venire or a juror, or by another toward a person* who is either a member of a venire or a juror or a member of his or her family, of which the ~~member~~ lawyer has knowledge.
- (Hk) This ~~rule~~ Rule does not prohibit a ~~member~~ lawyer from communicating with persons* who are members of a venire or jurors as a part of the official proceedings.
- (Hl) For purposes of this ~~rule~~ Rule, "juror" means any ~~empanelled~~ empaneled, discharged, or excused juror.

Comment

[1] An applicable code of judicial ethics or code of judicial conduct under this Rule includes the California Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of a tribunal* not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics for the Court Employees of California and 5 U.S.C. § 7353 (Gifts to Federal employees).

[2] For guidance on permissible communications with a juror in a criminal action after discharge of the jury, see Code of Civil Procedure § 206.

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given

to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

Rule 3.6 [5-120] Trial Publicity
(Redline Comparison of the Proposed Rule to Current California Rule)

- (Aa) A ~~member~~lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that ~~a reasonable person would expect to~~the lawyer knows* or reasonably should know* will (i) be disseminated by means of public communication ~~if the member knows or reasonably should know that it will~~and (ii) have a substantial* likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (Bb) Notwithstanding paragraph (Aa), ~~a member~~but only to the extent permitted by Rule 1.6 and Business and Professions Code § 6068(e), lawyer may state:
- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons* involved;
 - (2) ~~the~~ information contained in a public record;
 - (3) that an investigation of ~~the~~a matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;
 - (6) a warning of danger concerning the behavior of a person* involved, when there is reason to believe that there exists the likelihood of substantial* harm to an individual or to the public interest~~but only to the extent that dissemination by public communication is reasonably* necessary to protect the individual or the public~~; and
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (ai) the identity, general area of residence, and occupation, ~~and family status~~ of the accused;
 - (bii) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;
 - (eiii) the fact, time, and place of arrest; and
 - (div) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (Cc) Notwithstanding paragraph (Aa), a ~~member~~lawyer may make a statement that a reasonable* ~~member~~lawyer would believe is required to protect a client from the substantial* undue prejudicial effect of recent publicity not initiated by the ~~member~~lawyer or the ~~member's~~lawyer's client. A statement made pursuant to

this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a law firm* or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

DiscussionComment

~~Rule 5-120 is intended to apply equally to prosecutors and criminal defense counsel.~~

[1] Whether an extrajudicial statement violates ~~rule 5-120~~this Rule depends on many factors, including: (i)~~1~~2 whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (ii)~~2~~2 whether the extrajudicial statement presents information the ~~member~~lawyer knows* is false, deceptive, or the use of which would violate Business and Professions Code ~~section~~§ 6068(d) or Rule 3.3; (iii)~~3~~3 whether the extrajudicial statement violates a lawful “gag” order, or protective order, statute, rule of court, or special rule of confidentiality—~~for example, in juvenile, domestic, mental disability, and certain criminal proceedings.~~ (see Rule 3.4(f) and Business and Professions Code § 6068(a), which require compliance with such obligations); and (iv)~~4~~4 the timing of the statement.

[2] This Rule applies to prosecutors and criminal defense counsel. See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

~~Paragraph (A) is intended to apply to statements made by or on behalf of the member.~~

~~Subparagraph (B)(6) is not intended to create, augment, diminish, or eliminate any application of the lawyer-client privilege or of Business and Professions Code section 6068(e) regarding the member’s duty to maintain client confidence and secrets.~~

Rule 3.7 [5-210] MemberLawyer as Witness
(Redline Comparison of the Proposed Rule to Current California Rule)

- (a) A ~~member~~lawyer shall not act as an advocate ~~before a jury which will hear testimony from the member~~in a trial in which the lawyer is likely to be a witness unless:
- (A) ~~The~~(1)the lawyer's testimony relates to an uncontested issue or matter; ~~or~~
 - (B) ~~The~~(2)the lawyer's testimony relates to the nature and value of legal services rendered in the case; or
 - (C) ~~(3) The member has~~(3) The lawyer has obtained informed, written consent* ~~offrom~~ the client. If the ~~member~~lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the ~~member~~lawyer is employed ~~and shall be consistent with principles of recusal.~~
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm* is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Discussion:Comment

~~Rule 5-210 is intended to apply to situations in which the member knows or should know that he or she ought to be called as a witness in litigation in which there is a jury. This rule is not intended to encompass situations in which the member is representing the client in an adversarial proceeding and is testifying before a judge. In non-adversarial proceedings, as where the member testifies on behalf of the client in a hearing before a legislative body, rule 5-210 is not applicable.~~

~~Rule 5-210 is not intended to apply to circumstances in which a lawyer in an advocate's firm will be a witness.~~

[1] This Rule applies to a trial before a jury, judge, administrative law judge or arbitrator. This Rule does not apply to other adversarial proceedings. This Rule also does not apply in non-adversarial proceedings, as where a lawyer testifies on behalf of a client in a hearing before a legislative body.

[2] A lawyer's obligation to obtain informed written consent* may be satisfied when the lawyer makes the required disclosure, and the client gives informed consent,* on the record in court before a licensed court reporter or court recorder who prepares a transcript or recording of the disclosure and consent. See definition of "written" in Rule 1.0.1(n).

[3] Notwithstanding a client's informed written consent,* courts retain discretion to take action, up to and including disqualification of a lawyer who seeks to both testify and serve as an advocate, to protect the trier of fact from being misled or the opposing party

from being prejudiced. See, e.g., *Lyle v. Superior Court* (1981) 122 Cal.App.3d 470 [175 Cal.Rptr. 918].

**Rule 3.8 [5-110] ~~Performing the Duty of Member in Government Service~~ Special Responsibilities of a Prosecutor
(Redline Comparison of the Proposed Rule to Current California Rule)**

~~A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.~~

The prosecutor in a criminal case shall:

- (a) not institute or continue to prosecute a charge that the prosecutor knows* is not supported by probable cause;
- (b) make reasonable* efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable* opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal* has approved the appearance of the accused in propria persona;
- (d) make timely disclosure to the defense of all evidence or information known* to the prosecutor that the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known* to the prosecutor that the prosecutor knows* or reasonably should know* mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:*
 - (1) The information sought is not protected from disclosure by any applicable privilege or work product protection;
 - (2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) There is no other feasible alternative to obtain the information;
- (f) exercise reasonable* care to prevent persons* under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons* assisting or associated with the prosecutor in a criminal case

from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

- (g) When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
- (1) promptly disclose that evidence to an appropriate court or authority, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable* efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (h) When a prosecutor knows* of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.* This Rule is intended to achieve those results. All lawyers in government service remain bound by Rules 3.1 and 3.4.

[2] Paragraph (c) does not forbid the lawful questioning of an uncharged suspect who has knowingly* waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable* waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (d) include exculpatory and impeachment material relevant to guilt or punishment and are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. Although this Rule does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. A disclosure's timeliness will vary with the circumstances, and this Rule is not intended to impose timing requirements different from those established by statutes, procedural rules, court

orders, and case law interpreting those authorities and the California and federal constitutions.

[3A] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal* if disclosure of information to the defense could result in substantial* harm to an individual or to the public interest.

[4] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial* likelihood of prejudicing an adjudicatory proceeding. Paragraph (f) is not intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[5] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See Rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (f) will be satisfied if the prosecutor issues the appropriate cautions to law- enforcement personnel and other relevant individuals.

[6] When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a person* outside the prosecutor's jurisdiction was convicted of a crime that the person* did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable* efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See Rule 4.2.)

[7] Under paragraph (h), once the prosecutor knows* of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[8] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

**Rule 3.8 [5-110] Special Responsibilities of a Prosecutor
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

The prosecutor in a criminal case shall:

- (a) ~~refrain from prosecuting~~not institute or continue to prosecute a charge that the prosecutor knows* is not supported by probable cause;
- (b) make reasonable* efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable* opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, ~~such as the right to a preliminary hearing~~ unless the tribunal* has approved the appearance of the accused in propria persona;
- (d) make timely disclosure to the defense of all evidence or information known* to the prosecutor that the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense ~~and to the tribunal~~ all unprivileged mitigating information known* to the prosecutor that the prosecutor knows* or reasonably should know* mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:*
 - (1) ~~the~~The information sought is not protected from disclosure by any applicable privilege or work product protection;
 - (2) ~~the~~The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) ~~there~~There is no other feasible alternative to obtain the information;
- (f) ~~except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and~~ exercise reasonable* care to prevent persons* under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons* assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 ~~or this Rule~~.
- (g) When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a convicted defendant did not commit an offense of

which the defendant was convicted, the prosecutor shall:

- (1) promptly disclose that evidence to an appropriate court or authority, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable* efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (h) When a prosecutor knows* of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

CommentDiscussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. ~~The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.*~~ This Rule is intended to achieve those results. All lawyers in government service remain bound by Rules 3.1 and 3.4.

[2] ~~In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons.~~ Paragraph (c) does not ~~apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it~~ forbid the lawful questioning of an uncharged suspect who has knowingly* waived the ~~rights~~right to counsel and ~~silence~~the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable* waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (d) include exculpatory and impeachment material relevant to guilt or punishment and are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83

S.Ct. 1194] and its progeny. Although this Rule does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. A disclosure's timeliness will vary with the circumstances, and this Rule is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[3A] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal* if disclosure of information to the defense could result in substantial* harm to an individual or to the public interest.

~~[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client lawyer relationship.~~

[54] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial* likelihood of prejudicing an adjudicatory proceeding. ~~In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is~~ Paragraph (f) is not intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

~~[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.~~

[5] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See Rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (f) will be satisfied if the prosecutor issues the appropriate cautions to law- enforcement personnel and other relevant individuals.

[76] When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a person* outside the prosecutor's jurisdiction was convicted of a crime that the person* did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or

make reasonable* efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent ~~court-authorized~~court authorized delay, to the defendant. ~~Consistent with the objectives of Rules 4.2 and 4.3, disclosure~~Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See Rule 4.2.)

[~~8~~7] Under paragraph (h), once the prosecutor knows* of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. ~~Necessary steps may~~Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[~~9~~8] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of ~~sections~~paragraphs (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Rule 3.9 Advocate ~~In~~in Nonadjudicative Proceedings (Redline Comparison of the Proposed Rule to ABA Model Rule)

A lawyer ~~representing a client before~~communicating in a representative capacity with a legislative body or administrative agency in ~~a~~connection with a pending nonadjudicative ~~matter or~~ proceeding shall disclose that the appearance is in a representative capacity ~~and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5, except when the lawyer seeks information from an agency that is available to the public.~~

Comment

~~[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.~~

~~[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.~~

~~[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. ~~Not~~This Rule also does ~~it~~not apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4. This Rule does not require a lawyer to disclose a client's identity.~~

**Rule 3.10 [5-100] Threatening Criminal, Administrative, or Disciplinary Charges
(Redline Comparison of the Proposed Rule to Current California Rule)**

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

DiscussionComment

~~Rule 5-100 is not intended to apply to a member’s threatening to initiate contempt proceedings against a party for a failure to comply with a court order.~~

[1] Paragraph (a) does not prohibit a statement by a lawyer that the lawyer will present criminal, administrative, or disciplinary charges, unless the statement is made to obtain an advantage in a civil dispute. For example, if a lawyer believes* in good faith that the conduct of the opposing lawyer or party violates criminal or other laws, the lawyer may state that if the conduct continues the lawyer will report it to criminal or administrative authorities. On the other hand, a lawyer could not state or imply that a criminal or administrative action will be pursued unless the opposing party agrees to settle the civil dispute.

[2] This Rule does not apply to a threat to bring a civil action. It also does not prohibit actually presenting criminal, administrative or disciplinary charges, even if doing so creates an advantage in a civil dispute. Whether a lawyer’s statement violates this Rule depends on the specific facts. See, e.g., *Crane v. State Bar* (1981) 30 Cal.3d 117 [177 Cal.Rptr. 670]. A statement that the lawyer will pursue “all available legal remedies,” or words of similar import, does not by itself violate this Rule.

[3] This Rule does not apply to (i) a threat to initiate contempt proceedings for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code §§ 1377-78.

[4] This Rule does not prohibit a government lawyer from offering a global settlement or release-dismissal agreement in connection with related criminal, civil or

administrative matters. The government lawyer must have probable cause for initiating or continuing criminal charges. See Rule 3.8.

[5] As used in paragraph (b), “governmental organizations” includes any federal, state, local, and foreign governmental organizations. Paragraph ~~(B) is intended to exempt~~ b) exempts the threat of filing an administrative charge ~~which~~ that is a prerequisite to filing a civil complaint on the same transaction or occurrence.

~~For purposes of paragraph (C), the definition of “civil dispute” makes clear that the rule is applicable prior to the formal filing of a civil action.~~

**Rule 4.1 Truthfulness ~~In~~ Statements ~~To~~ Others
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

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

- (a) make a false statement of material fact or law to a third person;* or
- (b) fail to disclose a material fact to a third person* when disclosure is necessary to avoid assisting a criminal or fraudulent* act by a client, unless disclosure is prohibited by Rule 1.6 or Business and Professions Code § 6068(e)(1).

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person* that the lawyer knows* is false. ~~Misrepresentations can also occur by~~ However, in drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer makes a partially true but misleading ~~statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.~~ material statement or material omission. In addition to this Rule, lawyers remain bound by Rule 8.4 and Business and Professions Code § 6106.

Statements of Fact

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

Crime or Fraud by Client

[3] Under Rule ~~1.2(d)~~ 1.2.1, a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows* is criminal or fraudulent.* ~~Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily~~ See Rule 1.4(a)(5) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. In some circumstances, a lawyer can avoid assisting

a client's crime or fraud* by withdrawing from the representation. ~~Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by~~ in compliance with Rule 1.61.16.

[4] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see Rule 8.4, Comment [5].

**Rule 2-100 [4.2] Communication With a Represented Party Person
(Redline Comparison of the Proposed Rule to Current California Rule)**

- (a) ~~While~~In representing a client, a ~~member~~lawyer shall not communicate directly or indirectly about the subject of the representation with a ~~party~~person* the ~~member~~lawyer knows* to be represented by another lawyer in the matter, unless the ~~member~~lawyer has the consent of the other lawyer.
- (b) ~~For purposes of this rule, a "party" includes~~In the case of a represented corporation, partnership, association, or other private or governmental organization, this Rule prohibits communications with:
- (1) ~~An~~A current officer, director, partner,* or managing agent of ~~a corporation or association, and a partner or managing agent of a partnership~~the organization; or
 - (2) ~~An association member or an employee of an association, corporation, or partnership~~A current employee, member, agent, or other constituent of the organization, if the subject of the communication is any act or omission of such person* in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability ~~or whose statement may constitute an admission on the part of the organization.~~
- (c) This Rule shall not prohibit:
- (1) communications with a public ~~officer~~official, board, committee, or body; or
 - (2) communications otherwise authorized by law or a court order.
- (d) In any communication with a represented person* not prohibited by this Rule, the lawyer shall comply with the requirements of Rule 4.3.
- (e) For purposes of this Rule:
- (1) "Managing agent" means an employee, member, agent, or other constituent of an organization with substantial* discretionary authority over decisions that determine organizational policy.
 - (2) "Public official" means a public officer of the United States government, or of a state, county, city, town, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1).

Comment

[1] This Rule applies even though the represented person* initiates or consents to the communication. A lawyer must immediately terminate communication with a person* if, after commencing communication, the lawyer learns that the person* is one with whom communication is not permitted by this Rule.

[2] “Subject of the representation,” “matter,” and “person” are not limited to a litigation context. This Rule applies to communications with any person,* whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[2A] This Rule applies where the lawyer has actual knowledge that the person* to be contacted is represented by another lawyer in the matter. Actual knowledge may be inferred from the circumstances. (See Rule 1.0.1(f).)

[3] The prohibition against communicating “indirectly” with a person* represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person* through an intermediary such as an agent, investigator or the lawyer’s client. This Rule, however, does not prevent represented persons* from communicating directly with one another with respect to the subject of the representation, nor does it prohibit a lawyer from advising a client concerning such a communication. A lawyer may also advise a client not to accept or engage in such communications. The Rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person* in that matter.

[4] This Rule does not prohibit communications with a represented person* concerning matters outside the representation. Similarly, a lawyer who knows* that a person* is being provided with limited scope representation is not prohibited from communicating with that person* with respect to matters that are outside the scope of the limited representation. (See, e.g., Cal. Rules of Court, Rules 3.35 – 3.37; 5.425 (Limited Scope Representation).)

[5]~~(2)~~ This Rule does not prohibit communications initiated by a party represented person* seeking advice or representation from an independent lawyer of the party’s person’s choice; or.

~~(3) Communications otherwise authorized by law.~~

Discussion

~~Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal~~

~~employment opportunity. Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.~~

~~Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer party, and (2) not to accept or engage in communications with the lawyer party.~~

~~Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice. Since A is employed by the opposition, the member cannot give independent advice.~~

~~As used in paragraph (A), "the subject of the representation," "matter," and "party" are not limited to a litigation context.~~

~~Paragraph (B) is intended to apply only to persons employed at the time of the communication. (See *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493].)~~

~~Subparagraph (C)(2) is intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.) (Amended by order of Supreme Court, operative September 14, 1992.)~~

[6] If a current constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication is sufficient for purposes of this Rule.

[7] This Rule applies to all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations. When a lawyer communicates on behalf of a client with a governmental organization, or certain employees, members, agents, or other constituents of a governmental organization, however, special considerations exist as a result of the right to petition conferred by the First Amendment of the United States Constitution and Article I, § 3 of the California Constitution. Paragraph (c)(1) recognizes these special considerations by generally exempting from application of this Rule communications with public boards, committees, and bodies, and with public officials as defined in paragraph (e)(2) of this Rule. Communications with a governmental

organization constituent who is not a public official, however, will remain subject to this Rule when the lawyer knows* the governmental organization is represented in the matter and the communication with that constituent falls within paragraph (b)(2).

[8] Paragraph (c)(2) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person* that **would otherwise be subject to this Rule.** Examples of such statutory schemes include those protecting the right of employees to organize and engage in collective bargaining, employee health and safety, and equal employment opportunity. The law also recognizes that prosecutors and other government lawyers are authorized to contact represented persons,* either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., *United States v. Carona* (9th Cir. 2011) 630 F.3d 917; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133.) The Rule is not intended to preclude communications with represented persons* in the course of such legitimate investigative activities as authorized by law. This Rule also is not intended to preclude communications with represented persons* in the course of legitimate investigative activities engaged in, directly or indirectly, by lawyers representing persons* whom the government has accused of or is investigating for crimes, to the extent those investigative activities are authorized by law.

**Rule 4.3 ~~Dealing~~Communicating with an Unrepresented Person
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

- (a) In ~~dealing~~communicating on behalf of a client with a person* who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows* or reasonably should know* that the unrepresented person* ~~misunderstands the lawyer's role~~incorrectly believes* the lawyer is disinterested in the matter, the lawyer shall make reasonable* efforts to correct the misunderstanding. ~~The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if~~ the lawyer knows* or reasonably should know* that the interests of ~~such a~~the unrepresented person* are ~~or have a reasonable possibility of being~~ in conflict with the interests of the client, ~~the lawyer shall not give legal advice to that person,* except that the lawyer may, but is not required to, advise the person* to secure counsel.~~
- (b) In communicating on behalf of a client with a person* who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows* or reasonably should know* the person* may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

Comment

[1] This Rule is intended to protect unrepresented persons,* whatever their interests, from being misled when communicating with a lawyer who is acting for a client.

~~[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).~~

~~[2] The Rule~~Paragraph (a) distinguishes between situations ~~involving unrepresented persons whose~~in which a lawyer knows* or reasonably should know* that the interests ~~may be adverse to those of an unrepresented person* are in conflict with the interests~~ of the lawyer's client and ~~those in which the person's interests are not in conflict with the client's~~situations in which the lawyer does not. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any legal advice, apart from the advice to obtain counsel. ~~Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur.~~A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person.* So long as the lawyer ~~has explained~~discloses that the lawyer represents an

adverse party and ~~is not representing~~ the person,* the lawyer may inform the person* of the terms on which the lawyer's client will enter into ~~an~~the agreement or settle ~~a~~the matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document ~~or the lawyer's view of~~and the underlying legal obligations.

Rule 4.4 ~~Respect For Rights Of Third Persons~~ Duties Concerning Inadvertently Transmitted Writings*
(Redline Comparison of the Proposed Rule to 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.~~

~~(b) A lawyer who receives a document or electronically stored information~~writing* relating to the representation of the lawyer's client and knows* or reasonably should know* that the ~~document or electronically stored information~~writing* is privileged or subject to the work product doctrine, where it is reasonably* apparent that the writing* was inadvertently sent or produced, shall promptly notify the sender.

Comment

If a lawyer determines this Rule applies to a transmitted writing,* the lawyer should refrain from further examination of the writing* and either return the writing* to the sender, seek to reach agreement with the sender regarding the disposition of the writing,* or seek guidance from a tribunal.* See *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758]. If the sender is known* to be represented by counsel, the lawyer must communicate with the sender's counsel.

~~[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.~~

~~[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form.~~

~~Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.~~

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

**Rule 5.1 Responsibilities of a ~~Partner or~~ Managerial
and Supervisory ~~Lawyer~~ Lawyers**
(Redline Comparison of the Proposed Rule to ABA Model Rule)

- (a) A ~~partner in a law firm, and a~~ lawyer who individually or together with other lawyers possesses ~~comparable~~ managerial authority in a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that all lawyers in the firm* ~~conform to the Rules of Professional Conduct~~ comply with these Rules and the State Bar Act.
- (b) A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm,* shall make reasonable* efforts to ensure that the other lawyer ~~conforms to the Rules of Professional Conduct~~ complies with these Rules and the State Bar Act.
- (c) A lawyer shall be responsible for another ~~lawyer's~~ lawyer's violation of ~~the~~ these Rules ~~of Professional Conduct~~ and the State Bar Act if:
- (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer ~~is a partner or has comparable,~~ individually or together with other lawyers, possesses managerial authority in the law firm* in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.

Comment

Paragraph (a) – Duties Of Managerial Lawyers To Reasonably* Assure Compliance with the Rules. ~~[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.~~

[21] Paragraph (a) requires lawyers with managerial authority within a law firm* to make reasonable* efforts to establish internal policies and procedures designed ~~to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed, for example,~~ to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[2] Whether particular measures or efforts satisfy the requirements of paragraph (a) might depend upon the law firm's structure and the nature of its practice, including the size of the law firm,* whether it has more than one office location or practices in more than one jurisdiction, or whether the firm* or its partners* engage in any ancillary business.

~~[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.~~

[3] A partner,* shareholder or other lawyer in a law firm* who has intermediate managerial responsibilities might not be required to implement particular measures under paragraph (a) if the law firm* has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. However, a lawyer remains responsible to take corrective steps if the lawyer knows* or reasonably should know* that the delegated body or person* is not providing or implementing measures as required by this Rule.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).a) also requires managerial lawyers to make reasonable* efforts to assure that other lawyers in an agency or department comply with these Rules and the State Bar Act. This Rule contemplates, for example, the creation and implementation of reasonable* guidelines relating to the assignment of cases and the distribution of workload among lawyers in a public sector legal agency or other legal department. See, e.g., State Bar of California, Guidelines on Indigent Defense Services Delivery Systems (2006).

Paragraph (b) – Duties of Supervisory Lawyers

~~[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as Whether a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge~~

Paragraph (c) – Responsibility for Another’s Lawyer’s Violation

~~of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer~~[6] The appropriateness of remedial action under paragraph (c)(2) would depend on the immediacy of that lawyer’s involvement and the nature and seriousness of the misconduct. A supervisor is required to and the nature and immediacy of its harm. A managerial or supervisory lawyer must intervene to prevent avoidable consequences of misconduct if the ~~supervisor~~lawyer knows* that the misconduct occurred. ~~Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.~~

[7] A supervisory lawyer violates paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly* directing or ratifying the conduct, or where feasible, failing to take reasonable* remedial action.

~~[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.~~

~~[7]8] Apart from Paragraphs (a), (b), and (c) create independent bases for discipline. This Rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm.* Apart from paragraph (c) of this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner,* associate, or subordinate. Whether lawyer. The question of whether a lawyer may can be liable civilly or criminally for another lawyer’s lawyer’s conduct is a question of law beyond the scope of these Rules.~~

~~[89] The duties imposed by this Rule on managing and supervising lawyers do~~ This Rule does not alter the personal duty of each lawyer in a law firm* to ~~abide by the Rules of Professional Conduct~~comply with these Rules and the State Bar Act. See Rule 5.2(a). ~~the Rules of Professional Conduct. See Rule 5.2(a).~~

Rule 5.2 Responsibilities of a Subordinate Lawyer
(Redline Comparison of the Proposed Rule to ABA Model Rule)

- (a) A lawyer ~~is bound by the Rules of Professional Conduct~~shall comply with these Rules and the State Bar Act notwithstanding that the lawyer ~~acted~~acts at the direction of another lawyer or other person.
- (b) A subordinate lawyer does not violate ~~the~~these Rules ~~of Professional Conduct~~or the State Bar Act if that lawyer acts in accordance with a supervisory ~~lawyer's~~lawyer's reasonable* resolution of an arguable question of professional duty.

Comment

~~[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.~~

~~[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the lawyers' responsibilities under these Rules or the State Bar Act and the question can reasonably* be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate~~Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably* can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable* alternatives to select, and the subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonableIf the subordinate lawyer believes* that the supervisor's proposed resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

**Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a ~~partner, and a~~ lawyer who individually or together with other lawyers possesses ~~comparable~~ managerial authority in a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that the ~~person's~~nonlawyer's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm,* shall make reasonable* efforts to ensure that the ~~person's~~person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person* that would be a violation of ~~the~~these Rules ~~of Professional Conduct~~ of the State Bar Act if engaged in by a lawyer if:
 - (1) the lawyer orders or, with ~~the~~ knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer ~~is a partner or has comparable,~~ individually or together with other lawyers, possesses managerial authority in the law firm* in which the person* is employed, or has direct supervisory authority over the person,* whether or not an employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.

Comment

[1] Lawyers ~~generally employ assistants in their practice~~often utilize nonlawyer personnel, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the ~~lawyer's~~lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning ~~the~~all ethical aspects of their employment, ~~particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.~~ The measures employed in instructing and supervising nonlawyers should take account of the fact that they demight not have legal training ~~and are not subject to professional discipline.~~

[2] Paragraph (a) ~~requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c)~~

~~specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.~~

**Rule 5.3.1 [1-311] Employment of Disbarred,
Suspended, Resigned, or Involuntarily Inactive ~~Member~~Lawyer
(Redline Comparison of the Proposed Rule to Current California Rule)**

(Aa) For purposes of this ~~rule~~Rule:

(1) “Employ” means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;

(2) “Member” means a member of the State Bar of California.

(~~23~~) “Involuntarily inactive member” means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code ~~sections~~§§ 6007, 6203(~~ed~~(1)), or California Rule of Court 9.31;~~and~~(d).

(~~34~~) “Resigned member” means a member who has resigned from the State Bar while disciplinary charges are pending.

(5) “Restricted lawyer” means a member whose current status with the State Bar of California is ~~disbarred, suspended, resigned, or involuntarily inactive.~~

(Bb) A ~~member~~lawyer shall not employ, associate ~~professionally~~in practice with, or ~~aid~~assist a person* the ~~member~~lawyer knows* or reasonably should know* is a ~~disbarred, suspended, resigned, or involuntarily inactive member~~restricted lawyer to perform the following on behalf of the ~~member's~~lawyer's client:

(1) Render legal consultation or advice to the client;

(2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) Appear as a representative of the client at a deposition or other discovery matter;

(4) Negotiate or transact any matter for or on behalf of the client with third parties;

(5) Receive, disburse or otherwise handle the client's funds; or

(6) Engage in activities ~~which~~that constitute the practice of law.

(Cc) A ~~member~~lawyer may employ, associate ~~professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member~~in practice with, or assist a

restricted lawyer to perform research, drafting or clerical activities, including but not limited to:

- (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;
 - (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or
 - (3) Accompanying an active memberlawyer in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active memberlawyer who will appear as the representative of the client.
- (Dd) Prior to or at the time of employing, associating in practice with, or assisting a person* the memberlawyer knows* or reasonably should know* is a ~~disbarred, suspended, resigned, or involuntarily inactive member, the member~~restricted lawyer, the lawyer shall serve upon the State Bar written* notice of the employment, including a full description of such person's current bar status. The written* notice shall also list the activities prohibited in paragraph (bB) and state that the ~~disbarred, suspended, resigned, or involuntarily inactive member~~restricted lawyer will not perform such activities. The memberlawyer shall serve similar written* notice upon each client on whose specific matter such person* will work, prior to or at the time of employing, associating with, or assisting such person* to work on the client's specific matter. The memberlawyer shall obtain proof of service of the client's written* notice and shall retain such proof and a true and correct copy of the client's written* notice for two years following termination of the member'slawyer's employment withby the client.
- (Ee) A memberlawyer may, without client or State Bar notification, employ ~~a disbarred, suspended, resigned, or involuntarily inactive member,~~ associate in practice with, or assist a restricted lawyer whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.
- (Ff) ~~Upon termination of the disbarred, suspended, resigned, or involuntarily inactive member, the member~~When the lawyer no longer employs, associates in practice with, or assists the restricted lawyer, the lawyer shall promptly serve upon the State Bar written* notice of the termination.

DiscussionComment

~~For discussion of the activities that constitute the practice of law, see *Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford v. State Bar* (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants*~~

~~*Protective Corporation* (1922) 189 Cal. 531, 535 [209 P. 363]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].)~~

~~Paragraph (D) is not intended to prevent or discourage a member from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a member's client~~if the client ~~is an organization, then the written~~lawyer shall serve the ~~notice required by paragraph (D) shall be served upon the~~d) on its ~~highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule~~Rule 3-6001.13.~~)~~

~~Nothing in rule 1-311 shall be deemed to limit or preclude any activity engaged in pursuant to rules 9.40, 9.41, 9.42, and 9.44 of the California Rules of Court, or any local rule of a federal district court concerning admission *pro hac vice*.~~

Rule 5.4 [1-320] Financial and Similar Arrangements
~~With Non-Lawyers~~with Nonlawyers
(Redline Comparison of the Proposed Rule to Current California Rule)

~~(a)(A) Neither a member nor a~~A lawyer or law firm* shall ~~directly or indirectly~~not share legal fees ~~with a person who is not a lawyer~~directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:

- (1) ~~An~~An agreement ~~between a member and a law~~by a lawyer with the lawyer's firm,* partner,* or associate may provide for the payment of money ~~or other consideration~~over a reasonable* period of time after the ~~member's~~lawyer's death, to the ~~member's~~lawyer's estate or to one or more specified persons ~~over a reasonable period of time~~; ~~or~~
- (2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to Rule 1.17, to the lawyer's estate or other representative;
- ~~(2) A member or law firm undertaking to complete unfinished legal business of a deceased member may pay to the estate of the deceased member or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member; or~~
- (3) ~~A member~~a lawyer or law firm* may include ~~non-member~~nonlawyer employees in a compensation, ~~profit sharing~~, or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, ~~if such~~provided the plan does not ~~circumvent these rules or Business and Professions Code section 6000 et seq.; or otherwise violate these Rules or the State Bar Act;~~
- (4) ~~A member~~a lawyer or law firm* may pay a prescribed registration, referral, or ~~participation~~other fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California's Minimum Standards for ~~a Lawyer Referral Service in California~~.Services; or
- (5) a lawyer or law firm* may share with or pay a court-awarded legal fee to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm* in the matter.

~~(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise;~~

~~agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.~~

~~(C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.~~

Rule 1-310 Forming a Partnership With a Non-Lawyer

(b) A member~~lawyer~~ shall not form a partnership or other organization with a ~~person who is not a lawyer~~nonlawyer if any of the activities of ~~that~~the partnership or other organization consist of the practice of law.

(c) A lawyer shall not permit a person* who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or other organization authorized to practice law for a profit if:

(1) a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest for a reasonable* time during administration;

(2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or

(3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.

(e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.

Rule 1-600 Legal Service Programs

~~(A) A member shall not participate in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services, which allows any third person or organization to interfere with the member's independence of professional judgment, or with the client-lawyer relationship, or allows unlicensed persons to practice law, or allows any third person or organization to receive directly or indirectly any part of the consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules.~~

(e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.

~~(B) The Board of Governors of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on members.~~

(f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person* or organization to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person,* organization or group to practice law in violation of these Rules or the State Bar Act.

Discussion COMMENT

~~*[Discussion paragraph for Rule 1-320]*~~

~~Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment.~~

[1] Paragraph (a) does not prohibit a lawyer or law firm* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm* and does not violate these Rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5) permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]. See also Rule 6.3. Regarding a lawyer's contribution of legal fees to a legal services organization, see Rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

~~[Discussion paragraph for Rule 1-310]~~

~~Rule 1-310 is not intended to govern members' activities which cannot be considered to constitute the practice of law. It is intended solely to preclude a member from being involved in the practice of law with a person who is not a lawyer.~~

~~[Discussion paragraph for Rule 1-600]~~

~~The participation of a member in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of these rules.~~

~~Rule 1-600 is not intended to override any contractual agreement or relationship between insurers and insureds regarding the provision of legal services.~~

~~Rule 1-600 is not intended to apply to the activities of a public agency responsible for providing legal services to a government or to the public.~~

~~For purposes of paragraph (A), "a nongovernmental program, activity, or organization" includes, but is not limited to group, prepaid, and voluntary legal service programs, activities, or organizations.~~

[4] This Rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].

**Rule 5.5 [1-300] Unauthorized Practice of Law; Multijurisdictional Practice of Law
(Redline Comparison of the Proposed Rule to Current California Rule)**

~~(A) — A member shall not aid any person or entity in the unauthorized practice of law.~~

(a) A lawyer admitted to practice law in California shall not:

(1) ~~(B) A member shall not~~ practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

(2) knowingly* assist a person* or entity in the unauthorized practice of law.

(b) A lawyer who is not admitted to practice law in California shall not:

(1) except as authorized by these Rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

Comment

Paragraph (b)(1) prohibits lawyers from practicing law in California unless otherwise entitled to practice law in this state by court rule or other law. See, e.g., California Business and Professions Code, §§ 6125 et seq. See also California Rules of Court, rules 9.40 (counsel pro hac vice), 9.41 (appearances by military counsel), 9.42 (certified law students), 9.43 (out-of-state attorney arbitration counsel program), 9.44 (registered foreign legal consultant); 9.45 (registered legal services attorneys), 9.46 (registered in-house counsel), 9.47 (attorneys practicing temporarily in California as part of litigation), and 9.48 (non-litigating attorneys temporarily in California to provide legal services).

**Rule 1-500 ~~Agreements Restricting a Member's~~
[5.6] Restrictions on a Lawyer's Right to Practice
(Redline Comparison of the Proposed Rule to Current California Rule)**

- (a) A lawyer shall not participate in offering or making:
- (A1) ~~Aa member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement~~partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a ~~member~~lawyer to practice ~~law~~after termination of the relationship, except ~~that this rule shall not prohibit such an agreement which:~~that: (i) concerns benefits upon retirement, or (ii) is authorized by law; or
- (1) ~~Is a part of an employment, shareholders', or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship; or~~
- (2) ~~Requires payments to a member upon the member's retirement from the practice of law; or~~an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.
- (3) ~~Is authorized by Business and Professions Code sections 6092.5 subdivision (i), or 6093.~~
- (Bb) A ~~member~~lawyer shall not ~~be a party to or~~ participate in offering or making an agreement which precludes the reporting of a violation of these rules.
- (c) This Rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

DiscussionComment

~~Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.~~

~~Paragraph (A) permits a restrictive covenant in a law corporation, partnership, or employment agreement. The law corporation shareholder, partner, or associate may agree not to have a separate practice during the existence of the relationship; however, upon termination of the relationship (whether voluntary or involuntary), the member is free to practice law without any contractual restriction except in the case of retirement from the active practice of law.~~

[1] Concerning the application of paragraph (a)(1)(ii), see Business and Professions Code § 16602; Howard v. Babcock (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].

[2] Paragraph (a)(2) prohibits a lawyer from offering or agreeing not to represent other persons* in connection with settling a claim on behalf of a client.

[3] This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

**Rule 6.3 Membership In Legal Services Organization
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm* in which the lawyer practices, notwithstanding that the organization serves persons* having interests adverse to a client of the lawyer. The lawyer shall not knowingly* participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under ~~Rule~~Rules 1.7 or 1.9, or Business and Professions Code § 6068(e)(1); or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

~~[1]~~ Lawyers should ~~be encouraged to~~ support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons* served by the organization. However, there is potential conflict between the interests of such persons* and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

~~[2]~~ ~~It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.~~

**Rule 6.5 [1-650] Limited Legal Services Programs
(Redline Comparison of the Proposed Rule to Current California Rule)**

- (Aa) A ~~member~~lawyer who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the ~~member~~lawyer or the client that the ~~member~~lawyer will provide continuing representation in the matter:
- (1) is subject to ~~rule 3-310~~Rules 1.7 and 1.9(a) only if the ~~member~~lawyer knows* that the representation of the client involves a conflict of interest; and
 - (2) ~~has an imputed conflict of interest~~is subject to Rule 1.10 only if the ~~member~~lawyer knows* that another lawyer associated with the ~~member~~lawyer in a law firm* ~~would have a conflict of interest under rule 3-310~~is prohibited from representation by Rule 1.7 or 1.9(a) with respect to the matter.
- (Bb) Except as provided in paragraph (Aa)(2), ~~a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm~~Rule 1.10 is inapplicable to a representation governed by this Rule.
- (Cc) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

DiscussionComment

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services - such as advice or the completion of legal forms —that will assist persons* in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the ~~lawyer's~~lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A ~~member~~lawyer who provides short-term limited legal services pursuant to ~~rule 1-650~~this Rule must secure the client's informed consent* to the limited scope of the representation. See Rule 1.2(b). If a short-term limited representation would not be reasonable* under the circumstances, the ~~member~~lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. ~~See rule 3-110.~~Except as provided in this ~~rule 1-650, the~~Rule, ~~these~~ Rules of Professional Conduct and the State Bar Act, including the ~~member's~~lawyer's duty of confidentiality

under Business and Professions Code § 6068(e)(1), [Rule 1.6](#), and [Rule 1.9](#), are applicable to the limited representation.

[3] A [memberlawyer](#) who is representing a client in the circumstances addressed by ~~rule 1-650~~[this Rule](#) ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (Aa)(1) requires compliance with ~~rule 3-310~~[Rules 1.7 and 1.9\(a\)](#) only if the [memberlawyer](#) knows* that the representation presents a conflict of interest for the [memberlawyer](#). In addition, paragraph (Aa)(2) imputes conflicts of interest to the [memberlawyer](#) only if the [memberlawyer](#) knows* that another lawyer in the [member'slawyer's](#) law firm* would be disqualified under ~~rule 3-310~~[Rules 1.7 or 1.9\(a\)](#).

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the [member'slawyer's](#) law firm,* paragraph (Bb) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (Aa)(2). Paragraph (Aa)(2) imputes conflicts of interest to the participating [memberlawyer](#) when the [memberlawyer](#) knows* that any lawyer in the [member'slawyer's](#) firm* would be disqualified under ~~rule 3-310~~[Rules 1.7 or 1.9\(a\)](#). By virtue of paragraph (Bb), moreover, a [member'slawyer's](#) participation in a short-term limited legal services program will not be imputed to the [member'slawyer's](#) law firm* or preclude the [member'slawyer's](#) law firm* from undertaking or continuing the representation of a client with interests adverse to a client being represented under the ~~program's~~[program's](#) auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with ~~rule 1-650, a member~~[this Rule](#), a [lawyer](#) undertakes to represent the client in the matter on an ongoing basis, ~~rule 3-310 and all other rules~~[Rules 1.7, 1.9\(a\), and 1.10](#) become applicable.

Rule 7.1 [1-400] Advertising and Solicitation Communications Concerning A Lawyer's Services

(Redline Comparison of the Proposed Rule to Current California Rule)

- (A) ~~For purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:~~
- ~~(1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or~~
 - ~~(2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or~~
 - ~~(3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or~~
 - ~~(4) Any unsolicited correspondence from a member or law firm directed to any person or entity.~~
- (B) ~~For purposes of this rule, a "solicitation" means any communication:~~
- ~~(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and~~
 - ~~(2) Which is:~~
 - ~~(a) delivered in person or by telephone, or~~
 - ~~(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.~~
- (Ca) ~~A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.~~ lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains an untrue statement, or a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.
- (D) ~~A communication or a solicitation (as defined herein) shall not:~~

- (1) ~~Contain any untrue statement; or~~
 - (2) ~~Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or~~
 - (3) ~~Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or~~
 - (4) ~~Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or~~
 - (5) ~~Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.~~
 - (6) ~~State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.~~
- (Eb) The Board of ~~Governors~~Trustees of the State Bar ~~shall~~may formulate and adopt standards as to communications ~~which~~that will be presumed to violate ~~this rule 1-400~~Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these ~~rules~~Rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code ~~sections~~§§ 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all ~~members~~lawyers.
- (F) ~~A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.~~

Standards:Comment

~~Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:~~

[1] This Rule governs all communications of any type whatsoever about the lawyer or the lawyer's services, including advertising permitted by Rule 7.2. A communication includes any message or offer made by or on behalf of a lawyer concerning the

availability for professional employment of a lawyer or a lawyer's law firm* directed to any person.*

~~(1) A “communication” which contains guarantees, warranties, or predictions regarding the result of the representation.~~

~~{2}~~ A “communication” which contains testimonials about or endorsements of a member unless such communication also that contains an express disclaimer such as ~~“this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter.”~~guarantee or warranty of the result of a particular representation is a false or misleading communication under this Rule. See also, Business and Professions Code § 6157.2(a).

{3} This Rule prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if it is presented in a manner that creates a substantial* likelihood that it will lead a reasonable* person* to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable* factual foundation. Any communication that states or implies “no fee without recovery” is also misleading unless the communication also expressly discloses whether or not the client will be liable for costs.

~~(3) A “communication” which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.~~

~~(4) A “communication” which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.~~

~~(5) A “communication,” except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word “Advertisement,” “Newsletter” or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word “Advertisement,” “Newsletter” or words of similar import on the outside thereof.~~

~~(6) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.~~

~~(7)~~{4} A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists. that truthfully reports a lawyer's achievements on behalf of

clients or former clients, or a testimonial about or endorsement of the lawyer, may be misleading if presented so as to lead a reasonable* person* to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable* person* to conclude that the comparison can be substantiated. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations.

~~(8) A "communication" which states or implies that a member or law firm is "of counsel" to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.~~

~~(9) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.~~

~~(10) A "communication" which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.~~

~~(11) (Repealed. See rule 1-400(D)(6) for the operative language on this subject.)~~

~~(12) A "communication," except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.~~

~~(13) A "communication" which contains a dramatization unless such communication contains a disclaimer which states "this is a dramatization" or words of similar import.~~

~~(14) A "communication" which states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.~~

~~(15)~~[5]A ~~"This Rule prohibits a lawyer from making a communication" which that~~ states or implies that ~~a member~~the lawyer is able to provide legal services in a language other than English unless the ~~member~~lawyer can actually provide legal services in ~~such that~~ language or the communication also states in the language of the communication ~~(a)~~ the employment title of the person* who speaks such language ~~and (b) that the person is not a member of the State Bar of California, if that is the case.~~

[6] Rules 7.1 through 7.5 are not the sole basis for regulating communications concerning a lawyer's services. See, e.g., Business and Professions Code §§ 6150 – 6159.2 and 17000 et. seq. Other state or federal laws may also apply.

~~(16) An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.~~

**Rule 7.2 [1-400, 1-320(B), (C), & (A)(4), 2-200(B)] Advertising
(Redline Comparison of the Proposed Rule to Current California Rules)**

Proposed Rule 7.2(b) compared to current rule 1-320 (B), (C), (A)(4):

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through any written, recorded or electronic means of communication, including public media.
- (Bb) A ~~member~~lawyer shall not compensate, promise or give, ~~or promise~~ anything of value to anya person* or entity for the purpose of recommending or securing ~~employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.~~the services of the lawyer or the lawyer's law firm,* except that a lawyer may:
- (1) pay the reasonable* costs of advertisements or communications permitted by this Rule;
- (C) ~~A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.~~
- (A) ~~Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that:~~
- (42) ~~A member may pay a prescribed registration,~~the usual charges of a legal services plan or a qualified lawyer referral,~~or participation fee to service. A qualified lawyer referral service is~~ a lawyer referral service established, sponsored, and operated in accordance with the State Bar of ~~California's~~California's Minimum Standards for a Lawyer Referral Service in California;
- (3) pay for a law practice in accordance with Rule 1.17;
- (4) refer clients to another lawyer or a nonlawyer professional pursuant to an arrangement not otherwise prohibited under these Rules or the State Bar Act that provides for the other person* to refer clients or customers to the lawyer, if

Proposed Rule 7.2(b) compared to the 2nd sentence of current rule 2-200(B):

- (i) the reciprocal referral arrangement is not exclusive, and
 - (ii) the client is informed of the existence and nature of the arrangement;
- (B5) ~~Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving~~offer or give a gift or gratuity to ~~any lawyer who has~~a person* or entity having made a recommendation resulting in the employment of the ~~member~~lawyer or the ~~member's~~lawyer's law firm* ~~shall not of itself violate this rule~~, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

Proposed Rule 7.2(c) compared to current Rule 1-400, Standard (12):

- (c) ~~(12) A "communication," except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it. Any communication made pursuant to this Rule shall include the name and address of at least one lawyer or law firm* responsible for its content.~~

Comment

[1] This Rule permits public dissemination of accurate information concerning a lawyer and the lawyer's services, including for example, the lawyer's name or firm* name, the lawyer's contact information; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance. This Rule, however, prohibits the dissemination of false or misleading information, for example, an advertisement that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges or intends to charge a greater fee than that stated in the advertisement.

[2] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as court-approved class action notices.

Paying Others to Recommend a Lawyer

[3] Paragraph (b)(1) permits a lawyer to compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms* with respect to supervising the conduct of nonlawyers who prepare marketing materials and provide client development services.

[4] Paragraph (b)(4) permits a lawyer to make referrals to another lawyer or nonlawyer professional, in return for the undertaking of that person* to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rule[s 2.1 and] 5.4(c). Conflicts of interest created by arrangements made pursuant to paragraph (b)(4) are governed by Rule 1.7. A division of fees between or among lawyers not in the same law firm* is governed by Rule 1.5.1.

**Rule 7.2 ~~[1-400 1-320(B), (C), & (A)(4)]~~ Advertising
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through any written, recorded or electronic means of communication, including public media.
- (b) A lawyer shall not compensate, promise or give anything of value to a person* ~~for or~~ entity for the purpose of recommending or securing the ~~lawyer's~~ services of the lawyer or the lawyer's law firm,* except that a lawyer may:
- (1) pay the reasonable* costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal ~~services~~services plan or a ~~not-for-profit or~~ qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service ~~that has been approved by an appropriate regulatory authority~~established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California;
 - (3) pay for a law practice in accordance with Rule 1.17; ~~and-~~
 - (4) refer clients to another lawyer or a nonlawyer professional pursuant to an ~~agreement~~arrangement not otherwise prohibited under these Rules or the State Bar Act that provides for the other person* to refer clients or customers to the lawyer, if
 - (i) the reciprocal referral ~~agreement~~arrangement is not exclusive, and
 - (ii) the client is informed of the existence and nature of the ~~agreement.~~arrangement;
 - (5) offer or give a gift or gratuity to a person* or entity having made a recommendation resulting in the employment of the lawyer or the lawyer's law firm,* provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.
- (c) Any communication made pursuant to this ~~rule~~Rule shall include the name and ~~office~~-address of at least one lawyer or law firm* responsible for its content.

Comment

~~[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising~~

~~involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.~~

[21] This Rule permits public dissemination of accurate information concerning a ~~lawyer's~~lawyer and the lawyer's services, including for example, the lawyer's name or firm* name, ~~address, email address, website, and telephone number~~the lawyer's contact information; the kinds of services the lawyer will undertake; the basis on which the ~~lawyer's~~lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a ~~lawyer's~~lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance. This Rule, however, prohibits the dissemination of false or misleading information, for example, an advertisement that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges or intends to charge a greater fee than that stated in the advertisement.

~~[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.~~

[42] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as ~~notice to members of a class in~~court-approved class action ~~litigation~~notices.

Paying Others to Recommend a Lawyer

~~[53] Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and~~

~~group advertising. A lawyer may~~ permits a lawyer to compensate employees, agents and vendors who are engaged to provide marketing or ~~client development~~client-development services, such as publicists, public-relations personnel, business-development staff and website designers. ~~Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (for the duties of lawyers and law firms* with respect to supervising the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another) who prepare marketing materials and provide client development services.~~

~~[6]— A lawyer may pay the usual charges of a legal service plan or a not for profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not for profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the referral service.)~~

~~[7]— A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar~~

~~association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.~~

~~[84] A lawyer also may agree to refer clients~~Paragraph (b)(4) permits a lawyer to make referrals to another lawyer or ~~a~~ nonlawyer professional, in return for the undertaking of that person* to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the ~~lawyer's~~lawyer's professional judgment as to making referrals or as to providing substantive legal services. See ~~Rules~~Rule[s] 2.1 and] 5.4(c). ~~Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement.~~ Conflicts of interest created by ~~such~~ arrangements made pursuant to paragraph (b)(4) are governed by Rule 1.7. ~~Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities. A division of fees between or among lawyers not in the same law firm* is governed by Rule 1.5.1.~~

Rule 7.3 [1-400] ~~Advertising~~ Solicitation of Clients
(Redline Comparison of the Proposed Rule to Current California Rule)

(a) A lawyer shall not by in-person,* live telephone or real-time electronic contact solicit professional employment when a significant motive for doing so is the lawyer's pecuniary gain, unless the person contacted:

(B) ~~For purposes of this rule, a "solicitation" means any communication:~~

~~(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and~~

~~(2) Which is: a lawyer; or~~

~~(a2) delivered in person or by telephone, or~~ has a family, close personal, or prior professional relationship with the lawyer.

~~(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.~~

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the person* being solicited has made known* to the lawyer a desire not to be solicited by the lawyer; or

~~(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.~~

~~(D) A communication or a solicitation (as defined herein) shall not:~~

~~*****~~

~~(52) Be~~ the solicitation is transmitted in any manner which involves intrusion, coercion, duress, ~~compulsion, intimidation, threats, or vexatious or harassing conduct~~ or harassment.

~~*****~~

(c) ~~(5) A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word "Advertisement," "Newsletter" or words of similar import in 12 point print on the first page. If such communication,~~

~~including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word "Advertisement," "Newsletter" or words of similar import on the outside thereof.~~ Every written, recorded or electronic communication from a lawyer soliciting professional employment from any person* known* to be in need of legal services in a particular matter shall include the word "Advertisement" or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person* specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.

- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person, live telephone or real-time electronic contact to solicit memberships or subscriptions for the plan from persons* who are not known* to need legal services in a particular matter covered by the plan.
- (e) As used in this Rule, the terms "solicitation" and "solicit" refer to an oral or written* targeted communication initiated ~~by or on behalf of~~ the lawyer that is directed to a specific person* and that offers to provide, or can reasonably* be understood as offering to provide, legal services.

Standards:Comment

~~Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:~~

~~(3)[1] A "lawyer's communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.~~ does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

~~(4) A "communication" which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.~~

[2] Paragraph (a) does not apply to situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Therefore, paragraph (a) does not prohibit a lawyer from participating in constitutionally protected activities of bona fide public or charitable legal-service organizations, or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries. See, e.g., *In re Primus* (1978) 436 U.S. 412 [98 S.Ct. 1893].

[3] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a bona fide group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm* is willing to offer.

[4] Lawyers who participate in a legal service plan as permitted under paragraph (d) must comply with Rules 7.1, 7.2, and 7.3(b). See also Rules 5.4 and 8.4(a).

**Rule 7.4 [1-400(D)(6)] Communication of Fields of Practice
and Specialization ~~Provision~~
(Redline Comparison of the Proposed Rule to Current California Rule)**

~~*****~~

(~~D~~a) A ~~communication or solicitation (as defined herein) shall not~~ lawyer shall not state that the lawyer is a certified specialist in a particular field of law, unless:

~~*****~~

(~~6~~1) ~~State that a member is a~~ “the lawyer is currently certified ~~specialist” unless the member holds a current~~ specialist” unless the member holds a current ~~certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees;~~ ; ~~and states the complete name of the entity which granted certification.~~

(2) the name of the certifying organization is clearly identified in the communication.

(b) Notwithstanding paragraph (a), a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice specializes in, is limited to, or is concentrated in a particular field of law, subject to the requirements of Rule 7.1.

Rule 7.5 [1-400] Firm* Names and ~~Letterheads~~Trade Names
(Redline Comparison of the Proposed Rule to ABA Model Rule)

- (a) A lawyer shall not use a firm* name, ~~letterhead~~trade name or other professional designation that violates Rule 7.1.
- ~~(b) A trade name may be used by a~~ lawyer in private practice ~~if it does not imply a connection~~shall not use a firm* name, trade name or other professional designation that states or implies a relationship with a government agency or with a public or charitable legal services organization~~and is not, or~~ otherwise ~~in violation of~~violates Rule 7.1.
- ~~(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.~~
- ~~(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.~~
- ~~(dc) Lawyers may~~A lawyer shall not state or imply that ~~they practice in a partnership~~the lawyer practices in or has a professional relationship with a law firm* or other organization ~~only when~~unless that is the fact.

Comment

The term “other professional designation” includes, but is not limited to, logos, letterheads, URLs, and signature blocks.

~~[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm’s identity or by a trade name such as the “ABC Legal Clinic.” A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic,” an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.~~

~~[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, “Smith and Jones,” for that title suggests that they are practicing law together in a firm.~~

**Rule 8.1 [1-200] False Statement Regarding ~~Admission to the State Bar~~ Application for
Admission, Readmission, Certification or Registration
(Redline Comparison of the Proposed Rule to Current California Rule)**

- (a) This Rule applies to applications for admission, readmission, certification or registration submitted to the State Bar or a court, including applications for: admission to practice law under Business and Professions Code §§ 6060 and 6062; readmission or reinstatement to practice law pursuant to California Rules of Court, rule 9.10(f); certification as a legal specialist under California Rules of Court, rule 9.35; and appearance and practice under California Rules of Court, rules 9.40 – 9.46.
- (b) An applicant for admission, readmission, certification or registration shall not knowingly* make a false statement of material fact, fail to disclose a material fact, or fail to correct a statement known* to be false.
- (c) ~~(A) A member shall not~~ lawyer supporting or opposing another person's application for admission, readmission, certification or registration, shall not, as part of the application process, knowingly* make a false statement regarding a of material fact or knowingly, fail to disclose a material fact in connection with an application for admission to the State Bar, or fail to correct a statement known* to be false.
- ~~(B) A member shall not further an application for admission to the State Bar of a person whom the member knows to be unqualified in respect to character, education, or other relevant attributes.~~
- (d) ~~(C) This rule shall not prevent a member from serving as counsel of record for~~ Rule does not apply to a lawyer in representing an applicant for admission to practice in proceedings related to such relating to admission, readmission, certification or registration.

CommentDiscussion

~~For purposes of rule 1-200 "admission" includes readmission.~~

[1] A person* who makes a false statement in connection with that person's own application can be subject to discipline under this Rule or to later cancellation of that person's admission or other authorization.

[2] In representing an applicant for admission, readmission, certification or registration, a lawyer is subject to other applicable rules and the State Bar Act.

**Rule ~~8.1~~ [1-110] ~~Disciplinary Authority of the State Bar~~ Compliance with Conditions of Discipline and Agreements in Lieu of Discipline
(Redline Comparison of the Proposed Rule to Current California Rule)**

A ~~member~~ lawyer shall comply with the terms and conditions attached to any agreement in lieu of discipline, any public or private ~~reprovals or~~ reproval, or to other discipline administered by the State Bar pursuant to Business and Professions Code ~~sections~~ §§ 6077 and 6078 and ~~rule 9.19,~~ California Rules of Court, rule 9.19.

Comment

Other provisions also require a lawyer to comply with agreements in lieu of discipline and conditions of discipline. See e.g., Business and Professions Code § 6068, (k) and (l).

Rule 8.2 [1-700] ~~Member as Candidate for~~ Judicial Office ~~Officials~~
(Redline Comparison of the Proposed Rule to Current California Rule)

- (a) A lawyer shall not make a statement of fact that the lawyer knows* to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or judicial officer, or of a candidate for election or appointment to judicial office.
- (Ab) A ~~member~~lawyer who is a candidate for judicial office in California shall comply with Canon 5 of the California Code of Judicial Ethics.
- (B) For purposes of this Rule, “candidate for judicial office” means a ~~member~~lawyer seeking judicial office by election. The determination of when a ~~member~~lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A ~~member's~~lawyer's duty to comply with ~~paragraph (A)~~this Rule shall end when the ~~member~~lawyer announces withdrawal of the ~~member's~~lawyer's candidacy or when the results of the election are final, whichever occurs first.
- (c) A lawyer who seeks appointment to judicial office shall comply with Canon 5B(1) of the California Code of Judicial Ethics. A lawyer becomes an applicant seeking judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A lawyer's duty to comply with this Rule shall end when the lawyer advises the appointing authority of the withdrawal of the lawyer's application.

Discussion ~~Comment~~

~~Nothing in rule 1-700 shall be deemed to limit the applicability of any other rule or law.~~

[1] To maintain the fair and independent administration of justice, lawyers should defend judges and courts unjustly criticized. Lawyers also are obligated to maintain the respect due to the courts of justice and judicial officers. See Business and Professions Code § 6068(b).

[2] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons* being considered for election or appointment to judicial office. 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.

Rule 8.4 [1-120] ~~Assisting, Soliciting, or Inducing Violations~~ Misconduct
(Redline Comparison of the Proposed Rule to Current California Rule)

It is professional misconduct for a lawyer to:

- (a) violate these Rules ~~or the State Bar Act~~, knowingly* assist, solicit or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that involves moral turpitude or that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving moral turpitude, dishonesty, fraud,* deceit or reckless or intentional misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules, the State Bar Act, or other law; or
- (f) ~~A member shall not~~ knowingly assist ~~in, solicit, or induce any~~ judge or judicial officer in conduct that is a violation of ~~these~~ applicable rules ~~or the State Bar Act~~ of judicial conduct or other law.

Comment

[1] A violation of this Rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

[2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code §§ 6101 et seq., or if the criminal act constitutes “other misconduct warranting discipline” as defined by California Supreme Court case law. See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].

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

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules and the State Bar Act.

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

Rule 8.4.1 [2-400] Prohibited ~~Discriminatory Conduct in a Law-Practice~~ Discrimination, Harassment and Retaliation
(Redline Comparison of the Proposed Rule to Current California Rule)

- (a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic or for the purpose of retaliation.
- (b) In relation to a law firm's operations, a lawyer shall not, on the basis of any protected characteristic or for the purpose of retaliation, unlawfully:
- (1) discriminate or knowingly* permit unlawful discrimination;
 - (2) harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or
 - (3) refuse to hire or employ a person,* or refuse to select a person for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment.
- (Ac) For purposes of this rule:
- (1) ~~“law practice” includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;~~ protected characteristic” means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;
 - (2) “knowingly permit” means ~~a failure to fail~~ to advocate corrective action where the ~~member~~ lawyer knows* of a discriminatory policy or practice ~~which that~~ results in the unlawful discrimination ~~or harassment~~ prohibited in by paragraph (Bb); ~~and~~
 - (3) “unlawfully” and “unlawful” shall be determined by reference to applicable state ~~or and~~ federal statutes ~~or and~~ decisions making unlawful discrimination ~~or harassment~~ in employment and in offering goods and services to the public; ~~and~~
 - (4) “retaliation” means to take adverse action because a person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by this Rule.

- ~~(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:~~
- (d) A lawyer who is the subject of a State Bar investigation or State Bar Court proceeding alleging a violation of this Rule shall promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding.
- ~~(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or~~
- (2e) accepting or terminating representation of any client. Upon issuing a notice of a disciplinary charge under this Rule:
- (1) If the notice is of a disciplinary charge under paragraph (a) of this Rule, the State Bar shall provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review Section.
- (2) If the notice is of a disciplinary charge under paragraph (b) of this Rule, the State Bar shall provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.
- (f) This Rule shall not prevent a lawyer from representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation.
- ~~(G) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.~~

DiscussionComment

~~In order for discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this rule.~~

~~A complaint of misconduct based on this rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding is thereafter appealed.~~

~~A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.~~

[1] Conduct that violates this Rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). In relation to a law firm's operations, this Rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel. Law firm* management and supervisory lawyers retain their separate responsibility under Rules 5.1 and 5.3. Neither this Rule nor Rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this Rule any responsibility to advocate corrective action.

[2] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Canon 3B(6) of the Code of Judicial Ethics providing, in part, that: "A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others.") A lawyer does not violate paragraph (a) by referring to any particular status or group when the reference is relevant to factual or legal issues or arguments in the representation. This Rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows* of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer's relationship to the lawyer or law firm* implementing that policy or practice. For example, a law firm* non-management and non-supervisory lawyer who becomes aware that the law firm* is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm* management lawyer who would have responsibility under Rule 5.1 or 5.3 to take reasonable* remedial action upon becoming aware of a violation of this Rule.

[4] Paragraph (d) ensures that the State Bar and the State Bar Court will be provided with information regarding related proceedings that may be relevant in

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determining whether a State Bar investigation or a State Bar Court proceeding relating to a violation of this Rule should be abated.

[5] Paragraph (e) recognizes the public policy served by enforcement of laws and regulations prohibiting unlawful discrimination, by ensuring that the state and federal agencies with primary responsibility for coordinating the enforcement of those laws and regulations is provided with notice of any allegation of unlawful discrimination, harassment, or retaliation by a lawyer that the State Bar finds has sufficient merit to warrant issuance of a notice of a disciplinary charge.

[6] This Rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.

**Rule 8.4.1 [2-400] Prohibited ~~Discriminatory Conduct in a Law-Practice~~Discrimination, Harassment and Retaliation
(Redline Comparison of the Proposed Rule to Current California Rule)**

- (a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic or for the purpose of retaliation.
- (b) In relation to a law firm's operations, a lawyer shall not, on the basis of any protected characteristic or for the purpose of retaliation, unlawfully:
- (1) discriminate or knowingly* permit unlawful discrimination;
 - (2) harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or
 - (3) refuse to hire or employ a person,* or refuse to select a person* for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment.
- (Ac) For purposes of this rule:
- (1) ~~“law practice” includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;~~protected characteristic” means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;
 - (2) “knowingly permit” means ~~a failure to fail~~ to advocate corrective action where the ~~member~~lawyer knows* of a discriminatory policy or practice ~~which that~~ results in the unlawful discrimination or harassment prohibited ~~in by~~ paragraph (Bb); ~~and~~
 - (3) “unlawfully” and “unlawful” shall be determined by reference to applicable state ~~or and~~ federal statutes ~~or and~~ decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public.; ~~and~~
- (B) ~~In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:~~

(4) “retaliation” means to take adverse action because a person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by this Rule.

~~(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or~~

~~(2) accepting or terminating representation of any client.~~

~~(C)~~ (d) No disciplinary investigation or proceeding may be initiated by the State Bar against a ~~member~~lawyer under this ~~rule~~Rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first:

(1) adjudicated a complaint of alleged harassment or discrimination and found that unlawful conduct occurred; or

(2) has entered an order sanctioning a lawyer for such unlawful conduct.

Upon ~~such~~ adjudication or entry of order, the ~~tribunal~~tribunal’s finding ~~or~~ verdict or order shall then be admissible evidence of the occurrence or non-occurrence of the ~~alleged~~ harassment or discrimination alleged in any disciplinary proceeding initiated under this ~~rule~~. ~~In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.~~Rule.

(e) This Rule shall not prevent a lawyer from representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation.

DiscussionComment

[1] Conduct that violates this Rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). In relation to a law firm’s operations, this Rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel. Law firm* management and supervisory lawyers retain their separate responsibility under Rules 5.1 and 5.3. Neither this Rule nor Rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this Rule any responsibility to advocate corrective action.

[2] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Canon 3B(6) of the Code of Judicial Ethics providing, in part, that: “A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel,

or others.”) A lawyer does not violate paragraph (a) by referring to any particular status or group when the reference is relevant to factual or legal issues or arguments in the representation. This Rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court’s finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows* of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer’s relationship to the lawyer or law firm* implementing that policy or practice. For example, a law firm* non-management and non-supervisory lawyer who becomes aware that the law firm* is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm* management lawyer who would have responsibility under Rule 5.1 or 5.3 to take reasonable* remedial action upon becoming aware of a violation of this Rule.

[4] In order for harassment or discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. ~~Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this rule.~~

[5] A complaint of misconduct based on this ~~rule~~Rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding is thereafter appealed.

~~A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court’s inherent authority to impose discipline, or other disciplinary standard.~~

[6] This Rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.

Rule 8.5 Disciplinary Authority; Choice of Law
(Redline Comparison of the Proposed Rule to Current ABA Model Rule)

- (a) **Disciplinary Authority.** A lawyer admitted to practice in ~~this jurisdiction~~California is subject to the disciplinary authority of ~~this jurisdiction~~California, regardless of where the lawyer's conduct occurs. A lawyer not admitted in ~~this jurisdiction~~California is also subject to the disciplinary authority of ~~this jurisdiction~~California if the lawyer provides or offers to provide any legal services in ~~this jurisdiction~~California. A lawyer may be subject to the disciplinary authority of both ~~this jurisdiction~~California and another jurisdiction for the same conduct.
- (b) **Choice of Law.** In any exercise of the disciplinary authority of ~~this jurisdiction~~California, the rules of professional conduct to be applied shall be as follows:
- (1) for conduct in connection with a matter pending before a tribunal,* the rules of the jurisdiction in which the tribunal* sits, unless the rules of the tribunal* provide otherwise; and
 - (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes* the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

~~[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.~~

Choice of Law

~~[2]The conduct of a lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions~~

~~in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction. in California is subject to the disciplinary authority of California. See Business and Professions Code §§ 6077, 6100. Extension of the disciplinary authority of California to other lawyers who provide or offer to provide legal services in California is for the protection of the residents of California. A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. See e.g., Business and Professions Code § 6049.1.~~

~~[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.~~

~~[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.~~

~~[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.~~

~~[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.~~

~~[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.~~