

Rule 8.4 [1-120] Misconduct

(Commission's Proposed Rule Adopted on January 22 – 23, 2016 – Clean Version)

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) knowingly* assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

[1] A violation of this Rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

[2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[3] 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.

PROPOSED RULE OF PROFESSIONAL CONDUCT 8.4
(Current Rule 1-120)
Misconduct

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-120 (Assisting, Soliciting, or Inducing Violations) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 8.4 (concerning professional misconduct of a lawyer). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed rule 8.4 (Misconduct). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 8.4 carries forward the substance of current rule 1-120 by prohibiting a lawyer from knowingly assisting in, soliciting or inducing a violation of the Rules of Professional Conduct or the State Bar Act. The proposed rule also adopts the substance of ABA Model Rule 8.4 which contains a similar prohibition as well as additional provisions addressing misconduct that warrants imposition of discipline. The proposed rule is designed to collect in a single rule various misconduct provisions that are currently found in other California rules of professional conduct or in the Business and Professions Code. The rule is intended to facilitate compliance and enforcement by clearly stating these principles in a single rule where lawyers, judges and the public can identify basic standards of conduct addressing honesty, trustworthiness and fitness to practice with which a lawyer must comply.

Paragraph (a), which carries forward the substance of current rule 1-120, prohibits a lawyer from violating the rules of professional conduct, or the State Bar Act, or knowingly assist, solicit or induce another to do so. In addition, this paragraph prohibits a lawyer from doing any of the aforementioned through the acts of another.

One issue considered was whether to follow the approach in ABA Model Rule 8.4(a) which would generally prohibit a lawyer from “attempting” to violate a rule or a provision of the State Bar Act. The Commission determined that the question of whether an attempted violation should be an independent basis for discipline is better addressed on a rule-by-rule basis. This approach means that any prohibition on an attempt would be tailored to a specific rule’s violation and potential harm rather than a generalized standard for all of the rules and the State Bar Act. This avoids possible unintended consequences of a one size fits all attempt standard that would not account for the specific purpose of individual rules. For example, in proposed rule 1.5 [4-200], the Commission has recommend a rule that provides a lawyer “shall not make an agreement for, charge, or collect an unconscionable fee or illegal fee.” The terms “make” and “charge” in effect prohibit an attempt to “collect” an unconscionable fee.¹ Although only the

¹ This is similar to the standard in Business and Professions Code section 6090.5 that, in part, prohibits a lawyer from agreeing or seeking an agreement that professional misconduct shall not be reported to the State Bar. This section was revised in 1996 in response to a State Bar Court finding that the prior version of the section did not include terms that could be construed fairly as a prohibition on attempts. (See

actual collection of an unconscionable fee will result in harm to a client, even an attempt to impose a legal obligation on a client to pay an unconscionable or illegal fee should be prohibited as disciplinable misconduct. On the other hand, the Commission also recommends adoption of proposed rule 4.2 [2-100], which prohibits a lawyer who represents a client in a matter from communicating about the subject of the representation with a person who is represented by a lawyer in the same matter. For this rule, the harm is the actual communication with the represented person that could result in the disclosure of privileged information or otherwise interfere with a lawyer-client relationship. A generalized prohibition against an attempt to engage in such a communication does not further the purpose of this rule and it would pose a risk of unduly interfering with a lawyer's ability to investigate a claim as a lawyer often cannot know that a person is represented until the lawyer has contacted the person.

Paragraph (b) adopts the language of MR 8.4(b) but adds a reference to "moral turpitude." This provision focuses on crimes committed by a lawyer that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer, all of which are central principles in lawyer conduct. The reference to moral turpitude is added to maintain conformity with the broader public protection afforded by Business and Professions Code section 6106.

Paragraph (c) adopts the language of MR 8.4(c) but adds the words "reckless or intentional" to modify "misrepresentation." The conduct prohibited in this provision – dishonesty, fraud, deceit and reckless or intentional misrepresentation – are central concepts of conduct in which lawyers must not engage if respect for the legal profession and the proper administration of justice is to be maintained. The addition of "reckless or intentional" is intended to clarify that negligent misrepresentation is not regarded as dishonesty that should result in discipline under this rule.²

Paragraph (d) adopts the language of MR 8.4(d) concerning conduct "prejudicial to the administration of justice." The Commission concluded that a lawyer's fitness to practice law is called into question by conduct prejudicial to the administration of justice regardless of whether the conduct occurs in connection with the practice of law.

Some members of the Commission raised a concern that this provision may not survive a Constitutional challenge if it is not limited to situations where the lawyer's conduct occurs "in connection with the practice of law." Compare, *United States v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996) (former Bus. & Prof. Code § 6068(f), prohibiting "offensive personality," was found to be unconstitutional.) Proposed Comment [6] seeks to address this concern by specifying that paragraph (d) does not apply to constitutionally-protected conduct.

Paragraph (e) adopts the language of MR 8.4(e) prohibiting a lawyer from stating or implying the ability to improperly influence a government agency or official.

Paragraph (f) adopts the language of MR 8.4(f) prohibiting a lawyer from knowingly assisting a judge in violation of judicial conduct rules. Expressly stating that such conduct is prohibited should contribute to the confidence that the public places in the legal profession and administration of justice is justified.

[Assembly Bill No. 2787 \(Kuehl\)](#) 1995-1996 session; and *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752.)

² Compare proposed rule 1.1, under which discipline is imposed only if a lawyer has "intentionally, recklessly, repeatedly, or with gross negligence" failed to act competently.

Finally, non-substantive changes to the current rule include rule numbering to track the Commission's general proposal to use the Model Rule numbering system and the substitution of the term "lawyer" for "member."

Proposed Rule 8.4 contains six comments intended to clarify how the rule is to be applied. Of particular note is Comment [6] which, as noted above, has been added to clarify that the paragraph (d) does not apply to constitutionally-protected conduct.

**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~~ a 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.

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 8.4 [1-120]

Commission Drafting Team Information

Lead Drafter: George Cardona

Co-Drafters: Judge Karen Clopton, Robert Kehr, Howard Kornberg, Carol Langford, Toby Rothschild, Dean Zipser

Meeting Date at which the Rule was Discussed: January 22 – 23, 2016

Action Summary Approval Date: February 19 – 20, 2016

I. CURRENT CALIFORNIA RULE 1-120

Rule 1-120 Assisting, Soliciting, or Inducing Violations

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

II. COMMISSION'S RECOMMENDATION AND VOTE

The Commission voted to recommend a proposed amended rule as set forth below in Section III.

At the Commission's January 22 – 23, 2016 meeting, all members present voted to recommend adoption of the proposed rule with the exception of Mr. Martinez who voted no.

III. PROPOSED RULE 8.4 (CLEAN)

Rule 8.4 [1-120] Misconduct

It is professional misconduct for a lawyer to:

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- (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) knowingly* assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 8.4 [1-120]

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.

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

Rule 8.4 [1-120] ~~Assisting, Soliciting, or Inducing Violations~~ Misconduct

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~~ a judge or judicial officer in

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 8.4 [1-120]

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.

V. OCTC / STATE BAR COURT COMMENTS

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

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

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

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

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

- **Model Rule 8.4.** The ABA State Adoption Chart for Model Rule 8.4 addresses paragraph (a) of the model rule which is the direct counterpart to rule 1-120 as well as other provisions referenced in OCTC's recommendation. The chart is posted at:
 - http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4.authcheckdam.pdf
 - Thirteen jurisdictions have adopted Model Rule 8.4 verbatim.¹ Thirty-one jurisdictions have adopted a slightly modified version of Model Rule 8.4.² Eight jurisdictions have adopted a version of the rule that is substantially different from Model Rule 8.4.³
- **Model Rule 8.4, Comment [3] & Proposed Rule 8.4.1.** Comment [3] to Model Rule 8.4 prohibits lawyers from knowingly manifesting bias or prejudice by words or conduct when such actions are prejudicial to the administration of justice. Similar language was also included in Comment [3] of the first Commission's proposed rule 8.4. The subject matter of Comment [3] is addressed in proposed Rule 8.4.1. (See Rule 8.4.1 Report & Recommendation)

Twelve jurisdictions have adopted Model Rule 8.4, Comment [3] verbatim.⁴ Seven jurisdictions have adopted a slightly modified version of Model Rule 8.3, Comment [3].⁵ Fourteen jurisdictions have adopted a version of Comment [3] that is substantially different from Model Rule 8.3.⁶ Eighteen jurisdictions have not adopted a version of Comment [3].⁷

¹ The thirteen jurisdictions are: Arizona, Arkansas, Connecticut, Idaho, Montana, Mississippi, Nevada, New Mexico, Oklahoma, Pennsylvania, South Dakota, Utah and West Virginia.

² The thirty-one jurisdictions are: Alabama, Alaska, Colorado, Delaware, District of Columbia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming.

³ The eight jurisdictions are: California, Florida, Georgia, Illinois, Maine, New York, Texas, and Washington.

⁴ The twelve jurisdictions are: Delaware, Idaho, Illinois, Nebraska, New Hampshire, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wisconsin.

⁵ The seven jurisdictions are: Arizona, Colorado, Connecticut, Iowa, Maine, North Dakota, and Tennessee.

⁶ The fourteen jurisdictions are: Alaska, Arkansas, District of Columbia, Florida, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, New York, Ohio, Texas, and Washington.

⁷ The eighteen jurisdictions are: Alabama, California, Georgia, Hawaii, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nevada, North Carolina, Oklahoma, Oregon, Pennsylvania, Virginia, and Wyoming.

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

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

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

A. Concepts Accepted (Pros and Cons):

General Concepts. The Commission has used as its starting point current rule 1-120, which prohibits a lawyer from knowingly assisting in, soliciting or inducing a violation of the Rules or the State Bar Act, and ABA Model Rule 8.4, which contains a similar prohibition as well as additional misconduct provisions.

1. In accordance with the approach of Model Rule 8.4, expand the scope of current rule 1-120 and collect in a single rule various misconduct provisions that are currently found in other rules of professional conduct or in the Business & Professions Code.
 - **Pros:** There would be a single rule that lawyers, judges and the public can consult to identify basic standards of conduct addressing honesty, trustworthiness and fitness to practice with which a lawyer must comply. Placing these standards in a single rule should facilitate compliance with and enforcement of the Rules by clearly stating these basic principles and also promote confidence in the legal profession and the administration of justice by prominently placing the principles in a single rule.⁸
 - **Cons:** The principles already exist in the current rules or the State Bar Act. Collecting them in a single rule will create another source for a disciplinary charge, risking duplication of charging in the disciplinary process.
2. Address the concept of discrimination by a lawyer either in the practice of law or in the operation and management of a law practice in a separate rule, proposed Rule 8.4.1, rather than addressing it as either a blackletter provision⁹ or comment¹⁰ to this Rule.

⁸ The ABA similarly collected dispersed principles into Model Rule 8.4 by bringing together concepts from ABA Model Code of Professional Responsibility, DR [Disciplinary Rule] 1-102(A), DR 9-101(C), EC [Ethical Consideration] 7-34, and EC 9-1.

⁹ Although there is no blackletter provision in the Model Rules that expressly addresses discrimination by a lawyer, the ABA Standing Committee on Ethics and Professional Responsibility has recently proposed adoption of new paragraph 8.4(g), which would provide it is professional misconduct for a lawyer to:

(g) in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

The proposed amendment also includes a substantial reworking of MR 8.4, cmt. [3]. Both proposed paragraph 8.4(g) and the original and reworked comment [3] are discussed in detail in the Report & Recommendation relating to proposed Rule 8.4.1.

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- Pros: See discussion in Report & Recommendation re proposed Rule 8.4.1.
 - Cons: See discussion in Report & Recommendation re proposed Rule 8.4.1.
3. Address the concept of an “attempt” to violate a rule or a provision of the State Bar Act in individual rules rather than generally make an “attempt” a potential violation of any rule.
- Pros: Similar to the first Commission, the Commission believes¹¹ that the Commission should address on a rule-by-rule basis whether an attempted violation should be a basis for professional discipline. This approach should result in any prohibition on an attempt being tailored to a specific rule’s violation and potential harm, and avoid creating a blunt instrument for discipline that would serve little purpose when applied to most rules. For example, in proposed Rule 1.5 [4-200], this Commission has recommended a rule that provides a lawyer “shall not make an agreement for, charge, or collect an unconscionable or illegal fee.” The terms “make” and “charge” in effect prohibit an attempt to “collect” an unconscionable fee. Although only the actual collection of an unconscionable fee will result in harm to a client, even an attempt to impose a legal obligation on a client to pay such a fee should be prohibited. On the other hand, the Commission also recommends adoption of proposed Rule 4.2 [2-100], which prohibits a lawyer who represents a client in a matter from communicating about the subject of the representation with a person who is represented by a lawyer in the same matter. The harm is in the actual communication with the represented person that could result in the disclosure of privileged information or otherwise interfere with the lawyer-client relationship. Prohibiting an attempt to engage in such a communication poses the risk of unduly interfering with a lawyer’s ability to investigate a claim as a lawyer often cannot know that a person is represented until the lawyer has contacted the person. An additional example where problems would be created by a general provision authorizing discipline for an attempted violation is Rule 1.4, which requires a lawyer to “promptly” provide information to clients. With a general attempt provision, any delay not long enough to constitute an actual violation of Rule 1.4 might be characterized as indicating an attempt subject to discipline.
 - Cons: ABA Model Rule provides it is misconduct to “attempt to violate” any rule, so the proposed rule reflects a divergence from the national model.

¹⁰ Currently, Model Rule 8.4, cmt. [3] provides:

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

¹¹ It should also be noted that during the initial consideration of a rule based on current rule 1-120 in May 2015, the Chair inquired and determined that it was the view of a significant majority of the Commission that attempts should be addressed on a rule-by-rule basis. Similarly, RRC-1 appears to have voted unanimously to reject inclusion of a general attempt provision.

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Blackletter Provisions. Each of the proposed blackletter provisions is discussed in the following paragraphs:

4. Recommend adoption of paragraph (a) of Model Rule 8.4, without the concept of “attempt”.
 - **Pros:** Paragraph (a) largely carries forward current rule 1-120. Concerning the concept of “attempt,” see paragraph 3, above.
 - **Cons:** Proposed paragraph (a) does not go far enough in modifying MR 8.4(a). The first Commission deleted from the Model Rule not only the concept of attempt, but also the concept that it is misconduct to “violate the Rules of Professional Conduct.” As the first Commission explained: “[A]ny conduct that violates any Rule already is subject to discipline, so the quoted Model Rule language has no consequence except to create the risk that lawyers will be charged twice for every alleged Rule violation.” Ultimately, however, the proposed rule circulated by the Board included the concept that it was professional misconduct to violate the Rules or the State Bar Act.
5. Recommend adoption of paragraph (b) of Model Rule 8.4 but add a reference to “moral turpitude” to the paragraph.
 - **Pros:** As explained more fully in ABA Model Rule 8.4, cmt. [2], this provision focuses only on crimes committed by a lawyer that reflect adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer, central principles in lawyer conduct. The reference to moral turpitude is included to maintain conformity with the broader public protection afforded by the Business & Professions Code, specifically § 6106. The Model Rules deleted moral turpitude as a basis for discipline that had been in the ABA Model Code. Some jurisdictions have retained that standard, or have interpreted the rest of section (b) as being the equivalent of moral turpitude. However, the long and evolving history of case law in California interpreting moral turpitude has expanded the scope of public protection beyond the factors set forth in Model Rule 8.4(b). For these reasons, the Commission recommends adding “moral turpitude” to the proposed rule. In addition, there is a long history in California of discipline referrals of attorneys who have been convicted in criminal matters to the State Bar for discipline pursuant to Business and Professions Code §§ 6101 and 6102. That the crime is one of moral turpitude is a critical component of those referrals for interim suspension or summary disbarment upon proof of conviction.
 - **Cons:** “Moral turpitude” and “fitness as a lawyer in other respects” means essentially the same thing. If the purpose of the rule is to alert lawyers to the case law in California concerning moral turpitude, it should be done by means of a comment.
6. Recommend adoption of paragraph (c) of Model Rule 8.4, with the words “reckless or intentional” added to modify “misrepresentation.”
 - **Pros:** The conduct prohibited in this provision – dishonesty, fraud, deceit and reckless or intentional misrepresentation – are central concepts of conduct in which lawyers must not engage if respect for the legal profession and the proper administration of justice is to be maintained. The addition of “reckless or intentional” is intended to clarify that negligent misrepresentation is not regarded as dishonesty that would trigger this Rule. This clarification is consistent with the intended scope of the ABA’s rule and with the interpretation in disciplinary proceedings in states that

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- have adopted the Model Rule. (See, e.g., *State ex rel. Oklahoma Bar Ass'n v. Besly* (Okla., 2006) 136 P.3d 590 [2006 OK 18] and *In re Clark* (Ariz., 2004) 207 Ariz. 414 [87 P.3d 827]. Including these modifiers avoids the aspirational nature of the Model Rule provision. Compare proposed Rule 1.1, under which discipline is imposed only if a lawyer has “intentionally, recklessly, repeatedly, or with gross negligence” failed to act competently.
- Cons: None identified.
7. Recommend verbatim adoption of paragraph (d) of Model Rule 8.4, concerning conduct “prejudicial to the administration of justice.”
- Pros: A lawyer’s fitness to practice law is called into question by conduct prejudicial to the administration of justice in whatever capacity the lawyer acts. See also Comment [1], which clarifies that a violation of this Rule can occur even when a lawyer is not practicing law or acting in a professional capacity.
 - Cons: There is a concern that this provision might not pass Constitutional challenge if it is not limited to situations where the lawyer’s conduct occurs “in connection with the practice of law.” Compare *United States v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996) (Former Bus. & Prof. Code § 6068(f), prohibiting “offensive personality,” was found to be unconstitutional.) Proposed Comment [6] seeks to address this concern by specifying that paragraph (d) does not apply to constitutionally-protected conduct.
8. Recommend adoption of paragraph (e) of Model Rule 8.4, prohibiting a lawyer from stating or implying the ability to improperly influence a government agency or official.
- Pros: This provision, which in the original Model Rules (1983) was part of the advertising rules, (MR 7.1(b)), more properly belongs in this general rule regarding professional misconduct, as the prohibition should not be limited to advertising or soliciting legal business.
 - Cons: None identified.
9. Recommend verbatim adoption of paragraph (f) of Model Rule 8.4, prohibiting a lawyer from knowingly assisting a judge in a violation of judicial conduct rules.
- Pros: Expressly stating that such conduct is prohibited acts to ensure the confidence the public places in the legal profession and the administration of justice is justified.
 - Cons: None identified.

Comments to Proposed Rule 8.4. The Commission recommends six comments, some derived from Model Rule comments, some derived from comments proposed by the first Commission, and some new comments to address California-specific law.

10. Recommend adoption of Comment [1], which has no counterpart in the Model Rule.
- Pros: Comment [1] clarifies that the Rule applies to lawyer misconduct not only in connection with the representation of a client but also applies when the lawyer acts *in propria persona* as well as when the lawyer is not acting in a professional capacity.
 - Cons: The clarification is unnecessary as there is nothing in the language of the rule that limits its application to when a lawyer is representing a client.

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11. Recommend adoption of Comment [2], which is derived from the last sentence of Model Rule 8.4, cmt. [1].
 - Pros: This comment provides interpretative guidance by providing assurance that the prohibitions in paragraph (a) against assisting in violating a rule or the State Bar Act, or doing so through the acts of another, do not preclude a lawyer from advising a client concerning actions the client is legally entitled to make.
 - Cons: This sentence, taken out of context from the rest of MR 8.4, cmt. [1] seems simply to state the obvious. It should be deleted, or the substance of the first part of the model rule comment should be restored to provide the necessary context.
12. Recommend adoption of Comment [3], which is derived from the first Commission's proposed Comment [2A].
 - Pros: Comment [3] provides important guidance as to what is intended by the concept in California case law, "other misconduct warranting discipline." The cited case, *In re Kelley*, is the seminal Supreme Court case on this concept.
 - Cons: The comment does not provide guidance in applying or interpreting the Rule but instead appears to identify a separate basis for discipline. If that is the case, then it should appear in the blackletter of the Rule.
13. Recommend adoption of Comment [4], which is also derived from the first Commission's proposed Comment [2A].
 - Pros: Comments [3] and [4] are both related to the concept of "other misconduct warranting discipline." This sentence, originally in the first Commission's Comment [2A] with proposed Comment [3], has been split into a separate comment to emphasize the fact that a lawyer can be subject to discipline for acts involving gross negligence.
 - Cons: The comment does not provide guidance in applying or interpreting the Rule but instead appears to identify a separate basis for discipline. If that is the case, then it should appear in the blackletter of the Rule.
14. Recommend adoption of Comment [5], which is derived from the first Commission's proposed Comment [2C].
 - Pros: The first Commission drafted this comment in response to a public comment from the Department of Justice. Given the first Commission's decision not to recommend a version of Model Rule 4.1 [Truthfulness in Statements To Others], the language addressing covert activity that the first Commission previously had considered for inclusion as Rule 4.1(b), was added as a comment to Rule 8.4. The comment clarifies that Rule 8.4(c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules. Consideration was given to placing this comment in Rule 4.1, but it was determined that it should be included here in connection with proposed Rule 8.4(c)'s more general prohibition. A cross-reference has been recommended in the Comments to proposed Rule 4.1. (See Proposed Rule 4.1, cmt. 4.)
 - Cons: None identified as to substance. However, this Commission has recommended a version of Model Rule 4.1, and this comment might more

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appropriately be placed in that rule.

15. Recommend adoption of Comment [6], which is derived from RRC1's proposed Comment [2D].

- Pros: This comment provides important interpretive guidance. It stresses that constitutional rights in a disciplinary context must be protected so that activities protected by the First Amendment do not become the subject of disciplinary proceedings or their exercise is not chilled. See, e.g, *Ramirez v. State Bar* (1980) 28 Cal. 3d 402, 411 [169 Cal. Rptr. 206] (a statement impugning the honesty or integrity of a judge will not result in discipline unless it is shown that the statement is false and was made knowingly or with reckless disregard for truth); *Matter of Anderson* (Rev. Dept 1997) 3 State Bar Court Rptr 775 (disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1443 (a lawyer's statement unrelated to a matter pending before the court may be sanctioned only if the statement poses a clear and present danger to the administration of justice).
- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Include in the Rule the concept of "attempt" to violate a rule.
 - Pros: See Section A.3, above.
 - Cons: See Section A.3, above.

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

1. The Commission believes that none of the proposed revisions of current rule 1-120 constitutes a change in duties for California lawyers, all of the provisions in the proposed Rule having counterparts in the current Rules, the State Bar Act, or case law. (See also Section A.1, above).

D. Non-Substantive Changes to the Current Rule:

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

E. Alternatives Considered:

None.

VIII. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

That the Board of Trustees of the State Bar of California adopt proposed amended Rule 8.4 [1-120] in the form above for purposes of public comment authorization as a part of the Commission's proposed comprehensive revisions to the Rule.

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IX. FINAL COMMISSION VOTE/ACTION

Date of Vote: January 22 – 23, 2016

Action: Approve Rule 8.4 [1-120] as revised during the meeting.

Vote: 14 (yes) – 1 (no) – 0 (abstain)