RE: Rule 1.0.1 [1-100(B)]
3/26&27/10 Commission Meeting
Open Session Agenda Item III.A.

From: Kevin Mohr
To: Robert L. Kehr
Cc: Difuntorum, Randall; McCurdy, Lauren; Jerome Sapiro Jr.; Kevin Mohr G; Harry Sondheim
Subject: Re: RRC_Rule 1.0.1 March 2010 agenda item III.A.
Date: Thursday, March 18, 2010 9:40:19 AM
Attachments: RRC - 1-100 [1-0-1] - Compare - Rule & Comment Explanation - DFT3.1 (03-18-10).doc
RRC - 1-100 [1-0-1] - Compare - Introduction - DFT3.1 (03-18-10)RLK-KEM.doc
RRC - 1-100 [1-0-1] - Dashboard - ADOPT - DFT5.1 (03-13-10).doc
RRC - 1-100 [1-0-1] - Rule - DFT5.1 (03-15-10) - Cf. to DFT4.doc
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - DFT2.4 (03-17-10)RLK-JS.doc

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Hi Lauren & Drafters:

To make sure we're all on the same page, I've reviewed my notes on this rule and attached the following documents that Bob and the other drafters have been submitting to you so that you have them all in one place. Please note that I've renamed the files to conform the draft numbers to earlier drafts:

1. Rule, Draft 5.1 (3/15/10), redline, compared to Draft 4 (12/13/09) [Public Comment Draft];

2. Public Comment Chart, Draft 2.4 (3/17/10)RLK-JS. This is the draft Bob sent you yesterday (Jerry's draft from 3/16), in which I've re-sorted the commenters alphabetically but made no other changes, except to remove the "above" and "below" in the last column (not necessary w/ the commenter alphabetically listed).

3. Dashboard, Draft 5.1 (3/13/10). Identical to what Bob sent on 3/13 except that I've re-sized the summary box to capture all of the description and changed the rule draft #.

4. Introduction, Draft 3.1 (3/18/10)RLK-KEM. Identical to what Bob sent on 3/13 except that I've changed the date and the draft # in the footnote.

5. Rule & Comment Comparison Chart, Draft 3.1 (3/18/10). Identical to what Bob sent on 3/13 except that I've changed the draft # & date in the footnote.

Please let me know if you have any questions. Thanks,

Kevin

Robert L. Kehr wrote:

> Randy and Lauren: Jerry: I am out of gas and must call it a night. Let's use whatever Jerry did to my public comment chart with the other drafts I sent earlier as the agenda materials for this item. Thank you, Jerry.
>
> rlk

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Rule 1.0.1: Terminology

(Commission's Proposed Rule – Draft 5.1 (3/15/10) – COMPARED TO DFT4 (12/13/09))

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

(b) ~~"Confidential information relating to the representation" is defined in Rule 1.6, Comments [3] – [6].~~[to be renumbered following March 2010 meeting]

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

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

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

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

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

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

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

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

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

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

(k) "Screened" means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a 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 non-lawyer personnel communicating with the lawyer with respect to the matter.

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

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

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

COMMENT

Law Firm

[1] ~~A sole proprietorship is a law firm for purposes of these Rules.~~ Whether two or more lawyers constitute a law firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a 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. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved.

[2] Whether a lawyer who is denominated as "of counsel" should be deemed a member of law firm can also depend on the specific facts. The term "of counsel" implies that the lawyer so designated has a relationship with the law firm, other than as a partner or associate, or officer or shareholder, that is close, personal, continuous, and regular. Thus, to the extent the relationship between a law firm and a lawyer is sufficiently "close, personal, regular and continuous," such that the lawyer is held out to the public as "of counsel" for the law firm, the relationship of the law firm and "of counsel" lawyer will be considered a single firm for purposes of disqualification. See, e.g., *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816]. On the other hand, even when a lawyer has associated as "of counsel" with another lawyer and is providing extensive legal services on a matter, they will not necessarily be considered the same law firm for purposes of dividing fees under Rule 1.5.1 where, for example, they both continue to maintain independent law practices with separate identities, separate addresses of record with the State Bar, and separate clients, expenses, and liabilities. See, e.g., *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536]. Whether a lawyer should be deemed a member of law firm when denominated as "special counsel", or by another term having no commonly understood definition, also can depend on the specific facts.

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

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

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent and Informed Written Consent

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

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

Screened

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

[9] The purpose of screening is to assure the affected client, former client, or prospective client that confidential information known by the personally prohibited lawyer is neither disclosed to other law firm lawyers or non-lawyer personnel nor used to the detriment of the person to whom the duty of confidentiality is owed. The personally prohibited lawyer shall acknowledge the obligation not to communicate with any of the other lawyers and non-lawyer personnel in the law firm with respect to the matter. Similarly, other lawyers and non-lawyer 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 screened 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 ~~screened~~ personally prohibited lawyer relating to the matter, denial of access by ~~the screened~~ that lawyer to law firm files or other materials relating to the matter, and periodic reminders of the screen to the ~~screened~~ personally prohibited lawyer and all other law firm personnel.

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

Tribunal

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

Writing and Written

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

Rule 1.0.1 Terminology
[Sorted by Commenter]

TOTAL =__ Agree = __ Disagree = __ Modify = __ NI = __

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response required.
7	COPRAC	M		(e)	In paragraph (e), COPRAC objects to the requirement that, for consent to be informed, the lawyer must communicate (among other things) the "reasonably available alternatives to the proposed course of conduct." No such communication is required under the current California rules with respect to informed consent or informed written consent, nor is such communications generally necessary for consent to be informed.	COPRAC is correct that the current California rule, rule 3-310(A)(1), does not state the lawyer's obligation to advise the client of alternatives to either accepting or rejecting the representation; however, the Commission believes that a client's consent cannot fairly be described as having been "informed" if the lawyer has not competently advised the client about the situation. Competent advice includes an explanation of the reasonably available alternatives. As a result, the "reasonably available alternatives" requirement also is found in the Model Rule version of paragraph (e). This treatment is consistent with the requirements of Rule 1.4(b): "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Bob; I agree with your approach to this.
				(k)	In paragraph (k), COPRAC disagrees with the deletion of the word "reasonably" from the Model Rule (as in "the timely imposition of procedures within a firm that are ***reasonably*** adequate under the circumstances to (i) protect information . . ."). Firms should be	See the response to the similar comment from the O.C. Bar Assoc.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

TOTAL =__ Agree = __ Disagree = __ Modify = __ NI = __

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					entitled to rely on their reasonably imposed procedures, and not be held to a strict liability standard (judged after the fact) as to whether the procedures in fact proved to be adequate. Contrary to the suggestion contained in the Explanation of Changes to paragraph (k), "half-way measures" should never be sufficient anyway because they are not "reasonably adequate."	
				Comment [8]	Comment [8]: This Comment refers to a "personally *disqualified"* lawyer." Because the rules relate to discipline, we recommend conforming this term to the more preferred "personally prohibited lawyer," or for more clarity: "lawyer who is personally prohibited with respect to a matter."	BOB: As an alternative, how about "personally conflicted lawyer"? The Commission agrees and has made the requested change in somewhat different language.
				Comment [9]	Comment [9]: The use of the term "screened lawyer" in this Comment is imprecise and possibly confusing. We recommend revising the language of this Comment to clarify whether it applies to the lawyer in possession of confidential information, all other lawyers in the law firm on the other side of such screen, or both. We further recommend that the language in the last sentence of this Comment be revised to clarify which files or other materials will be subject to restricted access by reference to the appropriately screened lawyer or lawyers.	The Commission agrees and has made the suggested change. BOB: Sorry, but my copy of the rule that was attached to your email did not show any changes in Comment [9] The Commission is not convinced that there are

Rule 1.0.1 Terminology
[Sorted by Commenter]

TOTAL =__ Agree = __ Disagree = __ Modify = __ NI = __

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [1]	Comment [1]: COPRAC disagrees with the deletion of the last sentence from the corresponding Comment to the Model Rule. We believe that sentence adds textual clarity to the prior sentence and makes a very important point: namely, a group of lawyers may constitute a law firm for purposes of one rule, but not a law firm for the purposes of another rule. We further believe that the commentary for the definition of the term "law firm" is the appropriate place to make this important point. To make this point more clearly, however, COPRAC recommends revising the current last sentence of this proposed Comment, by adding language to the end thereof so that it would read as follows: "Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved, and to recognize that a group of lawyers could be regarded as a law firm for purposes of one rule but such same group of lawyers might not regarded as a law firm purposes of another rule." Finally, we note (and agree with) the Commission's stated intention to use the single term "law firm," and to drop the reference to "firm" [see last sentence in the	circumstances in which a group of lawyers could be considered a law firm so that they could not represent adverse parties in litigation but not be considered a law firm for purposes of the presumed sharing of information within a law firm. For this reason the Commission has not included any version of the last sentence of Model Rule Comment [2] so that this unusual question can work out over time. BOB: They may intend that the concept apply across more than conflicts rules. For example, could a group of lawyers that is not a law firm for the conflicts rules be a law firm for fee sharing purposes? I think not, but if you agree you might add this example to the response. BOB: I agree with you. The Commission agrees and has made the suggested changes.

Rule 1.0.1 Terminology
[Sorted by Commenter]

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No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Explanations of Chagnes to paragraph (c) of the rule]. Consistent with such approach, COPRAC recommends (1) using the term "law firm" consistently throughout the rules and commentary (e.g., the use of the term "firm" in the definition of "Screened" should be conformed), (2) changing the subheading in the commentary above Comment [1] from "Firm" to "Law Firm," and (3) rearranging the definitions such that the definition of "Law Firm" is correctly placed alphabetically afer the definition of "Knowingly."	
1	McIntyre, Sandra K.	A			No comment.	No response required.
6	Office of the Chief Trial Counsel	M			Many definitions appear later in the rules rather than being consolidated here. It is unclear why certain definitions are included here while others are not. Further, many of the definitions are repeated elsewhere, which is unnecessary.	The Commission's general policy has been to place in Rule 1.0.1 all of the definitions that are used in more than one substantive Rule so that the definition does not have to be repeated. As a result, this proposed Rule generally tracks the corresponding rule found in other jurisdictions. BOB: I am only concerned about OCTC saying that many definitions are repeated elsewhere. If so, we might ask Kevin or staff to search out those situations and, once we are alterted to them, decide whether they should be consolidated in 1.0.1.
				1.0.1(b)	Rule 1.0.1(b) states that "confidential information relating to representation" is defined in Rule 1.6, Comments [3] – [6]. This	No response needed as the Commission has eliminated this term.

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No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					is not a precise definition. Moreover, the Comments are not intended to be binding and, therefore, it is inappropriate to reference them as part of the actual (binding) definition.	See response to the comment from the San Diego County Bar Assoc. Legal Ethics Comm. BOB: see my remark below.
				1.0.1(m)	Rule 1.0.1(m) significantly deviates from the ABA rule defining "tribunal" by excluding legislative bodies acting in adjudicative capacities. OCTC agrees with the ABA drafters that legislative bodies acting in adjucative capacities should be included within the definition of "tribunal." Attorneys representing clients before legislative bodies acting in adjucicative capacities should be held to the same standards as those appearing before any other adjudicative body. It is confusing to have comments which simply define terms. For example, Comment [2] discusses the term "of counsel," if this term needs defining, it should be done in the rule, not a comment. Additionally, Comments [1], [3], [4], [5], [11] and [12] are so general as to provide no meaningful assistance. Comments [6] – [10] attempt to provide a very broad description of the factors involved in informed consent and informed written consent; factors involved in determining whether consent has been given; and the issues involved in screening. OCTC agrees	The Commission disagrees and has not made the requested changes. The Comment paragraphs regarding informed written consent and screening are not definitional but descriptive. Also see the response to the O.C. Bar Assn. letter regarding

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No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					with these Comments but suggests that they belong in the rules involving conflicts, not here.	Comment [9]. Bob: I think this is the correct approach.
5	Orange County Bar Association	M		(k)	We oppose removing the word "reasonably" from the Model Rule definition of "Screened." We believe there is little risk members of the Bar will interpret the word "reasonably" as authorizing "half-way" measures. Rather, we believe the greater risk is that removal of "reasonably" from the definition of screening will create a strict liability rule in a context where "adequate" – which would be the only standard remaining – is not even defined. Moreover, the Commission does not appear to have considered whether there is or should be a distinction between "adequate" screening procedures in a large firm versus a small firm.	Bob: You worded this very diplomatically. I think this is the correct approach. The Commission does not agree and has not made the requested change. It believes that the definition should emphasize the need for rigor because of the significant risk of injury to client trust in lawyers and the legal system that is implicit in any ethics screen imposed by a law firm without client consent. This language does not suggest that the law firm is a guarantor that procedures will be followed, but the law firm should be detailed and conscientious about creating and enforcing the screening protocol.
				Comment [1]	In Comment [1], the Commission proposes adding that "A sole proprietorship is a law firm for purposes of these Rules." However, because a sole proprietorship already is included in the definition of "law firm" under paragraph (c), it is unnecessary to include the proposed language in Comment [1]. Moreover, the heading to Comment [1] should read "Law Firm" instead of "Firm" in order to be consistent with the Commission's	Bob: I agree with you. The Commission agrees and has made both of the suggested changes.

Rule 1.0.1 Terminology
[Sorted by Commenter]

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No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					expressed preference for the former term.	
				Comment [2]	We propose revising Comment [2] to generally clarify that the relationship between the attorney and the law firm depends upon the circumstances, rather than the attorney's title. Accordingly, we recommend against singling out the title "Of Counsel" to the exclusion of other, similar titles, like "Special Counsel," "Senior Counsel," and "Special Partner." We also recommend that the substance of this provision (whether revised to encompass additional "alternative" titles or not) be incorporated into a Rule rather than into a Comment because it bears upon the substance of the definition of "law firm."	Bob: I agree with this response and with the sentence you added to the comment. However, in that sentence I would change the word "can" to the word "will." The Commission agrees that Comment [2] would benefit from the addition of a reference to other creative titles whose meaning might not be obvious. It has made this change by adding a sentence at the end of the Comment. The Commission does not agree that the substance of Comment [2] should be moved to the Rule's definition of "law firm". The question of whether a lawyer is part of a law firm is distinct from the question of what a law firm is. Moreover, it is not possible to define whether a lawyer should be considered to be part of a particular law firm while acting in future, unknown circumstances.
				Comment [9]	We recommend deleting Comment [9], which contains substantive guidance regarding screening procedures. This guidance, if it is to be given, properly belongs either in one or more substantive Rules related to screening, or in the Comment(s) to those Rules, not in a Comment to a definition, where it is less likely to be seen by lawyers searching for substantive rules regarding screening.	The Commission disagrees and has not made the suggested changes. First, it believes that the discussion of screening methods does not belong in the black letter Rule because it is not in the nature of a definition. That is why it is in the Comment. Second, the Commission concluded that the definition and discussion are best placed with this Rule because this is the location used almost without exception in other jurisdictions. [Third, non-consensual screening is permitted under multiple rules, and the Commission believes it is better to have the definition and comment in a single

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						location.] Bob: I agree with the recommendation in your email. If screening is only in 1.11, the discussion of screening should be in that rule.
3	San Diego County Bar Association Legal Ethics Committee	A			SDCBA expressed concern with the definition of a "tribunal," which is limited to adjudicative bodies and excludes legislative or administrative bodies or mediators. SDCBA suggests a broader definition of "tribunal" so that a lawyer's duty of candor would extend beyond adjudicative bodies.	Bob: I agree with these statements, but I would add one more. I urged that the duty of candor should apply to legislative or administrative bodies. However, I was outvoted. I argued that the SEC, Department of Corporations, Department of Real Estate, etc., have the right and expectation that lawyers who file documents or appear before them will be candid. However, Stan responded in substance that, when people appear before entities such as a board of supervisors or legislative committee, nonlawyers are not bound to be candid, and lawyers would be at a disadvantage if they fact discipline for not being candid before such bodies. The vast majority of RRC agreed with Stan. Not sure how to word this concept, but I think it was a major issue in RRC voting. The Commission believes that an expanisve definition of "tribunal" might be appropriate if used only as a reminder of best practices, but it believes that an expansive definition wouild not function properly as a disciplinary standard. If the Rule 3.3 duty of candor were extended to legislative and administrative activities, it would intrude on First Amendment requirements. In addition, there are concepts that are problematic outside of the court context. These include, *e.g.*: (i) the meaning of "legal authority in the controlling jurisdiction" in Rule 3.3(a)(2); and (ii)

Rule 1.0.1 Terminology
[Sorted by Commenter]

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						the application of the *ex parte* requirements of Rule 3.3(d). Moreover, California uniquiely has a statutory duty of honesty under B&P C § 6106 that will supplement Rule 3.3 in egregious situations. The Commission sees no benefit to extending Rule 3.3 to mediation because of California's strict statutory mediation confidentiality under Evid. C. § 1115, *et seq*. The Comission believes it is important to retain the distinction between the special responsiblities that lawyers have under Rule 3.3 in courts of law and in an arbitration that is equivalent to a court of law, and the different but still important duties that lawyers have under Rule 3.9.
4	Santa Clara County Bar Association	A			No comment.	No response required.

Proposed Rule 1.0.1 [1-100]
"Terminology"

(Draft #5.1, 3/15/10)

Summary: Proposed Rule 1.0.1, which is based on Model Rule 1.0 ("Terminology"), defines 145 terms used in other Rules in order to place these definitions in a single location for ease of reference (including a ~~it also~~ cross-reference~~s~~ to one statutory definition ~~that is located in another Rule and one definition defined in California by statute~~). ~~Eleven~~ Ten of these definitions exactly track or closely track the corresponding Model Rule definition; the remaining definitions differ from the Model Rule counterpart, as explained in the Comparison Chart.

Comparison with ABA Counterpart

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

Primary Factors Considered

☑ Existing California Law

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

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

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption _____
Opposed Rule as Recommended for Adoption _____
Abstain _____

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

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

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☑ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.0.1* Terminology

March 2010
(Draft rule to be considered for public comment.)

INTRODUCTION:

Proposed Rule 1.0.1 is based on Model Rule 1.0. For convenience of reference, this Rule is the repository for most of the defined terms used in other rules. It contains 14~~4~~5 separate definitions, including the incorporation of ~~. In addition, it incorporates~~ the Evidence Code definition of "writing". ~~Finally, it contains a cross-reference to the definition found in another rule of the term "confidential information relating to the representation".~~ The Commission has chosen to use this cross-reference because the term is particularly important since it is used in several other rules, and it is believed this cross-reference will make it more easily available.

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

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

* Proposed Rule 1.0.1, Draft #5.1 (03/15/10).

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

* Proposed Rule 1.0.1, Draft 5.1 (3/15/10). Redline markings are comparisons to the Model Rule.

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

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

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

ABA Model Rule **Rule 1.0 Terminology**	**Commission's Proposed Rule*** **Rule 1.0.1 Terminology**	**Explanation of Changes to the ABA Model Rule**
(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.	(k) "Screened" ~~denotes~~means the isolation of a lawyer from any participation in a matter ~~through~~, including the timely imposition of procedures within a firm that are ~~reasonably~~ adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and non-lawyer personnel communicating with the lawyer with respect to the matter.	Paragraph (k) is identical to the Model Rule definition ~~but makes~~ except for three changes. First, the substitution of "including" for "through" reflects the variability of what is needed to impose an effective screen, as is discussed in Comment [~~10~~9], below. Second, the removal of "reasonably" is intended to avoid the suggestion that half-way measures will suffice. The imposition of a non-consensual screen by a law firm is an extremely serious matter that creates significant risks to clients' trust in lawyers and the legal system. Finally, the Commission recommends add~~ed~~ing the concept in subpart (ii), which fills a gap in the Model Rule definition.
(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.	(l) "Substantial" when used in reference to degree or extent ~~denotes~~means a material matter of clear and weighty importance.	Paragraph (l) is identical to the Model Rule definition except for the single change previously explained.
(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.	(m) "Tribunal" ~~denotes~~means: (i) a court, an arbitrator~~ in a binding arbitration proceeding~~, or ~~a legislative body,~~an administrative ~~agency or other body~~law judge acting in an adjudicative capacity~~. A legislative body, administrative agency~~ and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other ~~body acts in an adjudicative capacity when~~person to whom a ~~neutral official, after the presentation of evidence~~court refers one or ~~legal argument by a party~~more issues and whose decision or ~~parties, will render a~~recommendation can be	Paragraph (m) is a material change from the Model Rule definition. The purpose of the changes is to distinguish the extremely high standards that apply to a lawyer's conduct as a client representative in a court of law or its equivalent, which is labeled as a "tribunal" by this definition (see Rule 3.3), from the more limited but still important duty of honesty that applies when a lawyer appears in a representative capacity before a legislative or administrative body (see Rule 3.9). The Commission concluded that this distinction is important because First Amendment protections apply in dealing with legislative and administrative bodies, involved in such things as writing statutes and administrative regulations and granting and denying governmental licenses and permits. First Amendment considerations do not

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

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

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

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

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

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

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

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

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

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Conference of California Bar Associations District Nine Representative
James W. Talley

February 12, 2010

Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of The State Bar of California (Batch 6)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 6 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,

Patrick L. Hosey, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6
LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010
SDCBA Deadline March 12, 2010

Coversheet

Rule	Title [and current rule number]	Rec.	Author
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

Format for Analyses:

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.
Yes [ ] No [ ]
(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [ ] No [ ]
(3) Is the new rule **worded correctly and clearly**? If "yes, please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [ ] No [ ]
(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [ ] No [ ]
(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

Format for Recommendations:

[ ] We approve the new rule in its entirety.
[ ] We approve the new rule with modifications.*
[ ] We disapprove the new rule and support keeping the old rule.
[ ] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*
[ ] We abstain from voting on the new rule but submit comments for your consideration.*

Summaries Follow:

LEC Rule Volunteer Name(s): Dave McGowan

Old Rule No./Title: **Part of 1-100**

Proposed New Rule No./ Title: **1.0.1 "Terminology"**

(1) Well, sort of. These are the definitions. It is a good idea to have definitions. Whether you agree with particular ones is a different question.

(5) There are 14 defined terms. Most are not objectionable. A good one is the definition of confidential information, which tracks the Restatement definition and does away with the pretense that anyone understands the actual language of 6068(e). The various definitions of "reasonable" are circular and vacuous but that is not the commission's fault.

More questionable is the definition of a tribunal, which is limited to adjudicative bodies and excludes legislative or administrative bodies or mediators. The difference is supposed to matter because free speech concerns are present in the latter situation but not the former. That premise is silly but its silliness may not matter much.

The bite to the definition is supposed to come in Rule 3.3, candor to the tribunal, but that rule is toothless. Sure, it says you can't lie to tribunals, but the bite to the rule came from remedial obligations to correct false testimony and statements. Under the Model Rules that obligation trumps the duty of confidentiality. Our commission reverses the trump, so if you client perjures herself before a tribunal you get to remonstrate with the client, wring your hands, and say nothing. Given that you could not straighten out a court it seems less important that you could not straighten out a mediator.

I would be inclined to favor a broader definition keyed to a more practical question: whom do we not want lawyers to lie to? But given the watering down of Rule 3.3 I do not think much turns on this and we've already had our whack at the confidentiality issue. I would just approve it and keep transaction costs down.

CONCLUSION: We approve the new rule in its entirety. (However, please see comments above.)

~~LEC Rule Volunteer Name(s): Ross G. Simmons~~

~~**Old Rule No./Title: CRPC 3-410 Disclosure of Professional Liability Insurance**~~

~~**Proposed New Rule No./ Title: CRPC 1.4.1 Disclosure of Professional Liability Insurance**~~

~~(5) First, please consider recently enacted CRPC 3-410. The issue of malpractice insurance disclosure has been the subject of State Bar consideration, as well as legislative activity within the State Bar Act, for decades. In 2005, the State Bar formed the Disclosure Task Force, which after a spirited and eventful analysis by the Board of Governors between 2006 and 2007, resulted in the text of CRPC 3-410. That rule was adopted by the California Supreme Court by order dated August 26, 2009, to be effective January 1, 2010.~~

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** Sandra K. McIntyre

*** City** San Francisco

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) mcintyres@lbbslaw.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.0.1 [1-100]	Rule 1.11 [n/a]	Rule 4.1 [n/a]	Rule 6.5 [1-650]
Rule 1.4.1 [3-410]	Rule 1.17 [2-300]	Rule 4.4 [n/a]	Rule 7.6
Rule 1.8.4 [n/a]	Rule 1.18 [n/a]	Rule 6.1 [n/a]	Rule 8.2 [1-700]
Rule 1.8.9 [n/a]	Rule 3.9 [n/a]	Rule 6.2 [n/a]	Discussion Draft [all rules]

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
1.0.1 Terminology [1-100]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.
- AGREE with this proposed Rule
- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

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

OFFICE USE ONLY.

* Date	Period	File :
02/19/2010	PC	F-2010-381a Sandra McIntyre [1.0.1].pdf

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		Online

* Required

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010

Your Information

Professional Affiliation Santa Clara County Bar Association

Commenting on behalf of an organization
- (●) Yes
- ( ) No

*** Name** Mark Shem, President

*** City** San Jose

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) chrisb@sccba.com

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The following proposed rules can be viewed by clicking on the links below:

Rule 1.0.1 [1-100]	Rule 1.11 [n/a]	Rule 4.1 [n/a]	Rule 6.5 [1-650]
Rule 1.4.1 [3-410]	Rule 1.17 [2-300]	Rule 4.4 [n/a]	Rule 7.6
Rule 1.8.4 [n/a]	Rule 1.18 [n/a]	Rule 6.1 [n/a]	Rule 8.2 [1-700]
Rule 1.8.9 [n/a]	Rule 3.9 [n/a]	Rule 6.2 [n/a]	Discussion Draft [all rules]

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
1.0.1 Terminology [1-100]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.
- (●) AGREE with this proposed Rule
- ( ) DISAGREE with this proposed Rule
- ( ) AGREE ONLY IF MODIFIED

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

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* Date	Period	File :
03/01/2010	PC	F-2010-382a SCCBA [1.0.1]

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ORANGE COUNTY BAR ASSOCIATION

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LEX ROMANA
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OC DEPUTY PUBLIC DEFENDERS
OC TRIAL LAWYERS ASSOC.
OC WOMEN LAWYERS ASSOC.

March 9, 2010

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Twelve Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association hereby submits written comments on the following:

Rule 1.0.1	Terminology [1-100]
Rule 1.4.1	Insurance Disclosure [3-410]
Rule 1.11	Special Conflicts for Government Employees [N/A]
Rule 1.17	Sale of a Law Practice [2-300]
Rule 1.18	Duties to Prospective Client [N/A]
Rule 3.9	Non-adjudicative Proceedings [N/A]
Rule 4.1	Truthfulness in Statements to Others [N/A]
Rule 4.4	Respect for Rights of 3rd Persons [N/A]
Rule 6.1	Voluntary Pro Bono Service [N/A]
Rule 6.2	Accepting Appointments [N/A]
Rule 6.5	Limited Legal Services Programs [1-650]
Rule 8.2	Judicial and Legal Officials [1-700]

These comments have been drafted by the OCBA Professionalism and Ethics Committee and approved by the OCBA Board of Directors. Please let me know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofske
Executive Director

P.O. BOX 6130
NEWPORT BEACH, CA 92658
TELEPHONE 949/440-6700
FACSIMILE 949/440-6710
WWW.OCBAR.ORG

MEMORANDUM

Date: February 24, 2010

To: Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.0.1 – Terminology**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism and Ethics Committee.

The OCBA respectfully submits the following comments concerning the subject proposed Rule:

The OCBA endorses the adoption of proposed Rule 1.0.1, with the following exceptions:

The Model Rule's definition of "Screened" contains the language, "...the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are **reasonably** adequate under the circumstances...." (emphasis added). The Commission proposes removing the word "reasonably," which the OCBA opposes. While the Commission expressed that "the removal of 'reasonably' is intended to avoid the suggestion that half-way measures will suffice," the OCBA believes that there is little risk members of the Bar will interpret the word "reasonably" as authorizing "half-way" measures. Rather, the OCBA believes the greater risk is that removal of "reasonably" from the definition of screening will create a strict liability rule in a context where "adequate" – which would be the only standard remaining – is not even defined. Moreover, the Commission does not appear to have considered whether there is or should be a distinction between "adequate" screening procedures in a large firm versus a small firm.

In (new) Comment [1], the Commission proposes adding that "A sole proprietorship is a law firm for purposes of these Rules." However, because a sole proprietorship already is included in the definition of a "law firm" under paragraph (c), it is unnecessary to include the proposed language in Comment [1]. Moreover, the heading to Comment [1] should read "Law Firm" instead of "Firm" in order to be consistent with the Commission's expressed preference for the former term.

The OCBA proposes revising Comment [2] to generally clarify that the relationship between the attorney and the law firm depends upon the circumstances, rather than the attorney's title. Accordingly, the OCBA recommends against singling out the title "Of Counsel" to the

exclusion of other, similar titles, like "Special Counsel," "Senior Counsel," and "Special Partner." The OCBA also recommends that the substance of this provision (whether revised to encompass additional "alternative" titles or not) be incorporated into a Rule rather than into a Comment because it bears upon the substance of the definition of "law firm."

Finally, the OCBA recommends deleting Comment [9], which contains substantive guidance regarding screening procedures. This guidance, if it is to be given, properly belongs either in one or more substantive Rules related to screening, or in the Comment(s) to those Rules, not in a Comment to a definition, where it is less likely to be seen by lawyers searching for substantive rules regarding screening.

THE STATE BAR OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
Russell G. Weiner, Interim Chief Trial Counsel

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2000
TDD: (415) 538-2231
FACSIMILE: (415) 538-2220
http://www.calbar.ca.gov

DIRECT DIAL: (415) 538-2063

March 12, 2010

Randall Difuntorum, Director
Office of Professional Competence & Planning
State Bar of California
180 Howard Street
San Francisco, California 94105

re: Comments of the Office of the Chief Trial Counsel to Proposed Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct , for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors in January 2010. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with most of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly applied in a uniform fashion by the prosecutor. We hope you find our thoughts helpful.

Rule 1.0.1 Terminology/Definitions.

1. Many definitions appear later in the rules rather than being consolidated here. It is unclear why certain definitions are included here while others are not. Further, many of the definitions are repeated elsewhere, which is unnecessary.
2. Rule 1.0.1(b) states that "confidential information relating to representation" is defined in rule 1.6, Comments [3] – [6]. This is not a precise definition. Moreover, the Comments are not intended to be binding and, therefore, it is inappropriate to reference them as part of the actual (binding) definition.
3. Rule 1.0.1(m) significantly deviates from the ABA rule defining "tribunal" by excluding legislative bodies acting in adjudicative capacities. OCTC agrees with the ABA drafters that legislative bodies acting in adjudicative capacities should be included within the definition of tribunal. Attorneys representing clients before legislative bodies acting in adjudicative capacities should be held to the same standards as those appearing before any other adjudicative body.

4. It is confusing to have comments which simply define terms. For example, Comment 2 discusses the term "of counsel;" if this term needs defining, it should be done in the rule, not a comment. Additionally, Comments 1, 3, 4, 5, 11 and 12 are so general as to provide no meaningful assistance.

5. Comments 6 - 10 attempt to provide a very broad description of the factors involved in informed consent and informed written consent; factors involved in determining whether consent has been given; and the issues involved in screening. OCTC agrees with these Comments but suggests that they belong in the rules involving conflicts, not here.

~~Rule 1.11 Special conflicts of interest for Former and Current Government Officers and Employees.~~

1. ~~Paragraph (a) is incomplete and confusing. Business and Professions Code section 6131 prohibits a former prosecutor from representing or receiving valuable consideration from a defendant he or she formerly prosecuted. Unlike paragraph (a) of proposed rule 1.11, section 6131 does not permit the government agency to waive this conflict. In OCTC's opinion, the rule must be harmonized with section 6131 regarding the waiver issue.~~

   ~~Paragraph (b) prohibits an attorney in a firm from "*knowingly*" undertaking or continuing representation in such a matter unless the conflicted attorney is timely and effectively screened, is apportioned no part of the fee, and written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of the rule. OCTC agrees with the Commission minority view that use of the term "*knowingly*" would inappropriately immunize attorneys who do not bother to check for conflicts. The Commission minority suggests using the term "knows or reasonably should know;" this appears to be the correct standard, and OCTC supports the use of this language.~~

2. ~~OCTC does not object to the concept contained in paragraph (c), but suggests that the Commission might want to tighten the language.~~

3. ~~Paragraph (d)(2)(ii), prohibiting government officers and employees from negotiating for private employment, might be too broad. For example, read literally, it would appear to prohibit any criminal prosecutor from negotiating with the public defender's office for a job.~~

4. ~~OCTC notes that paragraph (e) has no comparable provision in the ABA rules. While OCTC understands the intent is to screen the conflicted attorneys, this creates a rule which could negatively impact government agencies' ability to handle matters. Further, there is the issue of when disclosure must occur. This could impact the government's ability to conduct investigations without advising their targets. While the Commission appears to be trying to accommodate this concern by including language that notice to the former client is not required if prohibited by law or a court order, this language is probably inadequate to cover all situations. Overall, this provision is problematic.~~

5. ~~Paragraph (f) unnecessarily repeats the definition used in proposed rule 1.1(e).~~

6. ~~As a general observation, there are too many comments and most do not appear to serve any purpose. For example, comments 1-5, 7-9, 9C, and 10 explain in general terms the purpose of the rule and screening. They seem unnecessary given the language of the rule itself. Comment 9B has some value, but it provides no real guidance as to when the entire office should be disqualified.~~

THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2161

March 12, 2010

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.0.1

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.0.1 and offers the following comments.

COPRAC supports Rule 1.0.1, subject to the following comments with respect to the terms "Informed Consent," "Screened" and "Law Firm":

"INFORMED CONSENT":

Paragraph (e) [definition of "Informed Consent"]: COPRAC objects to the requirement in this paragraph that, for consent to be informed, the lawyer must communicate (among other things) the "reasonably available alternatives to the proposed course of conduct." No such communication is required under the current California rules with respect to informed consent or informed written consent, nor is such communication generally necessary for consent to be informed. For example, in connection with the engagement by a prospective new client where such engagement would result in a conflict of interest for the attorney, the proposed course of conduct is the engagement of the conflicted attorney, and the reasonably available alternative is so obvious it need not be communicated – namely, not engaging the conflicted attorney. Failure to communicate such information should not form the basis for discipline. COPRAC therefore recommends deleting this requirement from the definition of "Informed Consent." If there are instances in the rules where communication of such

reasonably available alternatives is appropriate, the requirement for such communication should be added in such relevant rules.

"SCREENED":

Paragraph (k) [definition of "Screened"]: COPRAC disagrees with the deletion of "reasonably" from the Model Rule (as in "the timely imposition of procedures within a firm that are ***reasonably*** adequate under the circumstances to (i) to protect information . . ."). Firms should be entitled to rely on their reasonably imposed procedures, and not be held to a strict liability standard (judged after the fact) as to whether the procedures in fact proved to be adequate. Contrary to the suggestion contained in the Explanation of Changes to paragraph (k), "half-way measures" should never be sufficient anyway because they are not "reasonably adequate."

Comment [8]: This comment refers to a "personally *disqualified* lawyer." Because the rules relate to discipline, we recommend conforming this term to the more preferred "personally prohibited lawyer," or for more clarity: "lawyer who is personally prohibited with respect to a matter."

Comment [9]: The use of the term "screened lawyer" in this comment is imprecise and possibly confusing. We recommend revising the language of this comment to clarify whether it applies to the lawyer in possession of confidential information, all other lawyers in the law firm on the other side of such screen, or both. We further recommend that the language in the last sentence of this comment be revised to clarify which files or other materials will be subject to restricted access by reference to the appropriately screened lawyer or lawyers.

"LAW FIRM":

Comment [1]: COPRAC disagrees with the deletion of the last sentence from the corresponding comment to the Model Rule. We believe that sentence adds textual clarity to the prior sentence and makes a very important point: namely, a group of lawyers may constitute a law firm for purposes of one rule, but not a law firm for purposes of another rule. We further believe that the commentary for the definition of the term "law firm" is the appropriate place to make this important point. To make this point more clearly, however, COPRAC recommends revising the current last sentence of this proposed comment, by adding language to the end thereof so that it would read as follows:

> "Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved, and to recognize that a group of lawyers could be regarded as a law firm for purposes of one rule but such same group of lawyers might not regarded as a law firm for purposes of another rule."

Finally, we note (and agree with) the Commission's stated intention to use the single term "law firm," and to drop the reference to "firm" [see last sentence in the Explanation of Changes to paragraph (c) of the rule]. Consistent with such approach, COPRAC

recommends (1) using the term "law firm" consistently throughout the rules and commentary (e.g., the use of the term "firm" in the definition of "Screened" should be conformed), (2) changing the subheading in the commentary above Comment [1] from "Firm" to "Law Firm," and (3) rearranging the definitions such that the definition of "Law Firm" is correctly placed alphabetically after the definition of "Knowingly."

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** Esther

*** City** Sacramento

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) earios62@yahoo.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.0.1 [1-100]	Rule 1.11 [n/a]	Rule 4.1 [n/a]	Rule 6.5 [1-650]
Rule 1.4.1 [3-410]	Rule 1.17 [2-300]	Rule 4.4 [n/a]	Rule 7.6
Rule 1.8.4 [n/a]	Rule 1.18 [n/a]	Rule 6.1 [n/a]	Rule 8.2 [1-700]
Rule 1.8.9 [n/a]	Rule 3.9 [n/a]	Rule 6.2 [n/a]	Discussion Draft [all rules]

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Other/Multiple Rules

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.
- AGREE with this proposed Rule
- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

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

I agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

OFFICE USE ONLY.

* Date	Period	File :
01/26/2010	PC	F-2010-378 Esther [multiple].pdf

Commented On:	Specify:	Submitted via:
		Online

* Required

Rule 1.0: Definition of "Law Firm"

STATE VARIATIONS

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

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

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

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

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

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

New York defines "fraud" as follows:

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

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

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

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

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

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

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

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

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

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

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March 10, 2010 McCurdy E-mail to Drafters (Kehr, Julien, Sapiro), cc Chair, Vice-Chairs & Staff:

Rule 1.0.1 Drafting Team (KEHR, Julien, Sapiro):

This message provides the assignment background materials for Rule 1.0.1 on the March agenda. **The assignment deadline is Thursday, March 18, 2010.**

This message includes the following draft documents:

1. public comment compilation (full text of comment letters received to date – public comment period ends March 12th)
2. public commenter chart (a staff prepared chart with the synopsis of comments in draft form and open third column for the codrafters recommended response to the comments)
3. dashboard (public comment version)
4. introduction (public comment version – this should be updated if there are any recommended amendments to the rule)
5. Model Rule comparison chart (public comment version)
6. clean rule text (public comment version – use this clean version to make any changes to the rule, do not edit the rule in the Model Rule comparison chart)
7. state variations excerpt (this does not require any work)

The codrafters are assigned to review any written comments received and to prepare a revised draft rule and comment, if any changes are recommended. The "RRC Response" column on the public commenter chart should be filled in with the drafting team's recommended action in response to the public comment. In addition, we need the drafting team to prepare a completed dashboard, and to update, as needed, the Introduction, and the Explanations in the third column of the Model Rule comparison chart based on the revised rule. Please do not edit the redline-middle column of the Model Rule comparison chart. Staff is available to generate a new redline of the post public comment rule to the Model Rule and will assist in completing the middle column of the Model Rule comparison chart.

We are looking for submissions that are as close to final form as possible. As noted above, please feel free to send us your revised clean version of the proposed rule and we will generate a redline comparison to the Model Rule for the comparison chart. Of course, you will still need to complete the Explanation column of the Model Rule Comparison Chart. Lastly, if among the drafters there is a minority view, please consider including the minority view in your draft Introduction.

Attached:
RRC - 1-100 [1-0-1] - Dashboard - FOR ADOPTION - DFT5 (03-10-10)2.doc
RRC - 1-100 [1-0-1] - Compare - Introduction - DFT2 (12-13-09)RLK-KEM-LM2.doc
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RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - DFT1 (03-10-10)AT.doc
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March 11, 2010 KEM E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

To assist you in preparing the materials for the 3/26-27/10 meeting, I've attached the following for this Rule:

1. My cumulative meeting notes, revised 11/27/09.

2. Full E-mail compilation, revised 1/5/10.

Please recall that initially, "Rule 1.0.1" was assigned to "law firm" definition only, as we addressed that definition because of our concomitant consideration of Rules 1.5.1 [2-200] and 5.4. Therefore, the first third or so of each of the attached concerns the definition of "law firm" only.

Please let me know if you have any questions.

March 13, 2010 Kehr E-mail to Drafters, cc Chair, Difuntorum & KEM:

JoElla and Jerry: I have attached initial drafts, with the following comments ---

Commenter chart:

1. The O.C. Bar Assn. objects to our removal of "reasonably" from the definition of screening. Here is what I found on this in reviewing Kevin's and my meeting notes and the related emails. The suggestion that we remove "reasonably" came in separate emails from Tony and Jerry, both on 8/10/09. I did not agree. As best I can reconstruct my thinking at the time, my view was not b/c of any lack of concern over non-consensual screening (I have opposed it everywhere except in Rule 1.11), but b/c I did not think that removing the word would alter the meaning of the definition in practice. A motion was made at the 11/09 meeting to adopt the MR definition, including "reasonably", and this was defeated by a vote of 5-5-0. A motion then was made to remove the word, and it passed by a vote of 6-4-0. The Commission might want to reconsider this in light of the closeness of its earlier votes and the O.C. comment. In drafting the RRC response, I have assumed that it will not change its position. If it does accept the O.C. comment, I suggest that the RRC response say: "The Commission agrees with this comment. It has added "reasonably", which recognizes that the details of a screen will vary with the circumstances, such as with the size of the law firm and the nature of its practice." Reading the current definition fresh, I am satisfied with what we did and would vote not to put "reasonably" back in.

2. I don't think that the Commission can reach a conclusion about the O.C. suggestion on Comment [9] without knowing how many of the rules will continue to provide for non-consensual screening following the Board's rejection of Rule 1.10. If non-consensual screening is restricted to the Rule 1.11 situation (the one in which I think the Commission came closest to unanimity), it might be possible to move the definition to that Rule. The attached draft assumes the Commission will decide to retain the definition in Rule 1.0.1, but it only is a stab at the reason for this. This needs to be revisited after the Commission makes its other decisions.

Rule:

1. Our defintions are not in alphabetical order b/c we have changed "firm" to "law firm". Should we reorder? I think we should b/c ease of reference within our Rule seems to me to be more important than consistency with the order of the Rules of other jurisdicitons.

2. Comment [8] must be revisited after the Commission decides what to do with non-consensual screening.

All other computer-marked changes should be self-explanatory.

Attached:
RRC - 1-100 [1-0-1] - Dashboard - ADOPT - DFT5.1 (03-13-10).doc
RRC - 1-100 [1-0-1] - Compare - Introduction - DFT3 (03-13-10).doc
RRC - 1-100 [1-0-1] - Compare - Rule & Comment Explanation - DFT3 (03-13-10).doc
RRC - 1-100 [1-0-1] - Rule - DFT5 (03-13-10) - Cf. to DFT4.doc
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - DFT2 (03-13-10).doc

March 15, 2010 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

This message provides an updated public comment compilation adding comments received since the materials I transmitted with the message below. In addition, I’ve attached an updated commenter chart.

Since the last transmission, comments from the following commenters were received:

OCTC
COPRAC

Any additional comments received will be sent to you as soon as they are received.

Attached:
RRC - 1-100 [1-0-1] - Public Comment Complete – REV (03-15-10).pdf
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - DFT1.1 (03-15-10)AT.doc

March 15, 2010 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

In follow-up to my message below, please use the attached commenter chart to continue your work on the responses for the new comments received. The attached commenter chart includes Bob Kehr’s responses, per his submission from Saturday. The additional comments received are highlighted in green.

Attached:
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - DFT1.2 (03-15-10)AT.doc

March 15, 2010 Kehr E-mail to KEM, cc Drafters, Chair, Vice-Chairs & Staff:

The OCTC comment forwarded this afternoon includes the following: Further, many of the definitions are repeated elsewhere, which is unnecessary.

Do you have any suggestion as to what this might refer? I don't recall that we repeated any definition.

March 15, 2010 Kehr E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

Here is a revised commenter chart that includes the late-filed letters from OCTC and COPRAC and a slightly revised Rule. In addition to the points identified in the 3/13/10 email with which I sent my initial drafts, I have the following points ---

1. COPRAC objects to our including in the definition of informed consent the obligation to advise the client of reasonably available alternatives. The commenter chart provides my explanation for this language, but I think that the COPRAC comment is important enough to be discussed at the next meeting.

2. I also ask that the Commission discuss COPRAC's comment on Comment [1] and my draft response.

3. This redraft has been done without the benefit of a reply from Kevin to my email of earlier this evening, so we will need to revisit the first paragraph of the response to OCTC to add something regarding the repetition of definitions.

I don't think that my latest changes require any alteration to the other drafts I sent to you on 3/13. To spare you extra tonnage, I am not re-attaching them.

I look forward to your comments.

Attached:
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - DFT2.1 (03-15-10).doc
RRC - 1-100 [1-0-1] - Rule - DFT5.1 (03-15-10) - Cf. to DFT4.doc

March 15, 2010 KEM E-mail to Kehr, cc Drafters, Chair, Vice-Chairs & Staff:

I think OCTC is referring to the earlier iterations of some of the rules, where we included definitions which are now found in 1.0.1 (e.g., 1.7, where we included a definition of "informed written consent" and "writing"). I would simply state something along the lines that earlier in the Commission's review process we did include definitions of terms and phrases in certain rules. However, we subsequently determined we would be better served w/ a terminology section, so where a term or phrase is generally applicable throughout the rules, we have removed the definition from the specific rule in which it might have appeared and consolidated it with others in a single, terminology rule similar to the Model Rule approach.

March 16, 2010 Kehr E-mail to KEM, cc Drafters, Chair, Vice-Chairs & Staff:

I have added one sentence to cover this. Revision attached.

Attached:
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - DFT2.2 (03-16-10).doc

March 16, 2010 Sapiro E-mail to Kehr, cc Drafters & KEM:

Thanks for doing this. Attached is a copy of the public comment chart redlined to show one correction and my responses to your responses.

I agree with your recommendations about matters the commission should discuss. Let's recommend that we alphabetize the definitions after we see what the commission does with the rule but before it goes to the board.

I agree with you about Comment [8].

In one respect, I agree with COPRAC about the reasonably available alternatives. Even reasonably competent lawyers may not perceive all reasonably available alternatives. A lawyer should not be disciplined because he or she did not catalog all reasonably available alternatives in the information given to obtain consent. The definition should not require lawyers to state every reasonably available alternative or face discipline. That, to me, would be overkill. It might expose the lawyer to damages if the overlooked alternatives would have avoided costs or other consequences for the client. But if an alternative were overlooked, even if it caused little or no monetary harm, I bet OCTC will charge multiple violations of both whatever rule required the informed consent plus the competence and the communications rules, all for the same incident, and thereby seek harsher sanctions in the disciplinary case.

Attached:
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - DFT2.3 (03-16-10)RLK-JS.doc

March 17, 2010 Kehr E-mail to McCurdy & Difuntorum, cc Drafters, Chair & KEM:

I am out of gas and must call it a night. Let's use whatever Jerry did to my public comment chart with the other drafts I sent earlier as the agenda materials for this item. Thank you, Jerry.

Attached:
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - DFT2.3 (03-16-10)RLK-JS.doc

March 18, 2010 KEM E-mail to McCurdy & Difuntorum, cc Drafters, Chair & Staff:

To make sure we're all on the same page, I've reviewed my notes on this rule and attached the following documents that Bob and the other drafters have been submitting to you so that you have them all in one place. Please note that I've renamed the files to conform the draft numbers to earlier drafts:

1. Rule, Draft 5.1 (3/15/10), redline, compared to Draft 4 (12/13/09) [Public Comment Draft];

2. Public Comment Chart, Draft 2.4 (3/17/10)RLK-JS. This is the draft Bob sent you yesterday (Jerry's draft from 3/16), in which I've re-sorted the commenters alphabetically but made no other changes, except to remove the "above" and "below" in the last column (not necessary w/ the commenter alphabetically listed).

3. Dashboard, Draft 5.1 (3/13/10). Identical to what Bob sent on 3/13 except that I've re-sized the summary box to capture all of the description and changed the rule draft #.

4. Introduction, Draft 3.1 (3/18/10)RLK-KEM. Identical to what Bob sent on 3/13 except that I've changed the date and the draft # in the footnote.

5. Rule & Comment Comparison Chart, Draft 3.1 (3/18/10). Identical to what Bob sent on 3/13 except that I've changed the draft # & date in the footnote.

Please let me know if you have any questions.

March 21, 2010 KEM E-mail to RRC:

Two comments/questions concerning this Rule:

1. "Firm" vs. "'Firm' or 'Law Firm'". Is it really necessary to use as our defined term "law firm" and not "firm" or "law firm" as is done in the Model Rule. I think there was a reason for departing from the Model Rule's term but I can't remember it and I'm not sure we need to distinguish ourselves from the Model Rules on this count. Please advise.

2. Substitute "information protected by Business and Professions Code section 6068(e)" for "confidential information relating to the representation". In place of paragraph (b) in the public comment draft, should we now insert "information protected by Business and Professions Code section 6068(e)." That term is used in other rules besides Rule 1.6 (e.g., 1.9) and I wonder if we should recommend that that term be substituted in 1.8.2 for the undefined term that is now there, "information relating to the client." I think "information relating to the client" means the same as "information protected by B&P Code section 6068(e)." We can keep the same definition as was stricken in the current redline draft at p. 3 of the Agenda Materials.

a. Another place where we use a similar term is 1.13(c), which provides: "In taking any action pursuant to paragraph (b), the lawyer shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068(e)(1)."

b. The same is true of proposed Rule 3.3, which in Cmt. [10] provides: "Remedial measures do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Business and Professions Code section 6068(e)."

c. Finally, proposed Rule 1.14 also provides in paragraph (c): "Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 and Business and Professions Code section 6068(e)."

The foregoing three rules use different terms but they could be rewritten to include the defined term if we decide an appropriate goal throughout the Rules is consistency of the term used to describe the information subject to the lawyer's duty of confidentiality. Even if we don't rewrite the foregoing three rules, a definition of the scope of protection that is provided under 6068(e) should be easily accessible to lawyers using the rules.

March 22, 2010 Tuft E-mail to RRC List:

1. Paragraph (e): In further response to COPRAC's comment, I would add a reference to Comment [6], which helps explain paragraph (e).

2. Paragraph (m): The restricted definition of tribunal will be a source of confusion for lawyers as evidenced by the comments received from OCTC and the San Diego County Bar Association. The explanation of the material change from the Model Rule definition on pages 24 and 25 of the agenda materials is not correct. The term tribunal in the Model Rules does not apply in situations governed by Rule 3.9. Under the proposed rule, "tribunal" would include an arbitrator and an ALJ, but would exclude numerous boards, administrative agencies and other bodies at the federal, state and local level that adjudicate disputes (e.g., the PUC, Worker's Compensation Appeals Board, proceedings before the Labor Commissioner , police review boards, the FTB) This will leave legislative and administrative boards and agencies that adjudicate disputes outside the purview of Rule 3.3 and other rules that are aimed at insuring administrative due process. There is no First Amendment or other reason for excluding a legislative body, administrative agency or other body acting in an adjudicative capacity from the definition in contrast to bodies acting in a rule or policy making capacity. The Model Rule definition adequately describes when such an agency or body acts in an adjudicative capacity. According to Gillers and Simon, there is no precedent for such an overly restrictive definition of tribunal in the rules. We should adopt the ABA definition and explain in a comment that the term tribunal does not apply in situations governed by Rule 3.9. As it is, the proposed response to San Diego and OCTC misses the point. The duty of candor under Rule 3.3 should apply to all adjudicative proceedings in which there is a resolution of a dispute by a binding judgment that affects the rights of the parties involved, regardless of what the majority thinks about Rule 3.9.

3. Comment [1]: The Commission should not agree with Orange County Bar Association in remove the first sentence. Telling lawyers that a sole proprietorship is a law firm under the rules is important since this is a significant change in the definition of law firm under existing Rule 1-100(B)(1)(a).

4. Comment [1]: I agree with COPRAC that the last sentence in the corresponding comment to the Model Rule should be retained. I suspect (but do not know for sure) that the ABA had in mind the use of temporary lawyers and the imputation of conflicts. See ABA Formal Opinion 88-356. The use of temporary or contract lawyers is on the increase and such lawyers may be considered as members of the firm for certain purposes (e.g., supervision and fee sharing) but not for purposes of imputation depending on whether the temporary lawyers have access to information relating to the representation of adverse parties. The structure of law firm is changing and this sentence provides useful guidance and should be retained.

5. Comment [2]: The suggested new sentence at the end of Comment [2] in response to the comment from the Orange County Bar Association provides little value and should not be included. We have out done ourselves is discussing the term of counsel, but at least that term has an established meaning. Law firms will continue to come up with creative ways to denominate lawyers and the terms law firms choose, aside from of counsel have little bearing on whether the lawyer is or is not a member of a law firm.

6. Comment [9]: This comment should be retained under the rule. The issue of nonconsensual screening is not limited to Rule 1.11, but also applies in Rule 1.12 and Rule 1.18.

7. The words "changes" and “unique” are misspelled on pages 10 and 15 respectively under the RRC response.

8. The dashboard. Based on the comments received, we should not characterize the rule as non-controversial. Some of the definitions, including screened and tribunal are at least moderately controversial.

March 23, 2010 Sondheim E-mail to RRC:

This is the first in a series of e-mails I will be sending regarding most, if not all, of the agenda items. Here are my views regarding 1.0.1:

1. On page 8, Bob suggests consideration of "personally conflicted lawyer," instead of "prohibited lawyer." However, on page 244 in the RRC Response column to comment 3 it is stated: "the term 'prohibited lawyer' is used throughout the rules to denote a lawyer who is prohibited from participation in the representation at issue." If this is correct, we would not consider Bob's alternative.

2. Page 10: In light of Bob's suggestion regarding the OCTC comment, staff should check what definitions, if any, are repeated and report the results at the meeting.

3. Page 11: At the top of the RRC Response, the response is misplaced as it relates to 1.0.1(m).

4. Page 11: The comment in the second full paragraph needs a response.

5. Pages 13-14: We will need to consider the screening issue after it is resolved in other rules. I will comment more on this in a forthcoming e-mail.

6. Page 14: In the RRC Response column, the first line after the underlined language has a typo: "wouild" should be "would."

7. Page 18: This rule should be listed at least as "Moderately Controversial" and perhaps "Highly Controversial."

8. Page 20: At the bottom of the Commission's Proposed Rule column, paragraph (b) should be deleted.

9. Page 26: In the CPR column, the heading should be "Law Firm" and the first sentence should be deleted since the Commission took it out.

March 23, 2010 Difuntorum E-mail to RRC:

In response to item #2 in the message below, the attached "Pub. 250" style version of all of the proposed rules (B1 - B5 as adopted by the BOG and the public comment versions of B6) uses yellow highlights to identify: (1) definitions; and (2) descriptive language that might be regarded as close to a definition, used in rules other than the global terminology Rule 1.0.1. Some may seem appropriate as separate definitions (for example, the definitions in Comments [1] through

[6] of Rule 1.15), while others may warrant consideration as a global term (for example, the definition of "judge" or "judicial officer" in Rule 3.5(c)). NOTE: When viewing the attached PDF online, you can simply use the "pages" navigation pane to quickly access all of the highlighted text (we've set this as the default view for the document provided your settings don't conflict). Much thanks to Mimi for carrying the laboring oar on this assignment.

Attached:
RRC - PubCom - Proposed Rules - [B1-B5] - [B6PCD] - TERMS - REV (03-23-10).pdf

March 23, 2010 Sapiro E-mail to Difuntorum:

But how do you find time to do 100 pages of annotations?

March 23, 2010 Difuntorum E-mail to Sapiro:

I think the idea is to just check out each instance and then decide for yourself if it warrants discussion as something to be added to Rule 1.0.1 either as a new global definition or a new cross reference in the Rule 1.0.1 comments. I don’t think there is any intent to re-open the substantive merits of each and every definition found throughout the rules. In fact, since the language is likely to be language that has already been approved by the Commission, Harry may impose restrictions on requests for de novo review.

March 23, 2010 Sapiro E-mail to Difuntorum:

Thanks for that explanation. It will save some time.