

July 26, 2010 KEM E-mail to Difuntorum, McCurdy & Lee:

With the removal of 1.5(e) and (f), there are no longer any substantive provisions that require a definition of "signed". Nevertheless, I don't think we should bother removing the definition from the Rule under the theory of no harm, no foul. Besides, some day we might add a provision concerning "signed by a client".

August 4, 2010 McCurdy E-mail to RRC:

To date, we have received 3 public comments for the rules currently circulating for public comment. Given the extremely short turn-around time between now and the next meeting, it is important that all members read all comments as they are received. I have attached copies of the following comments on the following rules, along with public commenter charts providing a synopsis of these comments:

- Rule 1.0.1 – Peter Liederman
- Rule 3.8 – Ventura DA – Michael Schwartz
- Rule 5.4 – Thomas Quinn

The public comments will be sent out to the entire Commission as they are received, and will also be available at the Google site under the heading "COMMENTS BATCH Y":

<http://Sites.google.com>

IMPORTANT: Please be advised that the assignments deadline is Thursday, August 26th at 9:00 am, due to the August 25th public comment deadline. This means that the usual opportunity for sending e-mail comments after receipt of the agenda materials will not be possible. Instead, all Commission members are asked to send e-mails responding to the public comment letters as they are distributed. Please send e-mail comments to the entire Commission to assure that leadership and the drafting teams can account for e-mail comments in preparing assignments.

Below is a list of the drafting teams assigned to each rule under consideration at the August meeting. Folders for each rule with the assignment background materials are available at the Google site under the heading "RULES BATCH Y." As updated public commenter charts become available we will send them to you by e-mail and post them at the Google site.

- III.A. Rule 1.0.1 - Terminology [1-100(B)] – KEHR, Julien, Sapiro
- III.B. Rule 2.1 - Advisor [N/A] – LAMPORT, Vapnek
- III.C. Rule 3.3 - Candor Toward the Tribunal [5-200] – TUFT, Peck, Ruvolo, Sapiro
- III.D. Rule 3.8 - Special Responsibilities of a Prosecutor [5-110] (At the direction of the Board of Governors, public comment is being solicited only as to paragraph (d).) – FOY, Peck, Tuft
- III.E. Rule 4.2 - Communications with a Represented Person [2-100] – MARTINEZ/TUFT
- III.F. Rule 5.4 - Financial and Similar Arrangements with Nonlawyers [1-310, 1-320, 1-600] – MOHR, Martinez, Peck, Tuft
- III.G. Rule 8.4 - Misconduct [1-120] – VAPNEK/PECK, Tuft

We're in the home stretch!

Attached:

**CalBar – RRC – Rule 1.0.1 [1-100] [“Terminology”]
E-mails, etc. – Revised (8/24/2010)**

RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - YDFT1 (08-04-10).doc
RRC - 5-110 [3-8] - Public Comment Chart - By Commenter - YDFT1 (08-04-10).doc
RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - YDFT1 (08-04-10).doc
RRC - [3-8] - Public Comment Complete - REV (08-04-10).pdf
RRC - [5-4] - Public Comment Complete - REV (08-04-10).pdf
RRC - [1-0-1] - Public Comment Complete - REV (08-04-10).pdf

August 12, 2010 Sondheim E-mail to RRC:

I think the comment of Mr. Liederman regarding 1.0.1 can be responded to in a manner similar to what I suggested for 5.4.

The changes made to this rule for public comment related to paragraphs (e) and (n) and comment 6. Mr. Liederman's comment does not directly respond to any of these changes. Rather he raises an issue relating to paragraph (e)(1), an issue which was inherent in the draft of this rule as previously circulated for public comment. Since no change was previously made along the lines suggested by Mr. Quinn, this issue was previously resolved by the Commission and therefore in essence approved by RAC when it sent out the limited changes which were made by the Commission.

My viewpoint is only a suggestion to the members of the drafting committee on 5.4 who are, of course, free to recommend whatever they deem appropriate in response to Mr. Liederman's comments. For example, if persuaded by Mr. Liederman's comments, paragraph (e)(1) and relevant comments might be deleted.

August 24, 2010 McCurdy E-mail to RRC:

Please review the attached comment from Phillip Feldman on Rule 1.0.1. An updated public commenter chart will be circulated as soon as it's ready.

All members are encouraged to lodge their e-mail comments concerning the attached public comment as soon as possible.

Attached:

RRC - [1-0-1] - Public Comment - Y-2010-542 Phillip Feldman (08-23-10).pdf

August 24, 2010 Difuntorum E-mail to RRC:

Also, the gist of Mr. Feldman's comment on proposed Rule 1.0.1(e) [Terminology, re definition of informed written consent] is that he does not like the Commission's language which is based on RPC 3-310(A). Instead, Mr. Feldman prefers the ABA Model Rule language.

August 24, 2010 McCurdy E-mail to RRC:

Over the past two days Randy and I have circulated the comments as we have received them. As promised, I’ve attached a copy of updated commenter charts including a synopsis of those comments received on the following rules:

Rule 1.0.1
Rule 3.3
Rule 3.8
Rule 4.2

Attached:

RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - YDFT1.1 (08-24-10).doc
RRC - 2-100 [4-2] - Public Comment Chart - By Commenter - YDFT1.3 (08-24-10).doc
RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - YDFT1.1 (08-24-10).doc
RRC - 5-110 [3-8] - Public Comment Chart - By Commenter - YDFT1.3 (08-24-10).doc

August 24, 2010 Kehr E-mail to Drafters (Sapiro, Julien), cc Chair & Staff:

I have attached a revised draft of the public commenter chart, updated to include a reply to Phil Feldman. I have inserted the suggested rewording of (e)(1) to make things easier for the other members of the Commission. Speak now, etc.

Attached:

RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - YDFT1.2 (08-24-10)RLK.doc

August 24, 2010 Sapiro E-mail to Drafters, cc Chair & Staff:

Regarding (e)(1), I would transpose the words “both must.”

August 24, 2010 Kehr E-mail to Drafters, cc Chair & Staff:

And fracture the verb? For shame.

August 25, 2010 Julien E-mail to RRC:

With respect to 1.0.1 I see no reason to change it. The definition is adequate, and if the rule is followed to the letter, the lawyer will not run afoul of the rule. Keeping what Mr. Feldman wants will only confuse the reader. Putting the deletion back it will have exactly the effect I presume Mr. Feldman doesn't want.

The issues will revolve around the adequacy of the communication rather than whether the necessary substance has been communicated.

August 25, 2010 Peck E-mail to RRC:

I agree with JoElla.

August 25, 2010 McCurdy E-mail to RRC:

Lead Drafters:

Thanks to those of you who have found time to promptly send e-mails addressing the public comments that have been distributed.

As you know, we will also need completed public commenter charts for each of the rules on the agenda. An updated draft of each public commenter chart including a synopsis of all of the comments received by the end of the comment period is attached. You may already have the most recent version of those charts which did not require a recent update, however we are sending all of them with this e-mail for ease of reference.

For the RRC Response column, we encourage you to fill in a tentative response based on your own individual view or the views that you find in the Commission member e-mails that have been sent concerning the comments. This would be preferable to leaving the RRC Response column blank pending final resolution at the meeting.

We request that you submit your draft public commenter charts, and any other rule agenda materials you wish to provide **no later than tomorrow morning, Thursday, August 26th, at 9:00 am.**

Many thanks for your work on this. You're almost there!

Attached:

RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - YDFT1.3 (08-25-10)LM.doc
RRC - [2-1] - Public Comment Chart - By Commenter - YDFT1 (08-25-10)LM.doc
RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - YDFT1.2 (08-25-10)LM.doc
RRC - 5-110 [3-8] - Public Comment Chart - By Commenter - YDFT1.4 (08-25-10)LM.doc
RRC - 2-100 [4-2] - Public Comment Chart - By Commenter - YDFT1.4 (08-25-10)LM.doc
RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - YDFT1 (08-25-10)LM.doc
RRC - 1-120X [8-4] - Public Comment Chart - By Commenter - YDFT1 (08-25-10)LM.doc

**Rule 1.0.1 Terminology
[Sorted by Commenter]**

TOTAL = 2 Agree = __
 Disagree = _
 Modify = 2
 NI = _

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Liederman, Peter H.	M	No	(e)(1)	<p>If I read this paragraph correctly, it imposes written disclosure as an essential and non-explicit component of “informed written consent.” First, this creates a trap for the unwary lawyer who might reasonably believe that “written consent” is only what its plain English suggests it is; second, without evident good cause it burdens any attorney in every circumstance from giving oral advice and obtaining a written consent on which he can rely, even when it is otherwise completely reasonable, mutually agreeable, and (except by your definition) ethical to do so.</p> <p>When there are circumstances where both written advice and written consent are necessary these should be specified. Further, the drafters should consider that handing unsophisticated clients written warnings or disclaimers about a legal question may actually impair informed consent compared to a patient oral explanation without the formidable-looking piece of paper.</p>	<p>The Commission believes that the current wording of paragraph (e)(1) is accurate, but it suggests a minor, non-substantive revision in order to avoid Mr. Liederman’s misreading of the paragraph. This is to revise (e)(1) to read in full as follows: “ ‘Informed Consent’ means that the disclosure of information and risks and the consent required by paragraph (e) both must be in writing.”</p> <p>The Commission disagrees with this comment and does not propose any change based on it. The obligation in some situations to make a written disclosure and obtain a written consent does not prevent a lawyer from also providing an oral disclosure and explanation, either before or after delivering the writing to the client, whenever the lawyer thinks it would be helpful to the client to do so.</p>

Proposed Rule 1.0.1 [1-100]

“Terminology”

(XDraft #7, 06/27/10)

Summary: Proposed Rule 1.0.1, which is based on Model Rule 1.0 (“Terminology”), defines 15 terms used in other Rules in order to place these definitions in a single location for ease of reference (it also cross-references one definition that is located in another Rule and one definition defined in California by statute). Eleven of these definitions exactly track or closely track the corresponding Model Rule definition; the remaining definitions differ from the Model Rule counterpart, as explained in the Comparison Chart.

Comparison with ABA Counterpart

Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted	<input checked="" type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input checked="" type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> 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 10

Opposed Rule as Recommended for Adoption 2

Abstain 0

Approved on Consent Calendar

Approved by Consensus

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See minority position re definition of “tribunal.”): Yes No

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

The Commission’s definitions of certain terms (i.e., “fraud,” “informed consent,” “screened,” and “tribunal”) depart from the Model Rule counterpart definitions and the rules which use those terms will, as a result, be subject to different interpretations and may effectively constitute different standards of conduct notwithstanding the fact that the same terms are used in the respective California and ABA rules.

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.0.1* Terminology

July 2010

(Proposed rule following June 15, 2010 public comment deadline.)

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 15 separate definitions, including the incorporation of the Evidence Code definition of “writing”. It also contains a cross-reference to the definition found in another rule of the term “information protected by Business and Professions Code section 6068(e)”. The Commission recommends including this cross-reference because the term is particularly important since it is used in several other rules. The Commission believes this cross-reference will make it more easily available.

Minority. A minority of the Commission dissents from the Commission’s recommended departure from the Model Rule’s definition of tribunal. The minority takes the position that the Commission’s proposed definition is substantially narrower than in any other jurisdiction and will be a source of confusion for lawyers practicing in California. See full Minority Dissent, below.

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, XDraft #7 (6/27/10).

Dissent to Proposed Rule 1.0.1(m) – Definition of “Tribunal”

A minority dissents from the proposed definition of “tribunal” in paragraph (m). The definition proposed by the Commission is substantially narrower than the definition of “tribunal” in Model Rule 1.0(m) and the rules in most jurisdictions. If approved, various governmental agencies and boards acting in an adjudicative capacity and deciding contested matters will not have the protection of rules governing lawyers appearing as advocates in such proceedings. Under the definition proposed by the Commission, “tribunal” would be limited to a court, an arbitrator, an ALJ or a special master or other person to whom a court refers an issue for recommendation or decision. The definition would exclude numerous administrative agencies and boards at the federal, state and local level acting in an adjudicative capacity and rendering legally binding decisions directly affecting a party’s interests following the presentation of evidence or legal arguments (e.g., the PUC, Worker’s Compensation Appeals Board, SEC and FTB). The result will be that a host of administrative and legislative boards and agencies that adjudicate disputes will be left without the protection of rules aimed at assuring candor, impartiality and decorum by lawyers who represent clients as advocates in such matters. This includes Rule 3.3 (candor toward the tribunal) and Rule 3.5 (impartiality and decorum of the tribunal). For example, there would be no rule prohibiting ex parte communications and other forms of improper influence in adjudicative proceedings before various boards and administrative agencies that

would otherwise come within the definition of “tribunal” under the Model Rule but which are excluded under the Commission’s definition.

The Commission’s restricted definition of “tribunal” is without precedent and will be a source of confusion as evidenced by the comments received from OCTC and the San Diego County Bar Association. No other jurisdiction employs such an overly restrictive definition of tribunal in the rules. There is no First Amendment or other reason for excluding from the definition of “tribunal” a legislative or administrative board or agency acting in an adjudicative capacity and rendering binding decisions directly affecting a person’s rights based on the presentation of evidence or legal argument by counsel. One of the stated objectives of the rules is promoting the fair administration of justice. This objective is not limited to courts but includes governmental agencies and bodies acting in an adjudicative capacity as defined in Model Rule 1.0(m). The explanation that a narrow definition is needed to distinguish proceedings governed by Rule 3.9 (advocate in non-adjudicative proceedings) is incorrect. The definition of “tribunal” in the Model Rules does not apply in situations governed by Rule 3.9. California should conform to the Model Rule definition and explain, if necessary, in a comment that the definition of tribunal does not apply in situations governed by proposed rule 3.9.

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.0.1 Terminology</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(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.</p>	<p>(a) "Belief" or "believes" denotes<u>means</u> that the person involved actually supposed<u>supposes</u> the fact in question to be true. A person's belief may be inferred from circumstances.</p>	<p>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.</p> <p>The verb "supposes" has been substituted for "supposed" to conform its tense with "believes".</p>
<p>(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.</p>	<p>(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.</p>	<p>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].</p>
	<p>(b) [Reserved]</p>	<p>The Commission has decided to leave paragraph (b) as "[Reserved]" in an attempt to keep the Commission's proposed definitions as close as possible to the Model Rule numbering.</p>

* Proposed Rule 1.0.1, XDraft 7 (06/27/10).

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.0.1 Terminology</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(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.</p>	<p>(c) "Firm" or "law firm" denotes a lawyer or lawyers in means a law partnership; <u>a</u> professional <u>law</u> corporation; <u>a</u> sole proprietorship or other <u>an</u> association authorized to <u>engaged in the</u> practice <u>of</u> law; or lawyers employed in a legal services organization or <u>in</u> the legal department, <u>division or office</u> of a corporation, <u>of a government organization</u>, or other <u>of another</u> organization.</p>	<p>Paragraph (c) modifies the Model Rule definition in several non-substantive ways, including referring to governmental law offices (this is not stated in the Model Rule but is intended, as is shown by the Model Rule Comment). This change emphasizes the need to comply with the California principle that all lawyers are bound by the Rules of Professional Conduct, specifically including government lawyers. See <i>People ex rel. Deumkejian v. Brown</i> (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.</p>
<p>(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.</p>	<p>(d) "Fraud" or "fraudulent" denotes <u>means</u> conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.</p>	<p>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.</p>
<p>(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 risks of and reasonably available alternatives to the proposed course of conduct.</p>	<p>(e) "Informed consent" denotes the agreement by <u>means a person's</u> <u>agreement</u> to a proposed course of conduct after the lawyer has communicated adequate information and explanation about <u>explained (i) the relevant circumstances and (ii) the actual and</u></p>	<p>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 "relevant circumstances" (following public comment from several commenters) and "actual and reasonably foreseeable" conforms the definition to California case law. See, e.g., <i>Sharp v. Next Entertainment, Inc.</i> (2008) 163 Cal. App. 4th 410, 429-31.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.0.1 Terminology</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>reasonably foreseeable material risks of the proposed conduct and, where appropriate, the reasonably available alternatives to the proposed course of conduct.</p>	<p>There are substantive changes to the definition in Alaska, Maine Rule, Michigan Missouri; New York, North Carolina, Oregon, Penn., South Carolina, and Wyoming.</p>
	<p>(e-1) "Informed written consent" means that both the communication and consent required by paragraph (e) must be in writing.</p>	<p>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.</p>
	<p>(e-2) "Information protected by Business & Professions Code section 6068(e)" is defined in Rule 1.6, Comments [3] - [6].</p>	<p>Paragraph (e-2) has no counterpart in Model Rule 1.0. The threshold use of the term "information protected by Business & Professions Code section 6068(e)" 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.</p>
<p>(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.</p>	<p>(f) "Knowingly," "known," or "knows" denotesmeans actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.</p>	<p>Paragraph (f) is identical to the Model Rule definition except for the substitution of "means" for "denotes". See Explanation for paragraph (a).</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.0.1 Terminology</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(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.</p>	<p>(g) "Partner" denotes<u>means</u> 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.</p>	<p>Paragraph (g) is identical to the Model Rule definition except for the substitution of "means" for "denotes". See Explanation for paragraph (a).</p>
	<p><u>(g-1) "Person" means a natural person or an organization.</u></p>	<p>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 adopted in Michigan.</p>
<p>(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.</p>	<p>(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes<u>means</u> the conduct of a reasonably prudent and competent lawyer.</p>	<p>Paragraph (h) is identical to the Model Rule definition except for the substitution of "means" for "denotes". See Explanation for paragraph (a).</p>
<p>(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.</p>	<p>(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes<u>means</u> that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.</p>	<p>Paragraph (i) is identical to the Model Rule definition except for the substitution of "means" for "denotes". See Explanation for paragraph (a).</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.0.1 Terminology</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(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.</p>	<p>(j) “Reasonably should know” when used in reference to a lawyer denotes<u>means</u> that a lawyer of reasonable prudence and competence would ascertain the matter in question.</p>	<p>Paragraph (j) is identical to the Model Rule definition except for the substitution of “means” for “denotes”. See Explanation for paragraph (a).</p>
<p>(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.</p>	<p>(k) “Screened” denotes<u>means</u> the isolation of a lawyer from any participation in a matter through, including the timely imposition of procedures within a <u>law</u> firm that are reasonably adequate under the circumstances <u>(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.</u></p>	<p>Paragraph (k) is identical to the Model Rule definition but makes three changes. First, the substitution of “including” for “through” reflects the variability of what is needed to impose an effective screen, as is discussed in Comment [10], below. Second, the removal of “reasonably” is intended to avoid the suggestion that half-way measures will suffice. The imposition of a non-consensual screen by a law firm is an extremely serious matter. Finally, the Commission recommends added the concept in subpart (ii), which fills a gap in the Model Rule definition.</p>
<p>(l) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.</p>	<p>(l) “Substantial” when used in reference to degree or extent denotes<u>means</u> a material matter of clear and weighty importance.</p>	<p>Paragraph (l) is identical to the Model Rule definition except for the substitution of “means” for “denotes”. See Explanation for paragraph (a).</p>
<p>(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</p>	<p>(m) “Tribunal” denotes<u>means: (i)</u> a court, an arbitrator in a binding arbitration proceeding, or a legislative body, an administrative agency or other body<u>law judge</u> acting in an adjudicative capacity. A legislative body, administrative agency <u>and authorized to make a decision that</u></p>	<p>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</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.0.1 Terminology</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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.</p>	<p>can be binding on the parties involved; or (ii) a special master or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence, court refers one or more issues and whose decision or parties, will render a recommendation can be binding legal judgment directly affecting a party's interests in a particular matter on the parties if approved by the court.</p>	<p>lawyer appears in a representative capacity before a legislative or administrative body (see Rule 3.9). The Commission concluded that this distinction is important because First Amendment protections apply in dealing with legislative and administrative bodies, involved in such things as writing statutes and administrative regulations and granting and denying governmental licenses and permits. First Amendment considerations do not similarly apply to court proceedings. Also, a lawyer's 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.</p>
<p>(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.</p>	<p>(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. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person with the intent to sign the writing.</p>	<p>Because California has a statutory definition of "writing", the Commission recommends substituting 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. The definition of "signed," added following public comment, is necessary to give effect to several rules that refer to a signed writing.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Confirmed in Writing</p> <p>[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.</p>	<p>Confirmed in Writing</p> <p>[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.</p>	<p>The Commission removed Model Rule 1.0, cmt. [1] because the term explained in the Comment is not used in the proposed Rules.</p>
<p>Firm</p> <p>[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</p>	<p><u>Firm or Law Firm</u></p> <p>[21] Whether two or more lawyers constitute a <u>law</u> 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 <u>law</u> firm. However, if they present themselves to the public in a way that suggests that they are a <u>law</u> firm or conduct themselves as a <u>law</u> firm, they should<u>may</u> be regarded as a <u>law</u> firm for purposes of the<u>these</u> 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</p>	<p>Comment [1] is nearly the same as Model Rule 1.0, cmt. [2], but 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.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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.</p>	<p>purpose of the Rule<u>rule</u> 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.</p>	
<p>[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.</p>	<p>[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.</p>	<p>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.</p>
	<p><u>[2] Whether a lawyer who is denominated as "of counsel" should be deemed a member of a law firm will 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</u></p>	<p>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.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>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., <i>People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.</i> (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., <i>Chambers v. Kay</i> (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536]. Whether a lawyer should be deemed a member of a law firm when denominated as “special counsel”, or by another term having no commonly understood definition, also will depend on the specific facts.</u></p>	
<p>[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.</p>	<p>[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.</p>	<p>Comment [3] is identical to Model Rule 1.0, cmt. [4].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[4] This Rule does not authorize any person or entity to engage in the practice of law in this state except as otherwise permitted by law.</p>	<p>Comment [4] has no counterpart in Model Rule 1.0. The Commission recommends its addition in order to prevent the definition of "law firm" from being misread as an authorization to practice law. The consequence is that anyone acting as a law firm has all the duties of law firms even if not authorized to practice law.</p>
<p>Fraud</p> <p>[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.</p>	<p>Fraud</p> <p>[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.</p>	<p>Comment [5] is identical to Model Rule 1.0, cmt. [5], changed only to track the revision to paragraph (d).</p>
<p>Informed Consent</p> <p>[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</p>	<p><i>Informed Consent <u>and Informed Written Consent</u></i></p> <p>[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. Other rules require a lawyer to obtain informed written consent. Compare.</p>	<p>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</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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</p>	<p>for example, Rules 1.2(c), and 1.6(a) and (informed consent) with Rules 1.7, 1.8.1 and 1.9 (informed written consent). 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.</p>	<p>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.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>the consent should be assumed to have given informed consent</p>	<p>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 the consent should be assumed to have given informed consent.</p>	
<p>[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).</p>	<p>[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. <u>Consent</u> <u>However, except where the standard is one of informed written consent, consent</u> 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) and 1.9(a). For a for the definition of "writing" and "confirmed in writing, <u>written</u>" 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).</p>	<p>Comment [7] is based on Model Rule 1.0, cmt. [7]. Changes conform the Comment to the paragraph (e) definition.</p>
<p>Screened</p> <p>[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.</p>	<p>Screened</p> <p>[8] This definition applies to situations where screening of a personally disqualified<u>prohibited</u> lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, or 1.12 or 1.18.</p>	<p>Comment [8] is identical to Model Rule 1.0, cmt. [8], except that the reference to Rule 1.10 has been deleted because the Board has declined to adopt Model Rule 1.10, and the reference to Rule 1.18 has been deleted because the Commission has recommended that Model Rule 1.18 not be adopted.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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.</p>	<p>[9] The purpose of screening is to assure the affected parties<u>client, former client, or prospective client</u> that confidential information known by the personally disqualified<u>prohibited</u> lawyer remains protected<u>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</u>. The personally disqualified<u>prohibited</u> lawyer should<u>shall</u> acknowledge the obligation not to communicate with any of the other lawyers <u>and non-lawyer personnel</u> in the <u>law</u> firm with respect to the matter. Similarly, other lawyers <u>and non-lawyer personnel</u> in the <u>law</u> firm who are working on the matter should<u>promptly shall</u> be informed that the screening is in place and that they may not communicate with the personally disqualified<u>prohibited</u> 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<u>law firm personnel</u> of the presence of the screening, it may be appropriate for the <u>law</u> firm to undertake such procedures as a written undertaking by the screened<u>personally prohibited</u> lawyer to avoid any communication with other <u>law</u> firm personnel and any contact with any <u>law</u> firm files or other materials relating to the matter, written notice and instructions to all other <u>law</u> firm personnel forbidding any communication with the screened<u>personally prohibited</u> lawyer relating to the matter, denial of access by the screened<u>that</u> lawyer</p>	<p>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”. Similarly, the one appearance of the phrase “screened lawyer” has been replaced with “personally prohibited lawyer.” 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.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>to law firm files or other materials relating to the matter, and periodic reminders of the screen to the screenedpersonally prohibited lawyer and all other law firm personnel.</p>	
<p>[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.</p>	<p>[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.</p>	<p>Comment [10] is identical to Model Rule 1.0, cmt. [10].</p>
	<p><u>Tribunal</u></p> <p>[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.</p>	<p>Comment [11] has no counterpart in Model Rule 1.0. It has been added as a brief explanation of the narrow definition of “tribunal” that the Commission recommends. See the paragraph (m) explanation, above.</p>
	<p><u>Writing and Written</u></p> <p>[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.</p>	<p>See the Explanation for paragraph (n), above.</p>

Rule 1.0.1: Terminology

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

- (a) “Belief” or “believes” means that the person involved actually supposes the fact in question to be true. A person’s belief may be inferred from circumstances.
- (b) [reserved]
- (c) “Firm” or “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, of a government organization, or of another 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~~explained (i) the relevant circumstances and (ii) the actual and reasonably foreseeable material risks of ~~the proposed conduct~~ and, where appropriate, the 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.
- (e-2) “Information protected by Business & Professions Code section 6068(e)” is defined in Rule 1.6, Comments [3] - [6].
- (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. [A “signed” writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person with the intent to sign the writing.](#)

COMMENT

Firm or Law Firm

- [1] 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 a law firm will 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 a law firm when denominated as “special counsel”, or by another term having no commonly understood definition, also will 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 does not 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 Compare, e.g. for example, Rules 1.2\(c\), and 1.6\(a\), and \(informed consent\) with Rules 1.7, 1.8.1 and 1.9 \(informed written consent\).](#) 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 prohibited lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11 or 1.12.
- [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 personally prohibited lawyer to avoid any communication with other law firm personnel and any contact with any law firm files or other materials relating to the matter, written notice and instructions to all other law firm personnel forbidding any communication with the personally prohibited lawyer relating to the matter, denial of access by that lawyer to law firm files or other materials relating to the matter, and periodic reminders of the screen to the personally prohibited lawyer and all other law firm personnel.

- [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
(Commission’s Proposed Rule – Clean Version)

- (a) “Belief” or “believes” means that the person involved actually supposes the fact in question to be true. A person’s belief may be inferred from circumstances.
- (b) [Reserved]
- (c) “Firm” or “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, of a government organization, or of another 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 and explained (i) the relevant circumstances and (ii) the actual and reasonably foreseeable material risks of the proposed conduct and, where appropriate, the reasonably available alternatives to the proposed conduct.
- (e-1) “Informed written consent” means that both the communication and consent required by paragraph (e) must be in writing.
- (e-2) “Information protected by Business & Professions Code section 6068(e)” is defined in Rule 1.6, Comments [3] – [6].
- (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. A “signed” writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person with the intent to sign the writing.

COMMENT

Firm or Law Firm

- [1] 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 a law firm will 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 a law firm when denominated as “special counsel”, or by another term having no commonly understood definition, also will 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 does not 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. Compare, for example, Rules 1.2(c) and 1.6(a) (informed consent) with Rules 1.7, 1.8.1 and 1.9 (informed written consent). 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 prohibited lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11 or 1.12.
- [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 personally prohibited lawyer to avoid any communication with other law firm personnel and any contact with any law firm files or other materials relating to the matter, written notice and instructions to all other law firm personnel forbidding any communication with the personally prohibited lawyer relating to the matter, denial of access by that lawyer to law firm files or other materials relating to the matter, and periodic reminders of the screen to the personally prohibited lawyer and all other law firm personnel.

[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: Terminology

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2010 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Alaska: In the rules effective April 15, 2009, Rule 9.1 (Alaska's terminology rule) adds an unusually detailed definition of "substantially related matters" to help guide lawyers in their assessment of conflicts of interest. The definition draws, in part, on Comment 3 to Model Rule 1.9.

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."

Massachusetts: Rule 9.1 retains the 1983 version of the ABA Terminology and adds a definition of "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: In the rules effective April 1, 2009, New York adds definitions for the terms "advertisement," "computer-accessed communication," "differing interests," "domestic relations matters," "matter," "person," "reasonable lawyers," and "sexual relations." New York also includes a more detailed definition of "fraud," providing as follows:

"Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

In addition, the definition of "confirmed in writing" includes "a statement by the person made on the record of any proceeding before a tribunal."

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.”

Rule 1.0.1 – Public Comment – File List

Y-2010-532 Peter Liederman [1.0.1]

Y-2010-542 Phillip Feldman [1.0.1]



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: AUGUST 23, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization ?

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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

[Rule 1.0.1 \[1-100\(B\)\]](#) [Rule 2.1 \[n/a\]](#) [Rule 3.3 \[5-200\]](#) [Rule 3.8 \[5-110\]](#)
[Rule 4.2 \[2-100\]](#) [Rule 5.4 \[1-310, 1-320, 1-600\]](#) [Rule 8.4 \[1-120\]](#) [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.

regarding e-1 the rule: if I read it correctly, it imposes written disclosure as an essential and non-explicit component of "informed written consent." First, this creates a trap for the unwary who might reasonably believe that "written consent" is only what its plain English suggests it is; second without evident good cause it burdens any attorney in every circumstances from giving oral advice and obtaining a written consent on which he can rely, even when it is otherwise completely reasonable, mutually agreeable, and (except by your definition) ethical to do so. When there are circumstances where both written advice and written consent are necessary these should be specified. Further, the drafters should consider that handing unsophisticated clients written warnings or disclaimers about a legal question may actually impair informed consent compared to a patient oral explanation without the formidable-looking piece of paper.

PHL

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Ms. Audrey Hollins, Office of Professional Competence
 Planning & Development, State Bar of California
 By Fax Only to 415-538-2171

Re: Comment Requesting that the Supreme Court modify Proposed Definition of "Informed Consent" as set forth in Commission's Proposed California Rule of Professional Conduct 1.0 (e) (terminology) and appurtenant Comment [6] to more closely conform to the national standard (ABA Rule of Professional Conduct 1.0 (e).)

Informed consent is relevant to multiple existing and proposed California Rules of Professional Conduct and a discussion thereof is not pertinent to the specific objections and criticisms raised herein.

ABA terminology reads: " *'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 risks of and reasonably available alternatives to the proposed course of conduct.* "

The Commission's proposed language inappropriately deletes "ADEQUATE INFORMATION AND EXPLANATION" which enables factual application narrowed down to adequacy of the communication from the lawyer to a lay client. The Commission proposes to replace the plain English, national language with "the relevant circumstances and the actual and reasonably foreseeable material risks of the proposed conduct". In addition the Commission proposes to qualify retained ABA language "reasonably available alternatives" by adding the modifier "appropriate".

It's apparent that ABA language simply describes a lawyer's duty to provide a client with a RISK-BENEFIT analysis. It is equally apparent that the Commission proposes to do away with an either/or "black letter" determination of ADEQUACY with a four element test to determine whether or not a client has received informed consent. This was done by adding superfluous modifiers RELEVANT, ACTUAL, REASONABLY FORESEEABLE and APPROPRIATE.

To many, it is equally apparent that by complicating that which is simple, well understood and applied nationally in both ethical/disciplinary and professional liability contexts that the Commission proposes California remain anachronistic.

LAW: Although informed consent duties of professionals to provide clients or patients with enough information to make intelligent decisions runs through the common law applicable to physicians everywhere, published decisions specifically pertaining to lawyers has lagged behind. An unsupported statement that ALL PROFESSIONALS and not just physicians owe their patients/clients a duty of providing enough information to make intelligent decisions never seems to be challenged as axiomatic since the same rationale applicable to physicians applies to attorneys as well.

The concept that every human being of sound mind and adult years has a right of self determination appears to have been re-articulated by Justice Cardozo in *Schloendorff v Society of New York Hospital* (1914) 211 N.Y. 125, 105 N.E. 92 after review of Illinois and other authority. *Cantebury v Spence and Washington Hospital Center* (DC 1972) 464 F. 2d 772 re-birthed it and *Cobbs v Grant* (1978) 8 Cal 3d 229 made the standard independent of the average reasonable professional's notion of full and fair informed consent but determinable as a matter of law. *Arato v. Avedon* (1993) 5 Cal. 4th 1172, 1182 analyzing *Cobbs*, identified the rationale for physicians as fourfold: patients are unlearned in medical sciences and have less knowledge than the professional; and "a person of adult years and a sound mind has the right in the exercise of control over his own body, to determine whether or not to submit to a lawful medical treatment"; and "the patient's consent to treatment to be effective, must be an informed decision"; and "the patient being unlearned in medical sciences, has an abject dependence upon and trust in his physician for the information upon which he relies during the decisional process, this raising an obligation in the physician that transcends arms-length transactions".

It's apparent that replacing medical science with "the law", physicians with "attorneys", body with "legal affairs" and, as pertinent, substituting "course of conduct" for medical procedures, suggests there ought be and is no difference in the rationale for informed consent duties of lawyers.

Although the Commission cites *Sharp v Next Entertainment, Inc.* (2008) 163 Cal. App. 4th 410 to support its proposed deviation from the ABA rule, Sharp's language is in full accord with the above. *"Once the client has been provided with sufficient information about the situation, the client can make a rational choice, based upon full disclosures as to the risks of the representations, the potential conflicts involved, and the alternatives available as required by particular circumstances."*

In it's proposed comments, the Commission inappropriately deleted the ABA language: "In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek advice of other counsel."

Looking to the medical model, does a general surgeon who never performed any thoracic procedure have a duty to inform her open-heart surgery patient he might wish to seek the advice of other physicians? Substitute family law practitioner for general surgeon, jury trial for thoracic procedure, and medical malpractice trial for open-heart surgery. Don't they both yield the same response.

Respectfully Submitted,

Law Offices of Phillip Feldman



by Phillip Feldman

*Certified. American Board of Professional Liability Attorneys in and for the American Bar Association et. al. in Legal Malpractice. Ten years ago the writer participated in ABA's Ethics 2000 plan to revise the ABA Rules of Professional Conduct after national inquiry. Although "informed consent" wasn't included in terminology then, the writer proposed that "it is inconsistent for rule of behavior for lawyers to require less than that which would make a lawyer liable under each state's common law." It was proposed that language be added to the communication rule: "When appropriate, a lawyer shall explain the advantages and risks of alternative courses of action to the client to accomplish the above objectives." A comment [5] to the revised rule advises that when informed consent is required, it's "as defined in 1.0 (e).