

TOTAL = 1 Agree = 1
 Disagree = _
 Modify = _
 NI = _

Rule 8.4 Misconduct. [Sorted by Commenter]						
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A			COPRAC supports the adoption of proposed Rule 8.4 and the Comments to the Rule.	No response required.

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

Proposed Rule 8.4 [RPC 1-120]

“Misconduct”

(YDraft #11.2, 7/26/10)

Summary: The text of proposed new Rule 8.4 retains current California Rule 1-120 (Assisting, Soliciting, or Inducing Violations) as paragraph (a) and includes most of the provisions found in ABA Model Rule 8.4. Some of the included Model Rule provisions have counterparts in current California rules or in sections of the Business and Professions Code. The text of proposed Rule 8.4 differs from ABA Model Rule 8.4 by: (i) not proscribing *attempts* to violate the rules in paragraph (a); (ii) including the concept of moral turpitude in paragraph (b); (iii) restricting discipline to misrepresentations that are intentional in paragraph (c); and (iv) limiting violations for conduct prejudicial to the administration of justice to conduct in connection with the practice of law (paragraph (d)).

Comparison with ABA Counterpart

Rule

Comment

- ABA Model Rule substantially adopted
- ABA Model Rule substantially rejected
- Some material additions to ABA Model Rule
- Some material deletions from ABA Model Rule
- No ABA Model Rule counterpart

- ABA Model Rule substantially adopted
- ABA Model Rule substantially rejected
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Primary Factors Considered

- Existing California Law

Rules

RPC 1-120

Statute

Business and Professions Code §§6100 et seq.

Case law

See Comment chart, Comments [2A], [2B] and [2C].

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

- 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 7

Opposed Rule as Recommended for Adoption 4

Abstain 1

Approved on Consent Calendar

Approved by Consensus

Minority/Position Included on Model Rule Comparison Chart: Yes No (See Explanations for Paragraphs (b) and (d)).

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

The continued references to moral turpitude when the ABA has essentially abandoned that concept in the Model Rules has been objected to by some, but the Commission believes it has continued viability and continues to be utilized by The State Bar Court for discipline.

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.4* Misconduct

July 2010

(Draft rule revised following July 22-24, 2010 Board of Governors Meeting.)

INTRODUCTION:

The text of proposed Rule 8.4 retains current California Rule 1-120 (Assisting, Soliciting, or Inducing Violations) as paragraph (a) and includes most of the provisions found in ABA Model Rule 8.4, thus collecting in one rule various misconduct provisions. Some of the included ABA provisions have counterparts in current California rules or in sections of the Business and Professions Code. The text of proposed Rule 8.4 differs from ABA Model Rule 8.4 by: (i) not proscribing attempts to violate the rules in paragraph (a); (ii) including the concept of moral turpitude in paragraph (b); (iii) restricting discipline under paragraph (c) to misrepresentations that are intentional; and (iv) limiting violations for conduct prejudicial to the administration of justice to conduct in connection with the practice of law (paragraph (d)).

Many of the Comments are based on corresponding comments in ABA Model Rule 8.4, but have been revised for brevity and clarity, and to conform to the differences in the Rule text. In addition, several comments have been added to apprise California lawyers of statutory and decisional law that might provide bases for discipline beyond those in Rule 8.4. After the subsequent public comment distribution, a new comment, Comment [2C], was added in response to comment letter from the Department of Justice. The new comment explains that certain covert activities are not prohibited by paragraph (c) of the rule.

* Proposed Rule, XDraft 10.2 (4/6/10).

INTRODUCTION (Continued):

Minority. A minority of the Commission objects to Comment [3], which states that manifestations by words or conduct of certain types of bias or prejudice can be a violation of paragraph (d). This is a category of speech that inherently has implications under the First Amendment and the California Constitution. The minority believes a legal professional should respect the right of all citizens, including lawyers, to express their opinions, even if they are disgusting or repugnant. The legal profession should not condone chilling speech by a rule that would call out a category of speech as a potential ground for discipline. The minority contends the focus of paragraph (d) should be on conduct in connection with the practice of law that is prejudicial to the administration of justice and not on categories of speech.

Variations in Other Jurisdictions. Every jurisdiction has adopted some version of Model Rule 8.4. District of Columbia Rule 8.4(d) prohibits conduct that “seriously interferes with the administration of justice.” Several jurisdictions, including Georgia, Virginia and Wisconsin, omit Model Rule 8.4(d). Other jurisdictions, e.g., Florida, expand Model Rule 8.4 (d), to prohibit conduct intended to “disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis,” including on account of race, ethnicity, etc. Some jurisdictions have added provisions to address such conduct specifically, e.g., Colorado, Illinois, Maryland (words or conduct), Texas (same), Ohio. See State Variations, below.

<p align="center">ABA Model Rule Rule 8.4 Misconduct</p>	<p align="center">Commission's Proposed Rule* Rule 8.4 Misconduct</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
<p>It is professional misconduct for a lawyer to:</p> <p>(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;</p>	<p>It is professional misconduct for a lawyer to:</p> <p>(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;</p> <p>(a) <u>knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act;</u></p>	<p>There are two principal changes in paragraph (a). First, paragraph (a) removes "... violate ... the Rules of Professional Conduct" The reason for this change is that any conduct that violates any Rule already is subject to discipline, so the quoted Model Rule language has no consequence except to create the risk that lawyers will be charged twice for every alleged Rule violation.</p> <p>Second, paragraph (a) eliminates an "attempt" to violate a Rule as a general disciplinary offense. It was the consensus of the Commission during the drafting process that it should address on a rule-by-rule basis whether an attempted violation should be a basis for professional discipline. As a result, the Commission decided not to include attempts to violate as a general rule of discipline.</p>
<p>(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;</p>	<p>(b) commit a criminal act <u>that involves moral turpitude or</u> that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;</p>	<p>The Commission added moral turpitude to the Model rule to maintain conformity with the broader public protection afforded by the Business and Professions Code, specifically, section 6106. The Model Rules deleted moral turpitude as a basis for discipline that had been in the ABA Model Code. See Explanation of Changes for Model Rule 8.4, Cmt. [2], below. Some states have retained that standard, or have interpreted the rest of section (b) as being the equivalent of moral turpitude. However, the long and evolving history of case law in California interpreting moral turpitude has expanded the scope of public protection beyond the factors set forth in Model Rule 8.4(b). For these reasons, the Commission recommends adding "moral turpitude" to the proposed rule.</p>

* Proposed Rule 8.4, XDraft 10.2 (4/6/10). Redline/strikeout showing changes to the ABA Model Rule.

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		<p>In addition, there is a long history in California of discipline referrals of attorneys who have been convicted in criminal matters to the State Bar for discipline pursuant to Business and Professions Code sections 6101 and 6102. Moral turpitude is a critical component of those referrals for interim suspension or summary disbarment upon proof of conviction.</p> <p>A minority of the Commission believes that California should not continue using moral turpitude as a standard when the ABA has essentially abandoned that concept in the Model Rules.</p> <p>The Commission also recommends deletion of the phrase "in other respects" as surplusage.</p>
<p>(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;</p>	<p>(c) engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation;</p>	<p>The addition of "intentional" is intended to clarify that negligent misrepresentation is not regarded as dishonesty that triggers this Rule. The Commission believes this clarification is consistent with the intended scope of the ABA's rule and with the interpretation in disciplinary proceedings in states that have adopted the Model Rule. (See, e.g., <i>State ex rel. Oklahoma Bar Ass'n v. Besly</i> (Okla., 2006) 136 P.3d 590 [2006 OK 18] and <i>In re Clark</i> (Ariz., 2004) 207 Ariz. 414 [87 P.3d 827].</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.4 Misconduct</p>	<p align="center"><u>Commission’s Proposed Rule*</u> Rule 8.4 Misconduct</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(d) engage in conduct that is prejudicial to the administration of justice;</p>	<p>(d) engage in conduct <u>in connection with the practice of law, including when acting in propria persona</u>, that is prejudicial to the administration of justice;</p>	<p>The addition of “in connection with the practice of law” was added because of concern that the vagueness of the language might not overcome facial Constitutional challenges under the First Amendment. The Commission sought to delimit the scope of conduct proscribed under paragraph (d) by clarifying in advance that the specific conduct that might be at issue in connection with a charge of prejudice to the administration of justice must be connected to the practice of law.</p> <p>A minority of the Commission disagrees with the language limiting the paragraph’s scope to conduct “in connection with the practice of law” because a lawyer’s fitness to practice law is called into question by conduct prejudicial to the administration of justice in whatever capacity the lawyer acts.</p> <p>Finally, the Commission has added the phrase “including when acting in propria persona,” to clarify that a lawyer appearing in propria persona is engaging in the practice of law and therefore not immune from this provision.</p>
<p>(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or</p>	<p>(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the<u>these</u> Rules of Professional Conduct or other law; or</p>	<p>Paragraph (e) is substantively identical to Model Rule 8.4(e). The Commission has adopted the convention of referring to the Rules of Professional Conduct as “these Rules.” Curiously, the ABA mostly refers to the Model Rules collectively as “these Rules” in its blackletter and comment, only occasionally (as here) referring to them as “the Rules of Professional Conduct.” An inquiry to the Model Rules drafters (reporters) confirmed that no substantive meaning should be attached to the varied usages.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.4 Misconduct</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 8.4 Misconduct</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.</p>	<p>(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.</p>	<p>Paragraph (f) is identical to Model Rule 8.4(f).</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.4 Misconduct Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.4 Misconduct Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.</p>	<p align="center"><u>Paragraph (a)</u></p> <p>[1] Lawyers areA lawyer is subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, for knowingly assistassisting or induceinducing another to do soviolate these Rules or the State Bar Act, or to do so through the acts of another, as when they requesta lawyer requests or instructinstructs an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.</p>	<p>Headings have been added to the Comment for clarity.</p> <p>The Model Rule language has been modified and attempted violations eliminated, to conform to the language of the black letter rule. See Explanation for paragraph (a), above.</p> <p>The substance of the deleted last sentence of the Model Rule comment is the subject of proposed Rule 1.2(d), the counterpart to current rule 3-210. See Comment [4], below.</p>
<p>[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a</p>	<p align="center"><u>Paragraph (b)</u></p> <p>[2] Many kinds of illegal conduct reflectA lawyer may be disciplined under paragraph (b) for a criminal act that reflects adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law.</p>	<p>Comment [2] is based on Model Rule 8.4, cmt. [2]. The first sentence of the Model Rule comment was revised to track the actual language of paragraph (b). The second sentence was deleted as unnecessary because the Commission has retained "moral turpitude" in the Rule, for the reasons set out in the Explanation for paragraph (b), above. At one point during the drafting process for this Rule, the Commission crafted a statement, based on the stricken sentence, that was intended to clarify that "offenses concerning some matters of personal morality" were not within the scope of the Rule. However, as it was unclear that such conduct, e.g., adultery, remains a criminal offense in California, the sentence was deleted as potentially</p>

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<p>lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.</p>	<p>Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.</p>	<p>confusing.</p> <p>The Commission deleted the last sentence of the Model Rule comment because the proposition stated is unclear in the absence of a definition of what is considered a "minor" offense. This ambiguity could give rise to interpretations that grant less public protection than the existing protection afforded by California's standards of moral turpitude, discipline under Business and Professions Code section 6068(a), and conviction referrals under Business and Professions Code section 6101. A lawyer's conviction for a single misdemeanor charge could be construed as a "minor" offense under the Model Rule language; however, a pattern of that misconduct might not be a prerequisite for discipline under California's standards.</p>
	<p>[2A] A lawyer may be disciplined for criminal acts as set forth in Article 6 of the State Bar Act, (Business & Professions Code, sections 6101 et seq.), or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See e.g., <i>In re Kelley</i> (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]; <i>In re Rohan</i> (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] [wilful failure to file a federal income tax return]; <i>In re Morales</i> (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] [twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer].)</p>	<p>This Comment was added because there is a substantial body of case law that has confirmed discipline for "other conduct warranting discipline," as set out in the Supreme Court cases cited.</p>

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	<p>[2B] In addition to being subject to discipline under paragraph (b), a lawyer may be disciplined under Business and Professions Code section 6106 for acts of moral turpitude that constitute gross negligence. (Gassman v. State Bar (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]; Jackson v. State Bar (1979) 23 Cal.3d 509 [153 Cal.Rptr. 24]; In the Matter of Myrdall (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363 [habitual disregard of clients' interests]; Grove v. State Bar (1967) 66 Cal.2d 680 [58 Cal.Rptr. 564]. See also Martin v. State Bar (1978) 20 Cal.3d 717 [144 Cal.Rptr. 214]; Selznick v. State Bar (1976) 16 Cal.3d 704 [129 Cal.Rptr. 108]; In the Matter of Varakin (Review Dept. 1994) 3 Cal State Bar Rptr 179 [pattern of misconduct]; In re Calloway (1977) 20 Cal.3d 165 [141 Cal.Rptr. 805 [act of baseness, vileness or depravity in the private and social duties which a man or woman owes to fellow human beings or to society in general, contrary to the accepted and customary rule of right and duty between human beings]; In re Craig (1938) 12 Cal.2d 93 [82 P.2d 442].)</p>	<p>This Comment is intended to alert lawyers to the expansive case law on moral turpitude.</p>
	<p>Paragraph (c)</p> <p>[2C] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with</p>	<p>This comment has no counterpart in Model Rule 8.4. In response to a public comment from the Department of Justice and, in light of the Commission's decision to not recommend a version of Model Rule 4.1, the language addressing covert activity previously considered for inclusion as Rule 4.1 (b), has been added as new Comment [2C] to Rule 8.4. In part, the new comment clarifies that Rule 8.4(c) does not apply where a lawyer</p>

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	<p>these Rules. But see Rule 1.2(d). "Covert activity," as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.</p>	<p>advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules. In addition, the Commission has included a cross reference to Rule 1.2(d) that generally prohibits a lawyer from advising a client to violate the law.</p>
	<p>Paragraph (d)</p> <p>[2D] Paragraph (d) is not intended to prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution. See, e.g., <i>Ramirez v. State Bar</i> (1980) 28 Cal 3d 402, 411 [169 Cal. Rptr 206] (a statement impugning the honesty or integrity of a judge will not result in discipline unless it is shown that the statement is false and was made knowingly or with reckless disregard for truth); <i>Matter of Anderson</i> (Rev. Dept 1997) 3 State Bar Court Rptr 775 (disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); <i>Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman</i> (9th Cir. 1995) 55 F.3d 1430, 1443 (a lawyer's statement unrelated to a matter pending before the court may be sanctioned only if the statement poses a clear</p>	<p>The Commission concluded that it is important to stress the protection of constitutional rights in connection with discipline so that activities protected by the First Amendment do not become the subject of disciplinary proceedings. See also Explanation of Changes at paragraph (d), above.</p>

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	<p>and present danger to the administration of justice).</p>	
<p>[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.</p>	<p>[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this ruleparagraph (b).</p>	<p>Comment [3] is based on Model Rule 8.4, cmt. [3]. The comment clarifies the scope of paragraphs (a) and (d).</p> <p>The Ninth Circuit invalidated Business and Professions Code section 6068(f) relating to "offensive personality" on constitutional grounds, resulting in the subsequent legislative striking of that section. <i>United States v. Wunsch</i>, 84 F.3d 110 (9th Cir. 1996). However, the Ninth Circuit expressly approved of Model Rule 8.4(b).</p>
<p>[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.</p>	<p>[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to Testing the validity, scope, meaning or application of the any law, rule, or ruling of a tribunal is governed by Rule 1.2(d). Rule 1.2(d) is also intended to apply to challenges of legalregarding the regulation of the practice of law.</p>	<p>Model Rule 8.4, cmt. [4], has been revised for brevity and clarity. This Comment is intended as a cross-reference to another rule that is applicable to related conduct. It is the second sentence to Model Rule 8.4, Comment [4], revised and split into two sentences for clarity. No change in meaning was intended.</p> <p>The first sentence ("A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists.") was deleted because it was not for the protection of the public, inconsistent with Bus. & Prof. Code section 6068(a), and overly broad with respect to what a lawyer may do to challenge a law that he or she believes is invalid.</p>

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<p>[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.</p>	<p>[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill <u>held by the professional role of lawyers. The same is true of</u> lawyer or abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization, <u>can involve conduct prohibited by this Rule.</u></p>	<p>Comment [5] is based on Model Rule 8.4, cmt. [5], but has been revised to make it more concise and also to clarify that the conduct described can violate the Rule. The Commission believes that the recommended clause – “can involve conduct prohibited by this Rule” – does not suffer the same vagueness of the Model Rule clause (“can suggest an inability to fulfill the professional role of lawyers.”)</p>
	<p>[6] <u>Alternative bases for professional discipline may be found in Article 6 of the State Bar Act, (Bus. & Prof. Code, sections 6100 et seq.), and published California decisions interpreting the relevant sections of the State Bar Act. This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act.</u></p>	<p>This Comment, which has no counterpart in the Model Rule, is intended as a clarification and to advise lawyers that there are bases for discipline for professional misconduct other than the Rules.</p>

Rule 8.4 Misconduct

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

It is professional misconduct for a lawyer to:

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

COMMENT

Paragraph (a)

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

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

Paragraph (b)

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

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

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

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

Paragraph (c)

[2C] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules. But see Rule 1.2(d). "Covert activity," as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.

Paragraph (d)

[2CD] Paragraph (d) is not intended to prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution. See, e.g., *Ramirez v. State Bar* (1980) 28 Cal 3d 402, 411 [169 Cal. Rptr 206] (a statement impugning

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

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

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

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

[6] Alternative bases for professional discipline may be found in Article 6 of the State Bar Act, (Business and Professions Code sections 6100 et seq.), and published California decisions interpreting the relevant sections of the

State Bar Act. This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act.

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

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

It is professional misconduct for a lawyer to:

- (a) ~~A member shall not~~ knowingly assist in, solicit, or induce any violation of these ~~rules~~ Rules or the State Bar Act;
- (b) commit a criminal act that involves moral turpitude or that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
- (c) engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation;
- (d) engage in conduct in connection with the practice of law, including when acting in propria persona, that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

COMMENT

Paragraph (a)

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

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

Paragraph (b)

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

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

[2B] In addition to being subject to discipline under paragraph (b), a lawyer may be disciplined under Business and Professions Code section 6106 for acts of moral turpitude that constitute gross negligence. (*Gassman v. State Bar* (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]; *Jackson v. State Bar* (1979) 23 Cal.3d 509 [153 Cal.Rptr. 24]; *In the Matter of Myrdall* (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363 [habitual disregard of clients' interests]; *Grove v. State*

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

Paragraph (c)

[2C] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules. But see Rule 1.2(d). "Covert activity," as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.

Paragraph (d)

[2D] Paragraph (d) is not intended to prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution. See, e.g., *Ramirez v. State Bar* (1980) 28 Cal 3d 402, 411 [169 Cal. Rptr 206] (a statement impugning the honesty or integrity of a judge will not result in discipline unless it is shown that the statement is false and was made knowingly or with reckless disregard for truth); *In the Matter of Anderson* (Rev. Dept 1997) 3 Cal. State Bar Ct.

Rptr. 775 (disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1443 (a lawyer's statement unrelated to a matter pending before the court may be sanctioned only if the statement poses a clear and present danger to the administration of justice).

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

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

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

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

Rule 8.4 Misconduct

(Commission's Proposed Rule – Clean Version)

It is professional misconduct for a lawyer to:

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

COMMENT

Paragraph (a)

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

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

Paragraph (b)

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

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

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[2C] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules. But see Rule 1.2(d). "Covert activity," as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.

Paragraph (d)

[2D] Paragraph (d) is not intended to prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution. See, e.g., *Ramirez v. State Bar* (1980) 28 Cal 3d 402, 411 [169 Cal. Rptr 206] (a statement impugning

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

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[6] Alternative bases for professional discipline may be found in Article 6 of the State Bar Act, (Business and Professions Code sections 6100 et seq.), and published California decisions interpreting the relevant sections of the

State Bar Act. This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act.

Rule 8.4: Misconduct

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.)

Alabama adds Rule 3.10, which provides that a lawyer “shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.”

Arizona adds Rule 8.4(g), which makes it professional misconduct for a lawyer to “file a notice of change of judge under Rule 10.2, Arizona Rules of Criminal Procedure, for an improper purpose, such as obtaining a trial delay. . . .”

California: Rule 2-400 provides, in part, as follows:

(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:

- (1) hiring, promoting, discharging or otherwise determining the conditions of employment of any person; or
- (2) accepting or terminating representation of any client.

(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

In addition, California Business & Professions Code §125.6 (Discrimination in the Performance of Licensed Activity) subjects a lawyer to professional discipline if, because of a prospective client’s “race, color, sex, religion, ancestry, disability, marital status, or national origin,” the lawyer “refuses to perform the licensed activity” (i.e., the practice of law) or “makes any discrimination or restriction in the performance of the licensed activity.”

Also, Business & Professions Code §490.5 permits the State to suspend a lawyer's license if the lawyer "is not in compliance with a child support order or judgment." Finally, Rule 290(a) of the Rules of Procedure of the California State Bar provides that (unless otherwise ordered by the Supreme Court) a member of the bar "shall be required to satisfactorily complete the State Bar Ethics School in all dispositions or decisions involving the imposition of discipline, unless the member previously completed the course within the prior two years."

Colorado: In addition to Rule 8.4(g), which forbids bias in various forms, Colorado adds Rule 4.5, which addresses threats of "criminal, administrative or disciplinary charges" to gain a civil case advantage. See Selected State Variations under Rule 4.4.

District of Columbia: Rule 8.4(d) prohibits conduct that "seriously interferes with" the administration of justice. Rule 8.4(e) omits the ABA phrase "or to achieve results by means that violate the Rules of Professional Conduct or other law." D.C. adds Rule 8.4(g), which makes it misconduct to "[s]eek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter."

In addition, D.C. adds Rule 9.1, which provides that a lawyer "shall not discriminate against any individual in conditions of employment because of the individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap."

Florida expands Rule 8.4(d) to provide that a lawyer shall not:

(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.

Florida also adds Rule 8.4(g), which provides that a lawyer shall not "fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency . . . when bar counsel or the agency is conducting an investigation into the lawyer's conduct."

In addition, Florida adds Rule 8.4(h) that makes it professional misconduct for a lawyer to "willfully refuse, as determined by a court of competent jurisdiction, to timely pay a child support obligation." The Comment explains that subparagraph (h) was added to make the treatment of lawyers who fail to pay child support consistent with the treatment of other professionals in Florida who fail to pay child support. Those other professionals are governed by §61.13015 of the Florida Statutes, which provides for the suspension or denial of a professional license due to delinquent child support payments after all other available remedies for the collection of child support have been exhausted.

Florida also adds Rule 4-8.4(i), which relates to sexual conduct with a client and provides that a lawyer shall not engage in sexual conduct with a client “or a representative of a client.” See the Selected Variations following Rule 1.8 for more detail.

Finally, the Florida Supreme Court has promulgated Rule 3-4.7, which provides:

Violation of the oath taken by an attorney to support the constitutions of the United States and the State of Florida is ground for disciplinary action. Membership in, alliance with, or support of any organization, group, or party advocating or dedicated to the overthrow of the government by violence or by any means in violation of the Constitution of the United States or constitution of this state shall be a violation of the oath.

Georgia deletes ABA Model Rule 8.4(b) in favor of two subparagraphs making it a violation to be “convicted of a felony” or to be “convicted of a misdemeanor involving moral turpitude where the underlying conduct relates to the lawyer’s fitness to practice law.” Rule 8.4(a)(4) — Georgia’s equivalent to ABA Model Rule 8.4(c) — makes it improper to engage in “professional” conduct involving dishonesty, fraud, deceit or misrepresentation. Georgia adds a Rule 8.4(a)(5) that makes it improper for a lawyer to “fail to pay any final judgment or rule absolute rendered against such lawyer for money collected by him or her as a lawyer within ten (10) days after the time appointed in the order or judgment.” A Rule 8.4(d) provides that Rule 8.4(a)(1) “does not apply to Part Six of the Georgia Rules of Professional Conduct” (which covers pro bono work, court appointments,

legal service organizations, and law reform organizations). Georgia deletes ABA Model Rules 8.4(d), (e), and (f).

For Georgia attorneys seeking guidance on their ethical conduct, Georgia Supreme Court Rule 4-401 authorizes the Georgia State Bar’s Office of General Counsel to “render Informal Advisory Opinions concerning the Office of the General Counsel’s interpretation of the Rules of Professional Conduct or any of the grounds for disciplinary action as applied to a given state of facts.” However, the rule cautions that an Informal Advisory Opinion is merely “the personal opinion of the issuing attorney of the Office of the General Counsel and is neither a defense to any complaint nor binding on the State Disciplinary Board, the Supreme Court of Georgia, or the State Bar of Georgia.” Rule 4-403 describes the procedures by which the Supreme Court of Georgia issues Formal Advisory Opinions and describes the weight to be given to Formal Advisory Opinions in various circumstances.

Illinois: In the rules effective January 1, 2010, Illinois expands Rule 8.4(f) and adds paragraphs (g)-(k), some of which are taken directly from the old ABA Model Code of Professional Responsibility. They provide that it is professional misconduct for a lawyer to:

(f) . . . give or lend anything of value to a judge, official, or employee of a tribunal, except those gifts or loans that a judge or a member of the judge’s family may receive under Rule 65(C)(4) of the Illinois Code of Judicial Conduct. Permissible campaign contributions to a judge or candidate for judicial office may be made only by check, draft, or other instrument payable to or to

the order of an entity that the lawyer reasonably believes to be a political committee supporting such judge or candidate. Provision of volunteer services by a lawyer to a political committee shall not be deemed to violate this paragraph.

(g) present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter.

(h) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Illinois Attorney Registration and Disciplinary Commission.

(i) avoid in bad faith the repayment of an education loan guaranteed by the Illinois Student Assistance Commission or other governmental entity. The lawful discharge of an education loan in a bankruptcy proceeding shall not constitute bad faith under this paragraph, but the discharge shall not preclude a review of the lawyer's conduct to determine if it constitutes bad faith.

(j) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after

consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.

(k) if the lawyer holds public office:

(1) use that office to obtain, or attempt to obtain, a special advantage in a legislative matter for a client under circumstances where the lawyer knows or reasonably should know that such action is not in the public interest;

(2) use that office to influence, or attempt to influence, a tribunal to act in favor of a client; or

(3) represent any client, including a municipal corporation or other public body, in the promotion or defeat of legislative or other proposals pending before the public body of which such lawyer is a member or by which such lawyer is employed.

Iowa: Rule 8.4(g) forbids lawyers to “engage in sexual harassment or other unlawful discrimination in the practice of law or knowingly permit staff or agents subject to the lawyer’s direction and control to do so.”

Louisiana: Among other variations, Louisiana adds a Rule 8.4(g), which makes it professional misconduct for a lawyer to “[t]hreaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.”

Maryland: Rule 8.4(e) provides that a lawyer may not “manifest by words or conduct” various kinds of bias or prejudice when such action is prejudicial to the administration of justice.

Massachusetts: Rule 8.4(h) forbids a lawyer to “engage in any other conduct that adversely reflects on his or her fitness to practice law.” Comment 5 states that such conduct is subject to discipline even if it “does not constitute a criminal, dishonest, or fraudulent or other act specifically described in the other paragraphs of this rule.”

Michigan: Rule 6.5, entitled “Professional Conduct,” provides as follows:

(a) A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person’s race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment.

(b) A lawyer serving as an adjudicative officer shall, without regard to a person’s race, gender, or other protected personal characteristic, treat every person fairly, with courtesy and respect. To the extent possible, the lawyer shall require staff and others who are subject to the adjudicative officer’s direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the adjudicative tribunal.

In addition, the Michigan Court Rules include the following Rule 9.104:

(A) The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:

(1) conduct prejudicial to the proper administration of justice;

(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;

(3) conduct that is contrary to justice, ethics, honesty, or good morals;

(4) conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court;

(5) conduct that violates a criminal law of a state or of the United States;

(6) knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;

(7) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);

(8) contempt of the board or a hearing panel; or

(9) violation of an order of discipline.

(B) Proof of an adjudication of misconduct in a disciplinary proceeding by another state or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate.

Minnesota adds Rule 8.4(g)-(h), which prohibits various kinds of harassment and discrimination.

Missouri: Rule 8.4(g) forbids a lawyer to “manifest by words or conduct, in representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation.” However, the rule “does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, or other similar factors, are issues.”

New Jersey: Rule 8.4(g) makes it professional misconduct for a lawyer to “engage, in a professional capacity, in conduct involving discrimination (except

employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socio-economic status, or handicap, where the conduct is intended or likely to cause harm.” The Supreme Court’s comment states that the rule

would, for example, cover activities in the court house, such as a lawyer’s treatment of court support staff, as well as conduct more directly related to litigation; activities related to practice outside of the court house, whether or not related to litigation, such as treatment of other attorneys and their staff; bar association and similar activities; and activities in the lawyer’s office and firm. Except to the extent that they are closely related to the foregoing, purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule. Nor is employment discrimination in hiring, firing, promotion, or partnership status intended to be covered unless it has resulted in either an agency or judicial determination of discriminatory conduct.

New Mexico creates a Rule 3.0 (Rule 16-300), which specifies as follows:

In the course of any judicial or quasi-judicial proceeding before a tribunal, a lawyer shall refrain from intentionally manifesting, by words or conduct, bias or prejudice based on race, gender, religion, national origin, disability, age or sexual orientation against the judge, court personnel, parties, witnesses, counsel or others. This rule does not preclude legitimate advocacy when race, gender, religion,

national origin, disability, age or sexual orientation is material to the issues in the proceeding.

New York: In the rules effective April 1, 2009, New York adds Rule 8.4(g) and (h), which provides that a lawyer or law firm shall not:

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

North Carolina: Rule 8.4(e) omits the clause "or to achieve results by means that violate the Rules of Professional Conduct or other law," and a Rule 8.4(g) makes it professional misconduct for a lawyer to "intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule

3.3." North Carolina also adds a Rule 6.6, which prohibits lawyers who hold "public office" from abusing their public positions.

Ohio adds Rule 8.4(g)-(h), which makes it professional misconduct for a lawyer to:

(g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;

(h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Ohio also adds an unusual Comment 2A, which provides that Rule 8.4(c) "does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law."

Oregon: Rule 8.4(b) is the result of a decision of the Oregon Supreme Court, *In re Gatti*, 8 P.3d 966 (Or. 2000). It provides that, notwithstanding Rules 8.4(a)(1), (3), and (4) and Rule 3.3(a)(1), "it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights," provided the lawyer's conduct otherwise complies with the Rules of Professional Conduct. "Covert activity" is defined in Rule 8.4(b) to mean "an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge." The rule permits covert activity to "be commenced by a lawyer or

involve the lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.”

Rhode Island adds Rule 9.1, which establishes an ethics advisory panel to be appointed by the Supreme Court and provides that “[a]ny lawyer who acts in accordance with an opinion given by the panel shall be conclusively presumed to have abided by the Rules of Professional Conduct.”

Texas: Rule 5.08, entitled “Prohibited Discriminatory Activities,” provides as follows:

(a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.

(b) Paragraph (a) does not apply to a lawyer’s decision whether to represent a particular person in connection with an adjudicatory proceeding, nor to the process of jury selection, nor to communications protected as “confidential information” under these Rules. See Rule 1.05(a), (b). It also does not preclude advocacy in connection with an adjudicatory proceeding involving any of the factors set out in paragraph (a) if that advocacy:

(i) is necessary in order to address any substantive or procedural issues raised by the proceeding; and

(ii) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice and procedure.

Texas Rule 8.04(a)(9) forbids a lawyer to “engage in conduct that constitutes barratry as defined by the laws of this state.” Rule 8.04(a)(2) forbids a lawyer to “commit a serious crime or commit any other criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” Rule 8.04(b) defines “serious crime” to include “barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.”

Virginia: Rule 8.4(b) applies to a criminal “or deliberately wrongful act,” and Rule 8.4(c) applies to conduct involving dishonesty, fraud, deceit or misrepresentation “which reflects adversely on the lawyer’s fitness to practice law.” Virginia omits Rule 8.4(d) (which forbids “conduct that is prejudicial to the administration of justice”), and retains the pre-2002 version of ABA Model Rule 8.4(e), which made it professional misconduct for a lawyer to “state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official,” without any reference to “means that violate the Rules of Professional Conduct or other law.”

Wisconsin: Among other variations, Wisconsin omits paragraph (d) and adds several additional paragraphs, including one relating to harassment.

Rule 8.4 – Public Comment – File List

Y-2010-534f COPRAC [8.4]



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

August 9, 2010

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

RE: Proposed Rule 8.4

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 8.4 – Misconduct. COPRAC supports the adoption of proposed Rule 8.4 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in black ink that reads "Carole J. Buckner".

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC