



**THE STATE BAR  
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2116

**RE: Rule 4.1  
12/11&12/09 Commission Meeting  
Open Session Agenda Item IV.H.**

**PLANNING, AND DEVELOPMENT**

**DATE:** November 19, 2009  
**TO:** Members of the Commission for the Revision of the Rules of Professional Conduct  
**FROM:** Randall Difuntorum, Commission Staff Counsel  
**SUBJECT:** 10-day Ballot Circulation of Proposed Rule 4.1

Proposed Rule 4.1 is being distributed for your consideration. The revisions adopted at the Commission's November 6 & 7, 2009 meeting have been implemented and approval is being sought through a 10-day ballot procedure.

Approval means that the proposed new rule would be cleared for transmission to the Board of Governors with a request that the rule be distributed for public comment as part of the Commission's Batch 6 proposed rules.

In accordance with the guidance provided by the Board, the proposed rule is presented in a comparison chart that compares the Commission's proposed rule and comment to the counterpart ABA Model Rule. The chart includes a general introduction and provides specific explanations for any departures from the ABA Model Rule. The comparison chart is provided as Enclosure 1. A clean version of proposed Rule 4.1, Draft 2.1 (11/14/09), is provided as Enclosure 2. A draft dashboard is provided as Enclosure 3. An annotated redline version of the rule showing changes to the Draft 1 (10/28/09), the version considered at the November meeting is provided as Enclosure 4. (In this annotated version, please pay particular attention to the recommendation in the Footnote #4, concerning paragraph (b).)

Pursuant to the Commission's 10-day ballot procedure, if six or more members object to this proposed rule, then the proposed rule will be placed on the Commission's next agenda for further consideration. Objections should be in writing, explaining reasons for the objection, and sent to me with copies to Lauren McCurdy and Kevin Mohr. **If less than six objections are received by 5 p.m. on Monday, November 30, 2009, proposed Rule 4.1 will be deemed approved.**

Questions about this mail ballot may be directed to me at (415) 538-2161

Thank you.

Encs.

## **Enclosure 1**

### **Proposed Rule 4.1**

(Comparison Chart Showing Changes to Model Rule 4.1)

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 4.1\* Truthfulness in Statements to Others\*

November 2009

(Draft rule to be considered for public comment.)

### *INTRODUCTION:*

Proposed Rule 4.1 is based on and largely tracks Model Rule 4.1, with some additions to conform the Rule to current California law or to provide what the Commission has concluded is a necessary exception from the rule's application. Paragraph (a) states a lawyer's duty of honesty that is owed to third persons in the course of representing a client. Paragraph (b), which is based on Oregon Rule 8.4, provides an exception for lawful covert activity in investigating violations of civil or criminal law, or constitutional rights. The exception is necessary because the activity described in paragraph (b), which is often engaged in by both government and private lawyers seeking to enforce constitutional rights, as well as civil and criminal laws, would otherwise be a violation of paragraph (a)(1). The Comment to the Rule largely tracks the Model Rule comment, with some additions intended to clarify California law.

*Minority.* A minority of the Commission dissents. The minority believes that, while the sentiment behind this Rule is unexceptional, the effort to capture concept has proven to be highly complex. The Commission debated at length fine distinctions, such as what constitutes "incorporation of a client's untrue statement or what is required to establish the lawyer's "knowledge" of that statement's untruth, and adopted that language by the closest vote. None of those distinctions are in the proposed Rule. Thus, the meanings of those terms are hidden in the proposed Rule are not clear. The minority takes the position that such subtleties do not lend themselves to disciplinary rules. Gross misconduct in respect of this subject, as in all other cases, is already subject to discipline under Business & Professions Code §§ 6068(d) and 6106. The minority suggests that there should be no new disciplinary rule on this subject because the concept of a lawyer's duty not to adopt or vouch for a client's or witness's falsehood is as old as the legal profession itself. The minority believes that the concept has thrived during all this time without the need for a disciplinary rule in an area where the boundaries between permissible and

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\* Proposed Rule 4.1, Draft 2.1 (11/14/09).

impermissible conduct are often especially difficult to determine.

*Variations in Other Jurisdictions.* Nearly every jurisdiction has adopted some version of Model Rule 4.1 (North Carolina is an exception). Some states require disclosure even if the information is otherwise protected under Rule 1.6 (e.g., Maryland, Massachusetts, Mississippi, New Jersey, Ohio, Virginia). Some jurisdictions omit Model Rule 4.1(b) (e.g., Michigan). Wisconsin adds paragraph (c), which states “a lawyer may advise or supervise others with respect to lawful investigative activities.”

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 4.1 Truthfulness in Statements to Others</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 4.1 Truthfulness in Statements to Others</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>In the course of representing a client a lawyer shall not knowingly:</p>	<p><a href="#">(a)</a> In the course of representing a client a lawyer shall not knowingly:</p>	<p>With the addition of proposed paragraph (b), below, which has no counterpart in Model Rule 4.1, the Commission recommends lettering the introductory clause of the Rule as paragraph (a), and re-lettering Model Rule 4.1(a) and (b) as subparagraphs (a)(1) and (2), respectively.</p>
<p>(a) make a false statement of material fact or law to a third person; or</p>	<p><a href="#">(a1)</a> make a false statement of material fact or law to a third person; or</p>	<p>The Commission recommends adoption of this paragraph.</p>
<p>(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.</p>	<p><a href="#">(b2)</a> fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 <a href="#">or Business and Professions Code section 6068(e)(1)</a>.</p>	<p>The Commission recommends adoption of this paragraph with the additional reference to section 6068(e).</p>
	<p><a href="#">(b)</a> <a href="#">This Rule 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. "Covert activity," as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge.</a></p>	<p>Proposed paragraph (b) has no counterpart in Model Rule 4.1. It is derived from Oregon Rule 8.4(b), which by its terms excludes from the entire set of Rules the conduct described.</p> <p>The Commission recommends adding this paragraph to proposed Rule 4.1 because the activity described in paragraph (b), which is often engaged in by both government and private lawyers seeking to enforce Constitutional rights, as well as civil and criminal laws, would be a violation of paragraph (a)(1). The exception is narrow,</p>

\* Proposed Rule 4.1, Draft 2.1 (11/14/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 4.1 Truthfulness in Statements to Others</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 4.1 Truthfulness in Statements to Others</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#"><u>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.</u></a></p>	<p>applying only to proposed Rule 4.1. However, the Commission intends to revisit this issue when it reconsiders proposed Rule 8.4 ("Misconduct") to determine whether this exception should be placed in that rule for broader application to the entire body of the Rules.</p>

<p align="center"><b><u>ABA Model Rule</u></b></p> <p align="center"><b>Rule 4.1 Truthfulness in Statements to Others</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule*</u></b></p> <p align="center"><b>Rule 4.1 Truthfulness in Statements to Others</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p><b>Misrepresentation</b></p> <p>[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.</p>	<p><b>Misrepresentation</b></p> <p>[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms <u>the truth of</u> a statement of another person that the lawyer knows is false. <del>Misrepresentations can also occur</del> <u>However, in drafting an agreement on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement. A nondisclosure can be the equivalent of a misrepresentation where a lawyer makes a</u> partially true but misleading <del>statements</del><u>material statement</u> or <del>omissions</del><u>material omission</u> that <del>are</del><u>is</u> the equivalent of <u>an</u> affirmative false <del>statements</del><u>statement</u>. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.</p>	<p>Comment [1] is based on Model Rule 4.1, cmt. [1]. The added third sentence of proposed Comment [1] clarifies that in drafting an agreement, a lawyer does not vouch for the truthfulness of representations made by the client.</p> <p>The third sentence of Model Rule 4.1, cmt. [1] (fourth sentence of the proposed Comment) is modified to reflect the view in California that partially true statements are viewed as nondisclosures or concealment, not misrepresentations. (See <i>Vega v. Jones, Day, Reavis &amp; Pogue</i> (2004) 121 Cal.App.4th 282, 293, 294 ["[A]ctive concealment may exist where a party 'while under no duty to speak, nevertheless does so, but does not speak honestly or makes misleading statements or suppresses facts which materially qualify those stated. . . . One who is asked for or volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud . . . ." ] [citation omitted].)</p>
<p><b>Statements of Fact</b></p> <p>[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under</p>	<p><b>Statements of Fact</b></p> <p>[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under</p>	<p>Comment [2] is based on Model Rule 4.1, cmt. [2]. The Commission does not recommend adoption of the last sentence of this comment because it does not add materially to an</p>

\* Proposed Rule 4.1, Draft 2.1 (11/14/09). Redline/strikeout showing changes to the ABA Model Rule.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 4.1 Truthfulness in Statements to Others</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 4.1 Truthfulness in Statements to Others</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.</p>	<p>generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. <del>Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.</del></p>	<p>understanding of the Rule and is essentially a practice pointer.</p>
<p><b>Crime or Fraud by Client</b></p> <p>[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under</p>	<p><b>Crime or Fraud by Client</b></p> <p>[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b)(2) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. <a href="#">See Rule 1.4(a)(6) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct.</a> Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation <a href="#">in compliance with Rule 1.16</a>. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed</p>	<p>Comment [3] is based on Model Rule 4.1, cmt. [3], with several changes intended to provide better guidance to lawyers. A reference to Rule 1.4(a)(6) is added to remind lawyers of their obligation under that Rule to advise clients of the limitations on their conduct. The reference to Rule 1.16 on withdrawal is added to direct lawyers to the rule governing their obligations to the client when withdrawing from representation. Finally, as in subparagraph (a)(2), the Comment includes a reference to section 6068(e).</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 4.1 Truthfulness in Statements to Others</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 4.1 Truthfulness in Statements to Others</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.</p>	<p>to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph <del>(b)</del><a href="#">(2)</a> the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6 <a href="#">or Business and Professions Code section 6068(e)</a>.</p>	
	<p><a href="#">[4] Paragraph (a)(2) requires that the lawyer have actual knowledge of the client's criminal or fraudulent act.</a></p>	<p>Comment [4] has no counterpart in the Model Rule. It clarifies the scienter requirement of subparagraph (a)(2) by explaining that the lawyer must have actual knowledge of the client's fraudulent or criminal act, and not merely knowledge of the material fact that is not disclosed to the third person. This is consistent with tort and criminal law that "liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted." (<i>Casey v. United States Bank Nat. Assn.</i> (2005)127 Cal.App.4th 1138, 1145.); <i>see also, People v. Rogers</i> (1985) 172 Cal.App.3d 502, 515 and 515, fn. 17 [culpability for aiding an offense requires knowledge of the perpetrator's unlawful purpose.]</p>

## **Enclosure 2**

### **Proposed Rule 4.1**

Clean Version of Draft 2.1 (11/14/09)

## Rule 4.1 Truthfulness in Statements to Others

- (a) In the course of representing a client a lawyer shall not knowingly:
- (1) make a false statement of material fact or law to a third person; or
  - (2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 or Business and Professions Code section 6068(e)(1).
- (b) This Rule 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. "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.

### Comment

#### Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person that the lawyer knows is false. However, in drafting an agreement on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement. A nondisclosure can be the equivalent of a misrepresentation where a lawyer makes a partially true but misleading material statement or material omission that is the equivalent of an affirmative false statement. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

#### Statements of Fact

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

### **Crime or Fraud by Client**

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (a)(2) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. See Rule 1.4(a)(6) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation in compliance with Rule 1.16. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (a)(2) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6 or Business and Professions Code section 6068(e).

[4] Paragraph (a)(2) requires that the lawyer know that the client's conduct is criminal or fraudulent.

**Enclosure 3**

**Proposed Rule 4.1**  
Draft “Dashboard”

# Proposed Rule 4.1 [N/A]

## “Truthfulness in Statements to Others”

(Draft # 2.1, 11/14/09)

**Summary:** Proposed Rule 4.1, which largely tracks Model Rule 4.1, addresses a lawyer’s duty of honesty owed to third persons in the course of representing a client. New paragraph (b), which is based on Oregon Rule 8.4(b), provides an exception for lawful covert activity in investigating violations of civil or criminal law, or constitutional rights.

### 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 type="checkbox"/> Some material deletions from ABA Model Rule	<input 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

Statute

Bus. & Prof. Code § 6068(e).

Case law

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

Oregon Rule 8.4(b).

- Other Primary Factor(s)

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## Stakeholders and Level of Controversy

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Minority position included on Model Rule comparison chart:  Yes  No

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

A minority of the Commission believes that the Rule addresses nuanced concepts that are better left to the civil and criminal law, and should not be the focus of a disciplinary rule. There also are concerns that the Rule will expand a lawyer's civil liability.

Not Controversial

## **Enclosure 4**

### **Proposed Rule 4.1 – Annotated Redline Version**

(showing changes to DFT1 (10/28/09), the draft considered at the November 2009 meeting)

RRC – Rule 4.1 [MR 4.1]  
Rule – Draft 2.1 (11/14/09) – COMPARED TO DFT1 (10/28/09)  
10-DAY BALLOT (Post – 11/6-7/09 Meeting

**Rule 4.1 Truthfulness in Statements to Others<sup>1</sup>**

(a)<sup>2</sup> In the course of representing a client a lawyer shall not knowingly:

- (a1) make a false statement of material fact or law to a third person; or
- (b2)<sup>3</sup> fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 or Business and Professions Code section 6068(e)(1).

(b)<sup>4</sup> This Rule 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. "Covert activity," as used in this Rule, means an effort to obtain information on unlawful activity through the use of

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<sup>1</sup> RRC Action: At the 11/6-7/09 meeting, the RRC voted 8-2-0 to recommend adoption of proposed Rule 4.1, as revised during the meeting. See 11/6-7/09 KEM Meeting Notes, III.C., at ¶. 9.

<sup>2</sup> Consultant's Note: In light of the recommended adoption of paragraph (b), below, which does not follow the introductory clause to draft 1 of this Rule, I have re-lettered the introductory clause (a) and renumbered paragraphs (a) and (b) as subparagraphs (1) and (2), respectively.

<sup>3</sup> RRC Action: At the 11/6-7/09 meeting, the RRC voted 7-2-0 to recommend adoption of subparagraph (a)(1) [then paragraph (b)] as drafted. See 11/6-7/09 KEM Meeting Notes, III.C., at ¶. 1A.

<sup>4</sup> RRC Action: At the 11/6-7/09 meeting, the RRC voted 6-3-0 to recommend adoption of paragraph (b), which is based on Oregon Rule 8.4(b). See 11/6-7/09 KEM Meeting Notes, III.C., at ¶. 2A.

The Chair noted the Commission might want to revisit this provision before final public comment to determine whether the provision is better placed in Rule 8.4, as is done in Oregon. Id. at ¶.2A.c.

Consultant's Note/Recommendation: I have inserted Oregon Rule 8.4(b) nearly verbatim, changing only the introductory clause ("Notwithstanding paragraphs (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 ..."). That means that proposed 4.1(b) is narrower than the Oregon Rule, i.e., our proposed rule states "This Rule does not apply where ..." Given the Chair's direction in the previous paragraph, narrowing the application of proposed 4.1(b) to rule 4.1 seemed to better track the Commission's vote, which was intended only to apply to Rule 4.1. To keep the same language as in the Oregon Rule ("it shall not be professional misconduct") would give proposed Rule 4.1(b) the same effect as placing the concept of 4.1(b) in Rule 8.4 ("Misconduct") – a result that the Commission did not intend by its vote.

For your reference, here are the proposed changes to Oregon Rule 8.4(b):

(b) ~~Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for~~ This Rule does not apply where a lawyer ~~to~~ advises clients or others about, ~~or to~~ 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 ~~of Professional Conduct~~. "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"~~ "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.

**RRC – Rule 4.1 [MR 4.1]**  
**Rule – Draft 2.1 (11/14/09) – COMPARED TO DFT1 (10/28/09)**  
**10-DAY BALLOT (Post – 11/6-7/09 Meeting**

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.

## Comment

### Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or<sup>5</sup> affirms the truth of a statement of another person that the lawyer knows is false. However, in drafting an agreement on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement. A nondisclosure can be the equivalent of a misrepresentation where a lawyer makes a partially true but misleading material statement or material omission that is the equivalent of an affirmative false statement.<sup>6</sup> For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

### Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.<sup>7</sup> Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.<sup>8</sup>

### Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph ~~(b)~~(a)(2) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation

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<sup>5</sup> RRC Action: At the 11/6-7/09 meeting, the RRC voted 5-3-1 to restore the Model Rule phrase, "incorporates or," to Comment [2]. See 11/6-7/09 KEM Meeting Notes, III.C., at ¶. 3A.

<sup>6</sup> RRC Action: At the 11/6-7/09 Meeting, Comment [1] as revised was deemed approved. See 11/6-7/09 KEM Meeting Notes, III.C., at ¶. 3B.

<sup>7</sup> RRC Action: the RRC defeated by a 1-6-2 vote a motion to delete the third sentence of Comment [2]. See 11/6-7/09 KEM Meeting Notes, III.C., at ¶. 4A.

<sup>8</sup> No objections to the drafters' recommendation that the last sentence of Comment [2] be deleted, it was deemed approved.

**RRC – Rule 4.1 [MR 4.1]**  
**Rule – Draft 2.1 (11/14/09) – COMPARED TO DFT1 (10/28/09)**  
**10-DAY BALLOT (Post – 11/6-7/09 Meeting**

where a client's crime or fraud takes the form of a lie or misrepresentation. [See Rule 1.4\(a\)\(6\) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct.](#)<sup>9</sup> Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation [in compliance with Rule 1.16.](#)<sup>10</sup> Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph ~~(b)~~[\(a\)\(2\)](#) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6 or Business and Professions Code section 6068(e).<sup>11</sup>

[4] Paragraph ~~(b)~~[\(a\)\(2\)](#) requires that the lawyer ~~have actual knowledge of~~[know that](#) the client's [conduct is](#) criminal or fraudulent ~~act.~~<sup>12</sup>

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<sup>9</sup> **RRC Action:** [At the 11/6-7/09 meeting, addition of the sentence \("See Rule 1.4\(a\)\(6\) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct."\) was deemed approved. See 11/6-7/09 KEM Meeting Notes, Ill.C., at ¶. 6.c.](#)

<sup>10</sup> **RRC Action:** [At the 11/6-7/09 meeting, addition of the phrase \("in compliance with Rule 1.16"\) was deemed approved. See 11/6-7/09 KEM Meeting Notes, Ill.C., at ¶. 6.c.](#)

<sup>11</sup> **RRC Action:** [At the 11/6-7/09 meeting, the RRC defeated by a 5-5-0 vote a motion to revise Comment \[3\] as follows:](#)

[Insert the following sentence after the fourth sentence \("Ordinarily ... Rule 1.16."\):](#)

[However, when doing so, the lawyer must not reveal information relating to the representation of the client that is protected by Business and Professions Code section 6068\(e\)\(1\).](#)

[Insert the following sentence after the fifth sentence \("Sometimes ... withdrawal."\):](#)

[Unless disclosure is prohibited under Rule 1.6 or Business and Professions Code section 6068\(e\), in some cases,](#)

[See 11/6-7/09 KEM Meeting Notes, Ill.C., at ¶. 7A.](#)

<sup>12</sup> **RRC Action:** [At the 11/6-7/09 meeting, revision of Comment \[4\] was deemed approved. See 11/6-7/09 KEM Meeting Notes, Ill.C., at ¶. 8.b.](#)



## Rule 4.1: Truthfulness in Statements to Others

### STATE VARIATIONS

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

**California:** Business & Professions Code §6128(a) provides that an attorney commits a misdemeanor if the attorney is “guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.”

**District of Columbia:** Rule 4.1 is identical to ABA Model Rule 4.1.

**Illinois:** Rule 4.1(a) prohibits a lawyer from making a statement of material fact or law to a third person which the lawyer knows “or reasonably should know” is false.

**Kansas:** The disclosure obligation under Rule 4.1(b) applies unless disclosure is prohibited by “or made discretionary under” Rule 1.6.

**Maryland** adds a separate paragraph (b) providing: “The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.”

**Massachusetts:** Comment 3 to Massachusetts Rule 4.1 defines “assisting” to refer “to that level of assistance which would render a third party liable for another’s crime or fraud, i.e., assistance sufficient to render one liable as an aider or abettor under criminal law or as a joint tortfeasor under principles of tort and agency law.

**Michigan:** Rule 4.1 says only: “In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.”

**Mississippi:** Rule 4.1(b) omits the phrase “unless disclosure is prohibited by Rule 1.6.”

**New Jersey** adds a separate paragraph (b) stating: “The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.”

**New York:** DR 4-101(C)(5) permits a lawyer to reveal confidences and secrets to the extent “implicit” in withdrawing an opinion that the lawyer discovers “was based on materially inaccurate information or is being used to further a crime or fraud.” DR 7-102(A)(5) provides that a lawyer representing a client shall not knowingly “make a false statement of fact or law.” DR 7-102(B) provides that a lawyer who receives information “clearly establishing” that a client has, in the course of the representation, “perpetrated a fraud upon a person... shall reveal the fraud to the affected person... except when the information is protected as a confidence or secret.”

**North Carolina** omits Rule 4.1(b).

**North Dakota:** Rule 4.1 provides only that “[i]n the course of representing a client a lawyer shall not make a statement to a third person of fact or law that the lawyer knows to be false.”

**Ohio:** Rule 4.1(b) prohibits lawyers from assisting “illegal” and fraudulent acts of clients, (rather than “criminal” and fraudulent acts), and omits the phrase “unless disclosure is prohibited by Rule 1.6.”

**Pennsylvania:** Rule 4.1(b) replaces the ABA word “assisting” with the phrase “aiding and abetting.”

**Texas:** Rule 4.01(b) provides that a lawyer shall not fail to disclose a material fact to a third person when disclosure is necessary to “avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.”

**Virginia:** In both subparagraphs of Rule 4.1, Virginia deletes the words “material” and “to a third person.” At the end of Rule 4.1(b), Virginia deletes the phrase unless disclosure is prohibited by Rule 1.6.”

**Wisconsin:** Rule 4.1(c) states that notwithstanding Wisconsin Rules 5.3(c)(1) and 8.4, which address supervision of nonlegal personnel and the duty not to violate a rule through another respectively, “a lawyer may advise or supervise others with respect to lawful investigative activities.”