# PROPOSED NEW RULE 1-120X

At its October 24-25, 2003 meeting, the Commission tentatively approved proposed amended rule 1-120X with the proposed rule Discussion Section subject to a 10-day mail ballot. The proposed rule Discussion Section subsequently was approved by a 10-day mail ballot. This proposal has not been considered or approved by the Board of Governors of the State Bar of California. Tentative approval means that the proposed new rule will not be the subject of further amendments until such time as the Chair places the rule on the Commission's agenda for consideration of transmission to the Board of Governors Committee on Regulation, Admissions and Discipline with a request that the Board Committee authorize a public comment distribution of the proposed new rule. (Note: The issue of a rule numbering system is a topic that the Commission will consider at a future meeting. This proposed rule is numbered "1-120X" because the concept of the proposal arose during discussions of current rule 1-120.)

This document provides the following resources: (1) the text of proposed new rule 1-120X; (2) explanatory notes; (3) a redline/strikeout version of the rule comparing it to ABA Model Rule 8.4; (4) concepts considered but not recommended; and (5) an excerpt from the Commission's October 24-25, 2003 meeting summary.

## Proposed New Rule 1-120X Clean Version

(As amended following the Commission's Oct. 24-25, 2003 meeting.)

**Rule 1-120X. Misconduct**

It is professional misconduct for a member 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 misrepresentation;

(D) Engage in conduct in connection with the practice of law 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.

Discussion

[1] Members are subject to discipline when they violate these rules, 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 member's behalf.

[2] As to testing the validity of any law, rule, or ruling of a tribunal, see rule 3-210. The provisions of rule 3-210 concerning a good faith challenge to the validity, scope, meaning or application of a law, rule or ruling of a tribunal apply to challenges of legal regulation of the practice of law.

[3] This rule is also intended to apply to the acts of entities. (See, e.g., Bus. & Prof. Code, sections 6160 - 6172 (Law Corporations); Bus. & Prof. Code, section 6155 (Lawyer Referral Services).)

[4] 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. 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. To the extent that criminal acts involving "moral turpitude" might be construed to include offenses concerning some matters of personal morality such as adultery and comparable offenses, such acts have no specific connection to fitness for the practice of law.

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

[6] Regarding paragraph (B) of this rule, a member 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., *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.])

[7] Regarding paragraph (B) of this rule, members may also be disciplined for acts of moral turpitude which 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].)

[8] A member 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.

[9] Members holding public office assume legal responsibilities going beyond those of other citizens. A member'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.

## Explanatory Notes

*Title:*

The rule title chosen for this new rule reflects the fact that the format and content of the rule has drawn upon Model Rule 8.4 (entitled "Misconduct") of the American Bar Association's Model Rules of Professional Conduct. The decision to explore the concept of this proposed new rule arose as an extension of the Rules Revision Commission's consideration of proposed amendments to rule 1-120 and responds to a written comment from the State Bar's Office of Chief Trial Counsel requesting consideration of a California analog to Model Rule 8.4.

*Text:*

1. The phrase "It is professional misconduct for a member to. . . " is patterned on the language used in Model Rule 8.4. As the word "member" is a defined term under the Rules of Professional Conduct, that term is used in the place of the word "lawyer" which is used in Model Rule 8.4.

2. Paragraph (A) adapts the concept and language of rule 1-120 to the format of proposed new rule 1-120X. Model Rule 8.4(a) includes an analogous prohibition against assisting or inducing rule violations. As a separate matter, the Rules Revision Commission is considering proposed amendments to rule 1-120 as an independent rule because it has not finally determined whether to recommend adoption of a proposed new rule 1-120X. Should the Rules Revision Commission finally determine to recommend adoption of a proposed new rule 1-120X, then the redundant concepts in proposed amended rule 1-120 would be deleted. For now, the intent is to have the substance of proposed new rule 1-120X(A) parallel the substance of current rule 1-120 and any relevant proposed amendments to that rule as tentatively approved by the Rules Revision Commission as of October 25, 2003.

3. Paragraph (B) contains two concepts: (1) the common law and statutory misconduct standard of "moral turpitude" (see Bus. & Prof. Code sec. 6106); and (2) the concept found in Model Rule 8.4(b).

4. Paragraph (C) is identical to the language used in Model Rule 8.4(c).

5. Paragraph (D) is similar to the language used in Model Rule 8.4(d). Unlike Model Rule 8.4(d), the language used in proposed new rule 1-120X(D) explicitly states that the prohibition is limited to attorney conduct occurring "in connection with the practice of law."

6. Paragraph (E) is similar to the language used in Model Rule 8.4(e). It differs only in that the phrase "these rules" replaces the phase "the Rules of Professional Conduct" that appears in Model Rule 8.4(e).

7. Paragraph (F) is identical to the language used in Model Rule 8.4(f).

*Discussion:*

1. Paragraph [1] of the proposed Discussion is intended to clarify the prohibition in paragraph (A) by indicating that paragraph (A) of the rule is violated, for example, when a person acting on behalf of an attorney engages in a violation of the Rules of Professional Conduct.

2. Paragraph [2] of the proposed Discussion provides a cross reference to rule 3-210 concerning an attorney's authority to test the validity of any law, rule, or ruling. As the application of paragraph (A) of proposed new rule 1-120X requires an attorney to make determinations as to whether the Rules of Professional Conduct or the State Bar Act might be violated, this cross reference is intended to alert attorneys to the fact that good faith challenges to the validity, scope, meaning or application of such a law, rule or ruling is permissible under rule 3-210.

3. Paragraph [3] of the proposed Discussion is intended to clarify the prohibition in paragraph (A) by explaining that paragraph (A) may be violated in circumstances where an attorney knowingly assists, solicits or induces a violation of the Rules of Professional Conduct or the State Bar Act committed by an entity that is under the regulatory authority of the State Bar. For example, paragraph (A) prohibits an attorney from assisting or inducing a law corporation to violate a State Bar Act requirement that the law corporation annually renew its State Bar certificate of registration (Bus. & Prof. Code sec. 6161.1).

4. Paragraph [4] of the proposed Discussion is similar to Comment [2] to Model Rule 8.4. It is intended to clarify that an illegal act perpetrated by an attorney may not necessarily reflect adversely on that attorney's fitness to practice law. For example, a misdemeanor perpetrated by an attorney must be scrutinized to determine if, in addition to relevant criminal penalties, an attorney should also be subject to professional discipline because the attorney's criminal conduct reflects adversely on the attorney's fitness to practice law.

5. Paragraph [5] of the proposed Discussion clarifies the fact that, as an alternative to discipline for a violation of proposed new rule 1-120X, an attorney may be disciplined in accordance with the provisions 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. The Rules Revision Commission has included this statutory

cross-reference to apprise members of sources of discipline besides those in the rules of professional conduct.

6. Paragraph [6] of the proposed Discussion alerts members to the fact that the conduct addressed by paragraph (B) of proposed new rule 1-120X may fall under Article 6 of the State Bar Act, (Bus. & Prof. Code, sections 6101 et seq.). Paragraph [6] of the proposed Discussion also provides case law examples of criminal acts that constitute "other misconduct warranting discipline" as defined by the California Supreme Court. The Rules Revision Commission has included these references simply to provide guidance to members on the kinds of conduct for which members have been disciplined.

7. Paragraph [7] of the proposed Discussion clarifies paragraph (B) of proposed new rule 1-120X by stating that members may also be disciplined for acts of moral turpitude which constitute gross negligence and by providing case law examples demonstrating that it is not necessary that such acts constitute a crime. The Rules Revision Commission has included these references to provide guidance to members on the kinds of conduct for which members have been disciplined.

8. Paragraph [8] of the proposed Discussion is substantially similar to Comment [3] to Model Rule 8.4. It is intended to clarify paragraph (D) of proposed new rule 1-120X by identifying some categories of bias or prejudice that may be regarded as prejudicial to the administration of justice. It also clarifies that legitimate advocacy does not violate paragraph (D) and that a finding that a member's peremptory challenges were exercised on a discriminatory basis would not, standing alone, establish a basis for a violation of paragraph (D).

9. Paragraph [9] of the proposed Discussion is substantially similar to Comment [5] to Model Rule 8.4. It states an important observation that members who hold public office or who occupy positions of private trust may be particularly susceptible to having their misconduct found to be a violation of proposed new rule 1-120X.

*Redline/Strikeout Comparison of Proposed New Rule 1-120X to ABA Model Rule 8.4:*

**Rule ~~8~~1-120X.~~4:~~ Misconduct**

It is professional misconduct for a member to: ~~lawyer to:~~

~~(a) violate or attempt to violate the Rules of Professional Conduct, knowingly~~

(A) Knowingly assist in, solicit, or induce ~~another to do so,~~any violation of these rules or ~~do so through~~ the ~~acts of another~~State Bar Act;

(~~b~~B) ~~c~~Commit a criminal act that involves moral turpitude or that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer ~~in other respects~~;

(~~c~~C) ~~e~~Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(~~d~~D) ~~e~~Engage in conduct in connection with the practice of law that is prejudicial to the administration of justice;

(~~e~~E) ~~s~~State or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the ~~R~~se rules ~~of Professional Conduct~~ or other law; or

(~~f~~F) ~~k~~Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

~~Comment~~Discussion

[1] ~~Lawyers~~Members are subject to discipline when they violate ~~or attempt to violate~~ the ~~R~~se 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~~ member's behalf. ~~Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.~~

[2] As to testing the validity of any law, rule, or ruling of a tribunal, see rule 3-210. The provisions of rule 3-210 concerning a good faith challenge to the validity, scope, meaning or application of a law, rule or ruling of a tribunal apply to challenges of legal regulation of the practice of law.

[3] This rule is also intended to apply to the acts of entities. (See, e.g., Bus. & Prof. Code, sections 6160 - 6172 (Law Corporations); Bus. & Prof. Code, section 6155 (Lawyer Referral Services).)

[~~2~~4] 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 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.~~ To the extent that criminal acts involving "moral turpitude" might be construed to include offenses concerning some matters of personal

morality such as adultery and comparable offenses, such acts have no specific connection to fitness for the practice of law.

~~[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.~~

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

[6] Regarding paragraph (B) of this rule, a member 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., *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.])

[7] Regarding paragraph (B) of this rule, members may also be disciplined for acts of moral turpitude which 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].)

[~~3~~8] A ~~lawyer~~member 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~~ D) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (~~d~~ D). A trial judge's finding that peremptory challenges

were exercised on a discriminatory basis does not alone establish a violation of this rule.

[~~5~~9] ~~Lawyers~~ Members holding public office assume legal responsibilities going beyond those of other citizens. A ~~lawyer's~~member'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.

*Concepts Considered but Rejected or Postponed for Future Consideration:*

In early discussions about the concept of this proposed new rule, the Commission considered whether the rule should attempt to include a comprehensive collection of various disciplinary provisions found outside of the Rules of Professional Conduct (i.e., Bus. & Prof. Code sec. 6106.7). Ultimately, the Commission determined to pursue a rule that tracked the substantive breadth of Model Rule 8.4.

## Excerpt from the Commission's October 24-25, 2003 Meeting Summary

* * * * *

**D. Consideration of Rule 1-120X. New Rule Proposal Arising from Discussion of Rule 1-120 re Incorporating Case Law and B&P Code Provisions**

The Commission considered an October 9, 2003 memorandum presented by Mr. Vapnek and Ms. Peck. The memorandum provided a redraft of proposed new rule 1-120X in a format similar to ABA MR 8.4. Mr. Vapnek noted that, per the Commission's directions, the redraft omitted the "other misconduct warranting discipline" standard. Comments on the revised draft were requested, specifically on the issue of including the concept of moral turpitude. Among the points raised during the discussion were the following:

(1) Moral turpitude should be covered by the proposed new rule because it is different from the "other misconduct warranting discipline" standard. Unlike the "other misconduct warranting discipline" standard, moral turpitude is codified in the State Bar Act in various provisions.

(2) The concept of moral turpitude can be found outside of the legal profession. For example, it is a concept used as a basis for terminating the employment of professional educators.

(3) If moral turpitude is used in the bar admissions process as one tool to evaluate "good moral character," then consideration could be given to borrowing some of the interpretative guidelines that may exist in that setting.

(4) The concept of moral turpitude has persisted in California due to the absence of a MR 8.4. States that have a version of MR 8.4 simply don't need the concept. If the Commission recommends including moral turpitude in California's first version of MR 8.4, then it would be perpetuating a standard that most other jurisdictions have abandoned as obsolete and unnecessary given the existence of a suitable rule. Notwithstanding this

point, for California, it is difficult to ignore moral turpitude in the rules because the concept is part of the State Bar Act statutory scheme and has its own special procedures.

(5) The true benefit of the draft rule is guidance. At the same time, a main draw back is the potential for the stacking of disciplinary charges.

(6) Definitive research is needed to determine whether the State Bar Act provisions concerning conviction referrals (B&P §§6101 et seq.) are triggered by any felony or only by felonies involving moral turpitude.

(7) In practice, under the conviction referral statutes, any felony gives rise to interim suspension but the ultimate penalty of disbarment follows a finding of moral turpitude.

(8) For now, the Commission may have done all it can do with the draft rule. Public comment is needed to go any further. It would be consistent with the Commission's charge to at least go out for public comment with this draft. It also would be responsive to the State Bar Trial Counsel written comment recommending a California version of MR 8.4.

Following discussion, the Commission considered a motion to cease consideration of a proposed new rule 1-120X. The motion was defeated by a vote of 3 yes, 7 no, and 1 abstain. The Commission considered but did not approve a motion to recast the proposed new rule as a description of situations in which discipline has been imposed (2 yes, 5 no, with 4 abstentions).

The Commission then proceeded to tentatively approve the rule text of proposed new rule 1-120X by considering the following motions. The Commission approved the inclusion of tentatively approved proposed amended rule 1-120(A) as the text of paragraph (A) of proposed new rule 1-120X by a vote of 9 yes, 1 no, and 1 abstention. The Commission approved Alternative #1 of paragraph (B) with the deletion of "in other respects" by a vote of 7 yes, 2 no, and 2 abstentions. The Commission approved paragraph (C) by a vote of 6 yes, 5 no, and 1 abstention. The Commission approved paragraph (D), as modified to add the phrase "in connection with the practice of law" by a vote of 6 yes, 4 no, 1 abstention. The Commission approved paragraph (E) by a vote of 6 yes, 5 no, and 1 abstention. The Commission approved paragraph (F) by a vote of 6 yes, 3 no, and 2 abstention. Subject to further research, the Commission approved the addition of "moral turpitude" to paragraph (B) (see Alternative #3), by a vote of 6 yes, 4 no, and 1 abstention.

Consistent with the foregoing, the text of proposed new rule 1-120X, as tentatively approved, is the following:

> **Rule 1-120X. Misconduct**
>
> It is professional misconduct for a member 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 misrepresentation;
>
> (D) Engage in conduct in connection with the practice of law 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.

After tentatively approving the rule text, the Commission considered the draft Discussion section. Following discussion, the Commission authorized the codrafters to revise the Discussion section for purposes of a 10-day mail ballot approval. The Chair directed that the 10-day mail ballot should be initiated before the Commission's next meeting on December 12, 2003 or the matter should be placed on the agenda for action.

++++++++++++++++

General information about the Commission, including: its charter; meeting schedule; and a member-staff roster is available at the State Bar of California website. Go to: www.calbar.ca.gov/ethics and access the link to the "Commission for the Revision of the Rules of Professional Conduct."