

From: [Kevin Mohr](#)
To: [McCurdy, Lauren](#); [Difuntorum, Randall](#)
Cc: [Raul L. Martinez](#); [Mark Tuft](#); [Harry Sondheim](#); [Kevin Mohr G](#)
Subject: Re: RRC - 4.1 - III.G. - Agenda Materials
Date: Thursday, March 18, 2010 12:10:30 PM
Attachments: [RRC - \[4-1\] - Public Comment Chart - By Commenter - DFT2.1 \(03-18-10\)RM-MLT-KEM.doc](#)

Darn. I just hate it when I do that. See attached.

Kevin Mohr wrote:

Greetings Lauren:

I've attached the following:

Public Comment Chart, Draft 2.1 (3/18/10).

Mark and Raul did not feel that they will be able to resolve their differences over this Rule so they have identified their respective position in the response column of the attached chart.

Please note that I've added to comments that came in late and to which neither Mark nor Raul have had an opportunity to respond - OCTC and David Ivester. I have shaded those orphan comments in forlorn gray in the attached chart. Perhaps they will have a chance to draft a response to each before next week's meeting.

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

Kevin

--
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McCurdy, Lauren

From: Raul Martinez [MARTINEZ@lbbslaw.com]
Sent: Thursday, March 18, 2010 1:52 PM
To: McCurdy, Lauren; Difuntorum, Randall; Kevin Mohr
Cc: Mark Tuft; Kevin Mohr G; Harry Sondheim
Subject: Re: RRC - 4.1 - III.G. - Agenda Materials
Attachments: RRC - MR 4-1 -REDLINE-Landscape - DFT2.1 (11-14-09)-ML.doc

And here is the rule with the modifications that are in question in brackets.

Rule 4.1: Truthfulness in Statements to Others
(Commission’s Proposed Rule – Redline Version)

- (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 with an intent to deceive such 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.

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 ~~in 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. In negotiations, certain types of statements ordinarily are not taken as statements of material fact. Statements of opinion or statements regarding the client’s maximum or minimum acceptable settlement offers, demands, willingness to compromise, or “puffing” are not statements of fact. ~~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.

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

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.

**Rule 4.1 Truthfulness in Statements to Others
[Sorted by Commenter]**

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response required.
6	COPRAC	A		Comment [2]	COPRAC generally supports the adoption of the rule, but is sympathetic to certain of the concerns raised by the Minority. COPRAC agrees with the Minority that the phrase "generally accepted conventions in negotiation" is abstruse and recommends that the phrase read: "In negotiations, certain types of statements ordinarily are not taken as statements of material fact."	See response to OCBA comment.
8	Ivester, David	D			Lawyers naturally should conduct themselves honestly when representing clients, and existing law affords means of addressing gross misconduct by lawyers in this regard. Proposed Rules 3.9 and 4.1, though, would unnecessarily and unwisely overlay disciplinary rules on this existing law—rules that do not adequately address the complexity of the subject and that uniquely expose lawyers to risks for statements made before legislative and administrative bodies, risks that may interfere with their representation of	

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 4.1 Truthfulness in Statements to Others
[Sorted by Commenter]**

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>clients. Adversaries in sometimes highly charged legislative and administrative proceedings may well resort to threatening lawyers for what they say in such proceedings, a risk that may distract lawyers from their representation of their clients in order to address the risk to themselves.</p> <p>I note that several states that have rules modeled after the ABA Model Rules have opted not to adopt Rule 3.9 or 4.1. For the reason noted above and expressed more fully in the Minority Dissent reports to Rules 3.9 and 4.1, I recommend that California do likewise.</p>	
9	Office of the Chief Trial Counsel	M			<p>OCTC's concern is one it has stated before: that this proposed rule requires <i>knowing</i> conduct and is thus inconsistent with well-established law that gross negligence can support a finding of moral turpitude and culpability under section 6068(d). (See, for example, <i>In the Matter of Chestnut</i> (Rev.Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174 [respondent's unqualified and unequivocal statements under circumstances that should have caused him at least some uncertainty were at minimum deceptive, in violation of section 6068(d) and 6106]; <i>In the Matter of Harney</i> (Rev.Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 281-282 [violation of section</p>	

Rule 4.1 Truthfulness in Statements to Others
[Sorted by Commenter]

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					6068(d) and 6106 through gross negligence]. The Comments to this rule are too general and should be eliminated.	
5	Orange County Bar Association	D		4.1(b)	We support the minority the view that proposed Rule 4.1 should not be adopted. Multiple rules and statutes already address an attorney's duty of candor and duty not to participate in fraud, deceit or criminal activity. The proposed Rule contains a number of exceptions and vague language that do more to create ambiguity than provide clarity and guidance for attorneys. For example, Rule 4.1(b) creates an exception for covert activity that is triggered when a "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." Under such circumstances, the proposed Rule indicates that a lawyer may use "misrepresentation or other subterfuge" to obtain information about unlawful activity and then states "provided the lawyer's conduct is otherwise in compliance with these Rules." Clearly, the lawyer's conduct also would have to be in compliance with all other laws, and this exception does not contemplate all of the other manners in which a lawyer or someone acting at his or her direction may violate the law by use of "subterfuge" to obtain	<u>Raul</u> : The are legitimate concerns regarding the vagueness of this rule and whether it will chill client representation and advocacy. This Rule comes dangerously close to requiring a duty of candor to third parties in the same way a duty of candor is owed to clients. However, the Supreme Court has made clear that attorneys owe no duty to third persons with whom their clients deal at arm's length. <i>Goodman v Kennedy</i> (1976) 18 Cal.3d 335, 344. Statutes like section 6068(d), 6128(a) and 6106 do contain some form of deceit requirement, whereas the proposed rule requires a knowing false statement of material fact without requiring an intent to deceive or actual deception. OCBA's concerns about vagueness in the rule are valid. This concern is magnified by Comment [1] and the idea that a lawyer can "incorporate" or "affirm" a client's statements. Paragraph (a)(2) also imposes vicarious responsibility on lawyers for the criminal or fraudulent acts of the client on mere knowledge, without intent to deceive or knowledge of the consequences. The Commission may want to narrow the rule by adding language requiring an intent to deceive. Knowing a statement is false is not the same as acting with an intent to defraud or with knowledge of the consequences.

**Rule 4.1 Truthfulness in Statements to Others
[Sorted by Commenter]**

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					information.	<p><u>Mark:</u> OCBA's concerns are not valid and there is no reason to change the Commission's position in favor of adopting this important rule of professional conduct. Virtually every state with the exception of California has Rule 4.1. There is no evidence that the rule, which has been in existence in most jurisdictions for over 25 years, curtails legitimate advocacy. Instead, the rule has proven to provide important public protection by insuring that lawyers not "knowingly" make false statements of "material" fact or law to a third person and not assist a client's criminal or fraudulent act by failing to disclose a "material" fact unless prohibited by rule 1.6 and 6068(e). Only North Carolina has not adopted Model Rule 4.1(b) [proposed rule 4.1(a)(2)]. There is nothing vague or uncertain about these requirements. "Knowingly" is a define term and material has common usage in ethics rules. The rule is consistent with duties of lawyers to others under rules 1.2(d) and 3.3 and 3.4. Including an additional requirement is this rule that there be an intent to deceive is no more necessary than in these other rules and would require that lawyers engage in fraud or other torts for the rule to apply. Comment [1] tracks the Model Rule and does not detract from the clarity of the rule. The majority's decision to include the Oregon exception under paragraph (b) does not change the importance of paragraph (a). The vague 19th Century aspirational language of §6068(d) would be a poor substitute for Rule 4.1. §6128 is</p>

**Rule 4.1 Truthfulness in Statements to Others
[Sorted by Commenter]**

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [1]	<p>Comment [1] suggests that an attorney can violate the proposed Rule by incorporating or affirming a false statement if the attorney does so knowingly. While the language suggests that an attorney must “know” that a statement of another person or declarant is false to rise to the level of a misrepresentation by the lawyer, the Comment does not provide guidance on what is required to establish knowledge. Further, there is some suggestion that attorneys vouch for the truth of deposition testimony and statements of declarants in court filings. When juxtaposed against the following sentence (stating that, “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”), the language implies that a lawyer does affirm or vouch for the truthfulness of the client’s statements in other situations, including court filings. Because Comment [1] states that a lawyer does not</p>	<p>much more limited in requiring actual deceit or collusion with the intent to deceive the court or any “party.”</p> <p>§6106 is limited to acts involving moral turpitude which is inherently ambiguous and provides lawyers with little or no guidance. No one else has objected to this rule and the San Diego Bar Association and other commenters have recommended its adoption.</p> <p><u>Mark</u> disagrees with OCBA's concern with Comment [1]. Proposed rule 1.0(f) provides an adequate definite of “know” that makes the requirements of the rule unambiguous. Since the Comment states that a misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person “the lawyer knows to be false,” there is no suggestion that lawyers will violate the rule by generally vouching for the truth of testimony or court filings. The knowledge requirement for this rule is no less uncertain than the knowledge requirement under rules 3.3(a) (candor to the tribunal) or 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal).</p> <p><u>Raul</u> believes that while “knowingly” is sufficiently defined, the Rule exposes lawyers to discipline (and let’s face it, civil liability) for representations made without any intent to deceive. Comment [1] strongly compels a duty of candor to third parties by stating that a misrepresentation can occur where the lawyer makes partially true but misleading statements or</p>

**Rule 4.1 Truthfulness in Statements to Others
[Sorted by Commenter]**

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [2]	<p>“necessarily” affirm or vouch for the truthfulness of the client’s representations in drafting an agreement, it leaves unclear when the lawyer does affirm or vouch for the truthfulness and when he or she does not.</p> <p>Comment [2] raises similar problems, stating that “[w]hether a particular statement should be regarded as one of fact can depend on the circumstances.” The circumstances are not defined in the Comment. Again, there is an entire body of case law that addresses the question: “What is a statement of fact?” Likewise, the language “[u]nder generally accepted conventions in negotiation” is too vague and provides no clear standard for attorneys to follow.</p>	<p>material omissions. The pressure will be on lawyers to make fuller disclosure than necessary -- solely to avoid civil or disciplinary liability.</p> <p><u>Raul</u>: I agree that the word “necessarily” in Comment [1] adds unnecessary ambiguity and should be deleted. (Mark disagrees).</p> <p><u>Mark</u> disagrees. Comment [2] follows the Model Rule comment (except for the deletion of the last sentence) and has not been shown to suffer from ambiguities suggested by OCBA. For example, “statement of fact” is used in Rule 3.3 without objection.</p> <p><u>Raul</u>: “Accepted conventions in negotiations” is an awkward term and assumes a universal standard exists. COPRAC’s language is clearer. I recommend that the language read:</p> <p>“In negotiations, certain types of statements ordinarily are not taken as statements of material fact. Statements of opinion or statements regarding the client's maximum or minimum acceptable settlement offers, demands, willingness to compromise, or “puffing” are not statements of fact.”</p>

**Rule 4.1 Truthfulness in Statements to Others
[Sorted by Commenter]**

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [3]	Comment [3] merely refers to and incorporates other Rules specifically designed to address criminal and fraudulent activity, underscoring why this proposed Rule should not be adopted. Again, there is ambiguity in the language of the Comment, and the language of the exceptions is difficult to follow. For example, the Comment states that “substantive law” may require an attorney to disclose information to avoid being deemed to have assisted in the client’s fraud or crime, but does not clarify the substantive law that may create such a duty. It then goes on to state that, if the lawyer can only avoid assisting in the fraud or the crime by disclosing the information, the lawyer is required to do so unless the lawyer is prohibited from doing so under Rule 1.6 or B&P Code section 6068(e). This language is confusing and should not be adopted.	Mark disagrees. Comment [3] tracks the Model Rule comment and provides useful cross references to Rule 1.2(d), Rule 1.4(a)(6) and Rule 1.16. Other rules have comments with similar cross references to assist lawyers in understanding that the rules are intended to work together and that other rules may also apply. There are also comments that remind lawyers that that substantive law should also be consulted. There is no good reason to depart from Model Rule Comment [3] which is believed to provide helpful guidance.
2	San Diego County Bar Association Legal Ethics Committee	A			We approve the rule in its entirety.	No response required.
4	Santa Clara County Bar Association	A			No comment.	No response required.

**Rule 4.1 Truthfulness in Statements to Others
[Sorted by Commenter]**

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
7	U.S. Attorney	A		4.1(b)	Rule 4.1(b) may create confusion and mislead private attorneys into believing they are permitted to authorize or engage in misrepresentation and deception as "covert activities" in instances beyond the narrow range of circumstances in which courts have found it legally permissible, such as compliance testing. To avoid any suggestion that Rule 4.1(b) is intended to broaden the areas in which private attorneys may authorize or engage in misrepresentations and deceptions, a comment should be added to make more clear that Rule 4.1(b) applies only to certain types of compliance investigations in which private attorneys are legally permitted to supervise investigators who may engage in very limited forms of deception or misrepresentation (as circumscribed by substantive law) and is not intended to broaden the areas in which this is permitted.	Raul: It is unclear what substantive law limitations on private attorneys are referred to by the commenter and why private parties should have lesser rights than the government to conduct covert investigations as long as the activities are lawful. Mark: The U.S. Attorney raises a valid concern about the breath of the "Oregon" exception that the majority has included in paragraph (b). A comment as suggested that paragraph (b) does not broaden areas where non-government lawyers may engage in legally permissible "testing" is needed to prevent paragraph (b) from being interpreted in an overly broad manner that undermines the entire rule. There are ethics opinions, such as New York, that explain the narrow use of testing in private practice under this rule.
3	Wied, Colin W.	A			Supports a rule similar to ABA Model Rule 4.1.	No response required.



Colin W. Wied*

*National Commercial Arbitration & Mediation
Panels, American Arbitration Association

*Mediator Credential
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October 7, 2009

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Re: Revisions to CA Rules of Professional conduct.

Dear Judy:

I just tried to send the enclosed email to Audrey Hollins. Unfortunately, it could not go through. I received a message that "Hollins" was an unauthorized recipient. I used her email address shown on p. 14 of the recent California Bar Journal.

Will you please forward my email to the appropriate party or group.

Thanks. I enjoyed our brief chat during the Annual Meeting in San Diego.

Very truly yours,

Colin W. Wied

Colin Wied

From: Colin Wied [cww@cwwied.com]
Sent: Wednesday, October 07, 2009 3:07 PM
To: 'hollins@calbar.ca.gov'
Subject: Rules of Professional Conduct

Ms. Hollins – I began teaching negotiation as an adjunct professor at University of San Diego Law School Spring Semester, 2008. A part of the course included ethics and rules of professional conduct. In preparing for this section of the course, I was aware of ABA Rule 4.1, which prohibits lying. I searched the CA Rules carefully, and I found no rule that would preclude lying generally, only lying to judges.

I am curious. Has this issue ever been addressed COPRA? If not, in my opinion, it should be.

There is more to this issue than the RPC. California case law not only condones lying and concealing, it seems to protect the perpetrator. Consider the case of *Home Ins. Co. v. Zurich Ins. Co.*, 96 Cal.App.4th 17; 116 Cal.Rptr.2d 583 (2002), in which the court determined that finality trumps fraud. An insurer brought an action against another insurer alleging fraud and seeking declaratory relief and subrogation or indemnity. Defendant's policy, with a \$500,000 limit, covered a permissive automobile driver who had negligently injured plaintiff's insured. However, during the underlying litigation, defendant was alleged to have misrepresented statutory limitations on coverage for permissive users as having restricted its policy limits to \$15,000. Relying on these representations, plaintiff's insured had settled the underlying case for \$15,000 and executed a release. Thereafter, in *Home v Zurich*, the plaintiff sought to overturn the settlement and release on grounds of fraud. Both the trial court and appellate court found in favor of the defendant, holding in essence that in California finality trumps fraud. No other state has adopted this draconian rule, and instead other states apply usual contract rules that permit agreements to be set aside for fraud or material mistake.

I urge the Board of Governors to consider adding a rule similar to ABA Rule 4.1 to the CA Rules of Professional Conduct.

Colin W. Wied, Past President, 1989
State Bar of California



**SAN DIEGO COUNTY
BAR ASSOCIATION**

February 12, 2010

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

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

Dear Ms. Hollins:

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

Sincerely,

Patrick L. Hosey, President
San Diego County Bar Association

Enclosures

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

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

Coversheet

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

Format for Analyses:

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.

Yes [] No []

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [] No []

(3) Is the new rule **worded correctly and clearly**? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [] No []

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [] No []

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

Format for Recommendations:

[] We approve the new rule in its entirety.

[] We approve the new rule with modifications.*

[] We disapprove the new rule and support keeping the old rule.

[] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

[] We abstain from voting on the new rule but submit comments for your consideration.*

Summaries Follow:

~~CONCLUSION: We approve the new rule with modifications.* delete paragraph (d)(2)~~

~~LEC Rule Volunteer Name(s): Jack Leer~~

~~Old Rule No./Title: N/A~~

~~Proposed New Rule No./ Title: 3.9 — “Non-adjudicative Proceedings”~~

~~(5) Rule 3.9, as proposed, would provide that attorneys appearing before legislative and other non-adjudicative bodies (1) disclose the attorney is acting in a representative capacity for the client and (2) comply with Rule 4.1 (i.e. refrain from making false statements or failing to disclose facts if necessary to avoid assisting in a fraud or crime). It differs from the ABA Rule by not including other duties set forth in Rules 3.3, 3.4 and 3.5, thus creating a less onerous burden on an attorney appearing before a non-adjudicative body than the ABA Rule would require, based on the Revision Committee’s determination that the legislative/administrative bodies serve materially different interests than the courts. A minority suggests the Rule should be omitted entirely (as it is in several states) because it would take lawyers out of the protections of Civil Code section 47, which provides immunity for others appearing before the same type of non-adjudicative bodies. However, given the proposed Rule’s minimal requirements and the policy of seeking to bring California’s rules in line with the ABA Model Rules, I believe the Rule should be adopted as proposed.~~

~~CONCLUSION: We approve the new rule in its entirety.~~

LEC Rule Volunteer Name(s): Richard D. Hendlin (telephone (858) 755-5442)

Old Rule No./Title: N/A (Existing CA statute: Bus & Prof. Code section 60608(e))

Proposed New Rule No./ Title: 4.1 “Truthfulness In Statements to Others”

(5) Proposed Rule 4.1 largely tracks Model Rule 4.1 which apparently every jurisdiction has some version of except North Carolina and California. In my view, proposed Rule 4.1 should be adopted because it provides some helpful guidance in this complex area and brings California into conformity with the rest of the country on this subject. Although it is extremely difficult to enforce, it might beneficially influence lawyers’ conduct and beliefs.

Proposed Rule 4.1 (a) states a lawyer’s duty of honesty that is owed to third persons in the course of representing a client as follows:

“(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)."

[Paragraph (b) based upon Oregon Rule 8.4, provides an exception for lawful convert activity in investigating violations of civil or criminal law, or constitutional rights.]

Thus, Rule 4.1 (a) applies only to statements of material fact or law that the lawyer knows to be false, and thus does not cover false statement that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law.

The proposed Comment to Rule 4.1 largely tracks the Model Rule comment, with some additions intended to clarify California law. Proposed **Comment [2]** to proposed Rule 4.1 states:

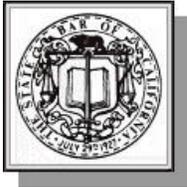
"This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. **Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of Price or value placed on the subject of the 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."

The above quoted proposed Rule 4.1 Comment [2] deletes the last sentence of the ABA Model Rule 4.1 Comment [2] which provides "Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation," because, the Commission found it does not add materially to an understanding of the Rule and "is essentially a practice pointer."

As an adjunct professor of Negotiations, I know that Model Rule 4.1 and particularly Comment [2] thereto have been the subject of numerous law review articles and considerable controversy over the past 30 years among academics primarily as it concerns the extent to which lawyers may lie and deceive during negotiations. The vast majority of legal academics writing on the subject have advocated (unsuccessfully) strengthening the duty of candor under the rules of professional conduct. Most scholars wishing to raise the ethical bar for lawyer-negotiators have advocated a variety of proposals including, but not limited to, forbidding lying and other forms of deception in a negotiation; requiring disclosure of all facts known to be important to the other party; requiring total candor and total cooperation to the extent required to insure that the result is fair; prohibiting false statements about interests and priorities; and mandating lawyers negotiate "honestly and in good faith." Proposals to significantly modify Rule 4.1 and its comments during the "Ethics 2000" review were rejected.

The Commission deemed Proposed Rule 4.1 "Moderately Controversial" because a minority of the Commission believed that the proposed Rule addresses "nuanced concepts that are better left to the civil and criminal law, and should not be the focus of a disciplinary rule" and also concerns that the proposed Rule will expand a lawyer's civil liability." The minority also found "The phrase 'generally accepted conventions in negotiation' (from Comment [2]) is so abstruse that it does not belong in a disciplinary rule.

CONCLUSIONS: We approve the new rule in its entirety.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

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DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization

- Yes
 No

* Name

* City

* State

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

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

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

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

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule
 DISAGREE with this proposed Rule
 AGREE ONLY IF MODIFIED

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F-2010-382i SCCBA [4.1]

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March 9, 2010

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

Re: Twelve Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

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

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

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

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofske
Executive Director

MEMORANDUM

Date: February 24, 2010

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

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 4.1 – Truthfulness in Statements to Others**

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

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

The OCBA supports the minority view that proposed Rule 4.1 should not be adopted. Multiple rules and statutes already address an attorney's duty of candor and duty not to participate in fraud, deceit or criminal activity. *See, e.g., CAL. BUS. & PROF. CODE, §§ 6068(d)* (An attorney has a duty "[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."); 6128(a) (An attorney is guilty of a misdemeanor if he or she engages in "any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party."); 6106 ("The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension."); proposed Rule 1.16 (addressing withdrawal from representation). In addition to these rules and statutes, case law defines fraud and deceit, and lawyers may face criminal and civil liability for such conduct. In other words, there is a well-defined body of law governing the duty of an attorney not to engage in fraudulent or criminal activity.

The proposed Rule contains a number of exceptions and vague language that do more to create ambiguity than provide clarity and guidance for attorneys. For example, proposed Rule 4.1(b) creates an exception for covert activity that is triggered when a "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." Under such circumstances, the proposed Rule indicates that a lawyer may use "misrepresentation or other subterfuge" to obtain information about unlawful activity and then states "provided the lawyer's conduct is otherwise in compliance with these Rules." Clearly, the lawyer's conduct also would have to be in compliance with all other laws, and this exception does not contemplate all of the other manners in which a lawyer or someone acting at his or her direction may violate the law by use of "subterfuge" to obtain information.

Comment [1] also creates ambiguities that do not assist in providing attorneys with clear guidance on what conduct will and will not subject them to potential disciplinary action. The Comment suggests that an attorney can violate the proposed Rule by incorporating or affirming a false statement if the attorney does so knowingly. While the language suggests that an attorney must “know” that a statement of another person or declarant is false to rise to the level of a misrepresentation by the lawyer, the Comment does not provide guidance on what is required to establish knowledge. Further, there is some suggestion that attorneys vouch for the truth of deposition testimony and statements of declarants in court filings. When juxtaposed against the following sentence (stating that, “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”), the language implies that a lawyer does affirm or vouch for the truthfulness of the client’s statements in other situations, including court filings. Because Comment [1] states that a lawyer does not “necessarily” affirm or vouch for the truthfulness of the client’s representations in drafting an agreement, it leaves unclear when the lawyer does affirm or vouch for the truthfulness and when he or she does not.

Comment [2] raises similar problems, stating that “[w]hether a particular statement should be regarded as one of fact can depend on the circumstances.” The circumstances are not defined in the Comment. Again, there is an entire body of case law that addresses the question: “What is a statement of fact?” Likewise, the language “[u]nder generally accepted conventions in negotiation” is too vague and provides no clear standard for attorneys to follow.

Finally, Comment [3] merely refers to and incorporates other Rules specifically designed to address criminal and fraudulent activity, underscoring why this proposed Rule should not be adopted. Again, there is ambiguity in the language of the Comment, and the language of the exceptions is difficult to follow. For example, the Comment states that “substantive law” may require an attorney to disclose information to avoid being deemed to have assisted in the client’s fraud or crime, but does not clarify the substantive law that may create such a duty. It then goes on to state that, if the lawyer can only avoid assisting in the fraud or the crime by disclosing the information, the lawyer is required to do so unless the lawyer is prohibited from doing so under Rule 1.6 or Business and Professions Code section 6068(e). This language is confusing and should not be adopted.



THE STATE BAR OF
CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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ENFORCEMENT

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DIRECT DIAL: (415) 538-2063

March 12, 2010

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

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

Dear Mr. Difuntorum:

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

~~**Rule 1.0.1 Terminology/Definitions.**~~

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

Rule 4.1 Truthfulness in Statements to Others.

1. OCTC's concern is one it has stated before: that this proposed rule requires *knowing* conduct and is thus inconsistent with well-established law that gross negligence can support a finding of moral turpitude and culpability under section 6068(d). (See, for example, *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174 [respondent's unqualified and unequivocal statements under circumstances that should have caused him at least some uncertainty were at minimum deceptive, in violation of section 6068(d) and 6106]; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar 266, 2381-282 [violation of section 6068(d) and 6106 through gross negligence].)
2. The Comments to this rule are too general and should be eliminated.

Rule 4.4 Respect for the Rights of Third Persons.

1. ~~OCTC is concerned that this proposed rule deviates substantially from the ABA rule by eliminating the ABA's paragraph (a). The Commission states that they are concerned about vagueness and over breadth of the ABA's language. OCTC finds this concern unwarranted; and when balanced against the needs to prevent litigation abuse, believes the ABA is correct.~~
~~The State Bar Act already prohibits counseling or maintaining unjust proceedings (section 6068(e); advancing facts prejudicial to the honor or reputation of a party or witness (section 6068(f)); and encouraging the commencement or the continuance of actions for any corrupt motive (section 6068(g)). The current Rules of Professional Conduct similarly prohibits an attorney from bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal without probable cause and for the purpose of harassing or maliciously injuring any person (rule 3-200(A).) The Ninth Circuit has held that a rule prohibiting attorneys from conduct unbecoming a member of the bar is not unconstitutionally vague. (*United States v. Hearst* (9th Cir. 1981) 638 F2d 1190, 1197.) OCTC believes the ABA's paragraph (a) should be adopted.~~
2. ~~OCTC believes both the Commission's language in paragraph (b) and the ABA's language are equally adequate and consistent with the California Supreme Court's decision in *Rico v. Mitsubishi Motors Corp* (2007) 42 Cal.4th 807, 818. We find either acceptable.~~
3. ~~Comments 1 and 3 seem unnecessary as the rule is clear and unambiguous.~~

Rule 6.1 Voluntary Pro bono Publico Service.

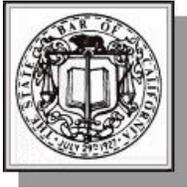
~~This is a noble goal, but it does not belong in a rule of professional conduct since it is merely advisory and not enforceable. It dilutes the rest of the rules. The Comments have the same problem.~~

Rule 6.2 Accepting Appointments.

~~OCTC appreciates the intent of this rule, but is concerned that this rule as written is not enforceable. OCTC would also strike the Comments as unnecessary.~~

Rule 8.2 Judicial and Legal Officials. (Current rule 1 700.)

1. ~~OCTC agrees with requiring a lawyer who seeks a judicial appointment shall comply with Canon 5B of the California Code of Judicial Ethics. OCTC, however, would eliminate Comments 1 and 2 as unnecessary.~~



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

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DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

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* Name

* City

* State

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

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

- | | | | |
|------------------------------------|-----------------------------------|--------------------------------|--|
| Rule 1.0.1 [1-100] | Rule 1.11 [n/a] | Rule 4.1 [n/a] | Rule 6.5 [1-650] |
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| Rule 1.8.9 [n/a] | Rule 3.9 [n/a] | Rule 6.2 [n/a] | Discussion Draft [all rules] |

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

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- AGREE with this proposed Rule
- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

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

Lawyers naturally should conduct themselves honestly when representing clients, and existing law affords means of addressing gross misconduct by lawyers in this regard. Proposed Rules 3.9 and 4.1, though, would unnecessarily and unwisely overlay disciplinary rules on this existing law—rules that do not adequately address the complexity of the subject and that uniquely expose lawyers to risks for statements made before legislative and administrative bodies, risks that may interfere with their representation of clients. Current law takes pains to assure that people can freely communicate with their government without fear of consequence. It would be unwise essentially to carve exceptions in such law to uniquely expose lawyers to risks for what they say on behalf of people communicating with their government, as Rule 3.9 would. Adversaries in sometimes highly charged legislative and administrative proceedings may well resort to threatening lawyers for what they say in such proceedings, a risk that may distract lawyers from their representation of their clients in order to address the risk to themselves.

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I note that several states that have adopted rules modeled after the ABA Model Rules have opted not to adopt Rule 3.9 or 4.1. For the reasons noted above and expressed more fully in the Minority Dissent reports to Rules 3.9 and 4.1, I recommend that California do likewise.

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File :

F-2010-394b David Ivester [4.1]

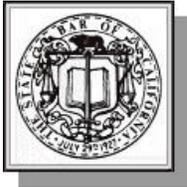
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THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

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Commenting on behalf of an organization

Yes

No

* Name

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[Rule 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

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

FROM: George S. Cardona.
Chief Assistant United States Attorney
Central District of California

RE: Proposed California Rules of Professional Conduct 4.1 and 1.11(e)

DATE: March 12, 2010

As an initial matter, I want to again thank the Commission for all the hard work it has done in arriving at its proposed revisions to the California Rules of Professional Conduct and for its willingness to hear and meaningfully consider views expressed regarding certain of these rules by state, local, and federal prosecutors. I write on behalf of my office to provide additional comments on Proposed Rule 4.1, Truthfulness in Statements to Others, which we believe could invite confusion by appearing to authorize private attorneys to authorize or engage in deception in situations beyond those narrow circumstances in which courts have found it permissible, and a subsection of Proposed Rule 1.11, Special Conflicts of Interest for Former and Current Officers and Government Employees, that we believe is contrary to current California law and could negatively affect our ability to maintain the confidentiality necessary to certain investigations.

A. Proposed Rule 1.11(e)

Unlike the ABA Model Rule, which has no equivalent provision, subsection (e) of Proposed Rule 1.11 imputes conflicts of individual government lawyers to their entire “office, agency or department” unless there is: (a) timely and effective screening; and (b) written notice to the former client, unless such notice is “prohibited by law or a court order.” We believe that adoption of this subsection and its accompanying comments, and the resulting variance from the ABA Model Rule, would run contrary to current California and Federal law, improperly limit the ability of our office to maintain the confidentiality necessary to certain investigations, and be difficult to administer in practice. Accordingly, we urge the Commission to adopt the approach taken by ABA Model Rule 1.11 and reject the addition of subsection (e).

As a starting point, we note that, as the result of “special problems raised by imputation within a government agency,” ABA Model Rule 1.11 “does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees.” ABA Model Rule 1.11, comment 2. As a result, ABA Model Rule 1.11 contains no counterpart to proposed subsection (e), and instead merely notes in its comments that “ordinarily it will be prudent to screen such lawyers.” ABA Model Rule 1.11, comment 2.

California and Federal cases recognize that imputation of conflicts within government offices pose the same “special problems” noted by the ABA. See, e.g., In re Charlissee C., 45 Cal. 4th 145, 162-65 (2008) (discussing cases that have “cited several considerations in declining to apply an automatic and inflexible rule of vicarious disqualification in the context of public law offices”); United States v. Bolden, 353 F.3d 870, 878 (10th Cir. 2003) (“disqualification of

Government counsel is a drastic measure and a court should hesitate to impose it except where necessary”); United States v. Caggiano, 660 F.2d 184, 190-91 (6th Cir. 1981) (“disqualification of an entire government department, because of a conflict of interest of a government attorney arising from his former employment, would not be appropriate”) (discussing ABA Formal Op. 342 (1975)). Nevertheless, as proposed by the Commission, subsection (e) diverges from the ABA Model rule by imputing conflicts within a “government office, agency or department.” As drafted, proposed subsection (e) applies to all government offices, and does not differentiate between government offices engaged in criminal prosecution and other government offices. Moreover, proposed subsection (e) has no limitation on the scope of the imputation within a government “office, agency or department,” thus potentially imputing conflicts on the part of a single attorney in a single United States Attorney’s Office to the entire Department of Justice, and prohibits the government office from relying on screening to avoid the conflict where the government office is unable to notify the former client “in writing of the circumstances that warranted implementation of the screening procedures” and “the actions taken to comply with those requirements” unless such notice is “prohibited by law or a court order.” See Proposed Subsection (e)(1), (2). In addition, the comments to proposed subsection (e) suggest that screening may not be available, and the government office “may be disqualified from the representation” if the “personally prohibited lawyer” is either the “head of the office, agency or department” or a “lawyer with direct supervisory authority over any of the lawyers participating in the matter,” citing to California cases as support. See Proposed Comment 9(b).

For the following reasons, we do not believe that proposed subsection (e) and its accompanying comments should be adopted:

1. As applied to prosecuting offices, proposed subsection (e) appears contrary to California law. In City & County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4th 839 (2006), which involved a city attorney’s office engaged in civil litigation, the court relied in part on the decision in Younger v. Superior Court, 77 Cal. App. 3d 892 (1978), in which the Court of Appeal upheld an order disqualifying the entire Los Angeles County District Attorney’s Office from prosecuting a defendant because that defendant had previously been represented by the recently appointed Assistant District Attorney (Johnie Cochran), “notwithstanding the ethical screen erected between Cochran and the prosecution of defendants formerly represented by his law firm.” Cobra Solutions, 38 Cal. 4th at 850. As Cobra Solutions recognized, however, its continued reliance on Younger was appropriate only because the disqualification issue before it did not involve a prosecuting agency:

The disqualification standard that the Court of Appeal applied in Younger no longer controls *criminal* prosecutions because the Legislature in 1980 enacted Penal Code Section 1424 (Stats. 1980, ch. 780, S 1, p. 2373), which provides for the recusal of local prosecuting agencies only when “the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial.” (Pen. Code, S 1424, subs. (a)(1) & (b)(1)).

38 Cal. 4th at 850; see also In re Charlyse C., 45 Cal. 4th at 164 n.9 (2008) (noting Cobra Solutions’ observation that “the Legislature, by statute, had ‘superseded’ Younger’s holding”); People v. Conner, 34 Cal. 3d 141, 147 (1983) (after § 1424 conflict permitting disqualification

must be one “of such gravity as to render it unlikely that defendant will receive a fair trial unless recusal is ordered”); People v. Jenan, 140 Cal. App. 4th 782, 791 (2006) (Section 1424 “supersedes the case law rule that previously allowed a defendant to recuse the district attorney by showing ‘a conflict of interest which might prejudice him [or her] against the accused and thereby affect, *or appear to affect*, his [or her] ability to impartially perform the discretionary functions of his [or her] office.’”) (emphasis in original) (citation omitted); United States v. Nosal, 2009 WL 482236 (N.D. Cal. Feb. 25, 2009) (holding that even though recently appointed United States Attorney had personal conflict based on prior representation of defendant in current criminal case, in light of Penal Code Section 1424, “even if California law were applied there would be no basis to force the recusal of the prosecutor’s office in this case,” and directing United States Attorney to file declaration under seal detailing screening procedures implemented to ensure his lack of influence over matter); Grand Jury Investigation of Targets, 918 F.Supp. 1374, 1379 (1996) (noting that § 1424 and People v. Conner “overruled” earlier, broader recusal rules). We recognize that discipline and disqualification/recusal are different matters. By essentially returning to the Younger standard for disciplinary purposes, however, proposed subsection (e) would, as applied to prosecuting offices, effectively require those offices and their attorneys, as a means of avoiding discipline, to apply the Younger standard as the basis for recusal, a result that would run directly contrary to the supercession of Younger by the legislature’s enactment of Penal Code Section 1424. It would also run contrary to the policy underlying Penal Code Section 1424, which was “a legislative response to a substantial increase in the number of unnecessary prosecutorial recusals” under the earlier standard. See Jenan, 140 Cal. App. 4th at 791. As a result, if the Commission adopts proposed subsection (e) as drafted, it will, as applied to prosecuting offices, run contrary to California law.

2. Even for government and public offices engaged in activities other than criminal prosecution, California law generally permits screening, and requires judicial consideration of the effectiveness of the screening and a multitude of other factors in assessing whether vicarious disqualification of a government or public office is required based on an individual attorney’s personal conflict, even if that individual attorney is a senior supervisor. In Cobra Solutions itself, the court recognized that it was not deciding “whether ethical screening might suffice to shield a senior supervisory attorney with a personal conflict and thus avoid vicarious disqualification of the entire government legal unit under that attorney’s supervision” and continued to note that:

In ruling on such a motion, the trial court should undertake a factual inquiry into the actual duties of the supervisor with respect to those attorneys who will be ethically screened and to the supervisor’s responsibility for setting policies that might bear on the subordinate attorneys’ handling of the litigation. In addition, the trial court should consider whether public awareness of the case, or the conflicted attorney’s role in the litigation, or another circumstance is likely to cast doubt on the integrity of the governmental law office’s continued participation in the matter.

38 Cal. 4th at 850 n.2. In In re Charlissee C., the court cited this portion of Cobra Solutions in concluding that in deciding whether to disqualify a public office, CLC, based on prior representation of a client adverse to its current client, the court “should have determined whether CLC has adequately protected, and will continue to adequately protect, [the former client’s]

confidences through timely, appropriate, and effective screening measures and/or structural safeguards.” 45 Cal. 4th at 165. More generally, the court stated:

[W]e begin by noting that there are court-created limitations to the vicarious disqualification rule, which itself was “judicially created.” As here relevant, California courts have generally declined to apply an automatic and inflexible rule of vicarious disqualification in the context of public law offices. Instead, in this context, courts have looked to whether the public law office has adequately protected, and will continue to adequately protect, the former client’s confidences through timely, appropriate, and effective screening measures and/or structural safeguards.

45 Cal. 4th at 161-162.

Thus, for government and public offices, California law requires courts addressing disqualification motions to consider the adequacy of screening measures, coupled with consideration of other factors, before disqualifying a government or public office based on an individual attorney’s conflict. Federal law is similar. See Bolden, 353 F.3d at 876 (“disqualifying an entire United States Attorney’s office is almost always reversible error regardless of the underlying merits of the case”); United States v. Whitaker, 268 F.3d 186, 194-96 (3d Cir. 2001) (disqualification of entire United States Attorney’s office improper); United States v. Vlahos, 33 F.3d 758, 762-63 (7th Cir. 1994) (error to disqualify entire United States Attorney’s Office; even if individual AUSA had conflict of interest, weight of authority indicates court should have ordered another AUSA To handle case rather than disqualify entire office); United States v. Lorenzo, 995 F.2d 1448, 1453 (9th Cir. 1993) (no basis for disqualification because “even were we to hold that the vicarious disqualification rules apply to a U.S. Attorney’s Office, the appellants have not demonstrated prejudice”).

Nowhere do the California cases adopt (and to the contrary, they appear to reject) a bright line, inflexible rule of the type included in proposed subsection (e) that would require notice to the former client to render screening effective. Indeed, the California cases’ placement of the burden of establishing the effectiveness of screening on the government or public office defending against a disqualification motion appears to be in part based on recognition that the party seeking disqualification will not have had notice or an opportunity to obtain advance access to the relevant information relating to screening. See In re Charlissee C., 35 Cal. 4th at 166. We appreciate the Commission’s apparent recognition, as evidenced by its addition to proposed subsection (e)(2) of a sentence recognizing that such notice need not be given where “prohibited by law or a court order,” that there are instances where other laws (for example, Federal Rule of Criminal Procedure 6(e)’s secrecy limitations prohibiting disclosure of grand jury information, or Proposed Rule 1.6’s prohibitions on the disclosure of confidential client information) may preclude such notice. But this does not address all the situations in which notice may be impossible. For example, the very nature of an ongoing investigation (for example, an investigation using individuals posing as prospective tenants to investigate housing discrimination) may require that the existence of the investigation remain confidential. In such circumstances, notice to the target of the investigation of screening, which would be notice of the investigation’s existence, would render the investigation impossible to complete. There is no law that would prohibit the notice, and it may be impossible to obtain from any court

(particularly if there is no pending proceeding) what would essentially be an advisory opinion that such notice is not required. Under these circumstances, however, proposed subsection (e) would require notice, even though we think it clear the California cases would not, and would instead consider all the circumstances to determine whether the screening implemented by the government office remained, even in the absence of notice, effective. We believe the flexible approach taken by the California cases to be far the better one, and accordingly urge that proposed subsection (e), which requires notice as a prerequisite for effective screening, should not be adopted.

3. The decisions in which California courts have relied on policy considerations to impute and require vicarious disqualification based on personal conflicts of the head of a government or public office have arisen in situations involving relatively localized government or public offices. The policy concerns underlying these decisions simply do not apply to large, complex government offices of the size and scope of the Department of Justice, which has approximately 11,000 lawyers operating through a number of distinct divisions and offices. Yet, proposed subsection (e) has no limitation on the scope of the “office, agency or department” to which it would apply its requirements, posing the possibility of absurd results. For example, it would make no sense to require that the entire United States Department of Justice, including the local United States Attorney’s Office handling the matter, be recused from an ongoing undercover investigation of a relatively small defense procurement fraud in California simply because current Attorney General Eric Holder happened to be involved in that matter before he was appointed to his position. All that should be required is that the Attorney General, who typically is not involved in local investigations in any event, be screened from participating in or supervising the investigation in any way.

What this demonstrates is that issues of this type are far better dealt with, as they have been by both California and Federal courts, on a case by case basis that can take into account the multitude of factors that must be assessed based on particular facts to determine whether screening is timely and effective, factors that include the relative position of the individual with the personal conflict, the mechanics of the screening implemented, and the likelihood that the individual’s position would influence the handling of the case regardless of these screening efforts. Attempting to suggest or define bright lines governing certain of these factors (such as the position of the individually conflicted lawyer, as in proposed comment 9(B)) or requiring written notice (as in proposed subsection (e)) in a disciplinary rule will invariably result in lines that are, for particular cases, either over or under broad, and will deter the development of case law that can more effectively fashion and define standards to be used in assessing when screening will be effective or ineffective in preventing the imputation of personal conflicts to require vicarious disqualification.

4. The policy factors cited by California and Federal courts in their discussion of vicarious disqualification of government and public offices also weigh in favor of leaving imputation of conflicts to the disqualification arena, and not addressing them in a disciplinary rule. In particular, California courts have repeatedly recognized the “heavy” “burdens” imposed by vicarious disqualification of government legal offices. Cobra Solutions, 35 Cal. 4th at 852. Moreover, courts have recognized that the incentives to breach client confidences are less in a public office because “public sector lawyers do not have a financial interest in the matters on

which they work.” In re Charlisse C., 45 Cal. 4th at 163 (quoting City of Santa Barbara v. Superior Court, 122 Cal. App. 4th 17, 24-25 (2004)). It is in light of these dual considerations that screening (without more) has generally been permitted to avoid conflicts within government and public offices:

As the Christian court put it, “in the public sector, in light of the somewhat lessened potential for conflicts of interest and the high public price paid for disqualifying whole offices of government-funded attorneys, use of internal screening procedures or ‘ethical walls’ to avoid conflicts within government offices . . . have been permitted. [Citations.]”

45 Cal. 4th at 163 (quoting People v. Christian, 41 Cal. App. 4th 986, 998 (1996)). In the federal system an additional Constitutional concern weighing against vicarious disqualification of an office as a whole is the separation of powers issue posed by a judicial order that effectively will prevent an executive office from carrying out its statutorily authorized duties. See United States v. Bolden, 353 F.3d 870, 879 (2003) (noting that “disqualifying government attorneys implicates separation of powers issues” and that “every circuit court that has considered the disqualification of an entire United States Attorney’s office has reversed the disqualification”); Cf. United States v. Silva-Rosa, 275 F.3d 18, 22 (1st Cir. 2001) (rejecting disqualification even of individual AUSAs because “appellants are asking this Court to dictate to the executive branch whom it can appoint as its prosecutors. Such a position would expand the power of judicial officials to such a degree as to trigger weighty separation of powers concerns.”).

In addition to the effectiveness of screening, California courts consider other policy-based factors in assessing whether conflicts should be imputed to justify vicarious disqualification, including in particular, the likelihood of whether the overall circumstances concerning the individually conflicted attorney are “likely to cast doubt on the integrity of the governmental law office’s continued participation in the matter.” In re Charlisse C., 45 Cal. 4th at 165 (quoting Cobra Solutions, 38 Cal 4th at 850 n.2). Neither the actual effectiveness of screening nor these other policy-based factors are readily amenable to ex ante evaluation. By forcing government and public office attorneys to run the risk of discipline based on their ex ante evaluation of these factors, however, proposed subsection (e) will likely lead these attorneys to err on the side of disqualification, a result that will cause more disqualifications of government and public offices, and a result thus at odds with the very policy considerations that have led California courts to recognize the general validity of screening as a means of avoiding disqualification of government and public offices. To avoid this unjustified result, and leave in place the policy-based balance already reached by California courts, the Commission should follow the ABA Model Rules and delete subsection (e).

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B. Proposed Rule 4.1(b)

Our concern is that, as presently worded, Rule 4.1(b) may create confusion and mislead private attorneys into believing they are permitted to authorize or engage in misrepresentation and deception as “covert activities” in instances beyond the narrow range of circumstances in which courts have found it legally permissible, such as compliance testing. See Apple Corps Ltd., v. International Collectors Society, 15 F. Supp. 2d 456 (D.N.J. 1998) (plaintiffs’ attorneys did not violate rules of professional responsibility in supervising investigators who misrepresented their identities and purpose of their contacts with defendant’s sales personnel to determine whether defendants had failed to comply with consent decree). Government lawyers who supervise investigations of criminal and fraudulent enterprises and activities are subject to restraints on their conduct imposed by the 4th, 5th, 6th and 14th Amendments to the Constitution, as well as statutes, regulations and agency practices and supervision that have developed over an extensive period of time. It is in part because of these restraints, which can in many instances be cited as a basis for relief by individuals who are the subjects of a government supervised investigation, and in part because of the public interest in detecting and deterring criminal wrongdoing, that courts have liberally authorized the use in government supervised investigations, by both law enforcement agents and informants, of misrepresentations and deceptions. Courts have more severely limited the areas in which private attorneys may authorize or engage in similar misrepresentations and deceptions in part because these Constitutional, statutory, and regulatory limitations do not apply to private attorneys. Instead, the primary sources of restraint on such parties are the rules of professional conduct. To avoid any suggestion that Rule 4.1(b) is intended to broaden the areas in which private attorneys may authorize or engage in misrepresentations and deceptions, we recommend adding a comment to make more clear that Rule 4.1(b) applies only to certain types of compliance investigations in which private attorneys are legally permitted to supervise investigators who may engage in very limited forms of deception or misrepresentation (as circumscribed by substantive law) and is not intended to broaden the areas in which this is permitted.

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**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

March 12, 2010

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

RE: Proposed Rule 4.1

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 4.1 and offers the following comments.

COPRAC generally supports the adoption of the rule. While we are sympathetic to certain of the concerns raised by the Minority (and attempt to address one of those concerns below), we nevertheless support the proposed rule. We further support the narrow exception related to covert activity as contained in paragraph (b) of the rule.

COPRAC also supports the modifications made to Comment [1] of the Model Rule as reflected in Comment [1] to the proposed rule. In particular, we support the inclusion of the qualifier "material," which makes clear that immaterial misrepresentations and immaterial omissions will not be the basis for attorney discipline.

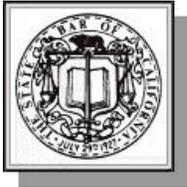
We agree with the Minority that the phrase "generally accepted conventions in negotiation" (as in "Under *generally accepted conventions in negotiation*, certain types of statements ordinarily are not taken as statements of material fact.") is too abstruse. The phrase implies some form of official standard, such as Generally Accepted Accounting Principles, yet to our knowledge there is no such recognized standard. We recommend that this reference be eliminated and the sentence rewritten to simply read: "In negotiations, certain types of statements ordinarily are not taken as statements of material fact."

Thank you for your consideration of our comments.

Very truly yours,

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

cc: Members, COPRAC



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

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

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

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

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

[Rule 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

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

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

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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)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by Consensus

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): Yes No

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

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

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 4.1* Truthfulness in Statements to Others*

December 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 rule does not adequately capture the details of a highly complex subject. 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. The phrase "generally accepted conventions in negotiation" is so abstruse that it does not belong in a disciplinary rule. None of those distinctions are in the proposed Rule. Thus, the meanings of those terms are hidden in the proposed Rule and 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 been solidly established during all this time without the need for a disciplinary rule in an area where the boundaries between

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

permissible and impermissible conduct are often especially difficult to determine. To the extent that this Rule is intended to assure that lawyers be candid and complete in dealing with opposing parties, the law of civil liability for incomplete statements and disclosures, and even for inexcusable silence while a client makes untrue statements, is well established and needs no assistance from the Rules of Professional Conduct. See: *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 293, 294; *Roberts v. Ball, Hunt, Hart etc.* (1976) 57 Cal.App.3d 104; *Cicone v. URS Corporation* (1986) 183 Cal.App.3d 194, 208; and *Pumphrey v. K.W.Thompson Tool Co.* (9 Cir 1995) 62 F.3d 1128.

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 style="text-align: center;"><u>ABA Model Rule</u> Rule 4.1 Truthfulness in Statements to Others</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 4.1 Truthfulness in Statements to Others</p>	<p style="text-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><u>(a)</u> 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)<u>1</u> 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>(b)<u>2</u> 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 <u>or Business and Professions Code section 6068(e)(1)</u>.</p>	<p>The Commission recommends adoption of this paragraph with the additional reference to section 6068(e).</p>

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

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 4.1 Truthfulness in Statements to Others</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 4.1 Truthfulness in Statements to Others</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(b) <u>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.</u></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, 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"><u>ABA Model Rule</u></p> <p align="center">Rule 4.1 Truthfulness in Statements to Others</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u>*</p> <p align="center">Rule 4.1 Truthfulness in Statements to Others</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Misrepresentation</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>Misrepresentation</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 a</u> statement of another person that the lawyer knows is false. Misrepresentations can also occur <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 statements<u>material statement</u> or omissions<u>material omission</u> that are<u>is</u> the equivalent of <u>an</u> affirmative false statements<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 & 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>

* 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">Rule 4.1 Truthfulness in Statements to Others</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 4.1 Truthfulness in Statements to Others</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Statements of Fact</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 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>Statements of Fact</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 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>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 understanding of the Rule and is essentially a practice pointer.</p>
<p>Crime or Fraud by Client</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,</p>	<p>Crime or Fraud by Client</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)<u>(a)(2)</u> 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. <u>See Rule 1.4(a)(6) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct.</u> Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation <u>in</u></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">Rule 4.1 Truthfulness in Statements to Others</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 4.1 Truthfulness in Statements to Others</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.</p>	<p>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 (b)(a)(2) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6 <u>or Business and Professions Code section 6068(e)</u>.</p>	
	<p>[4] Paragraph (a)(2) requires that the lawyer have actual knowledge of the client's criminal or fraudulent act.</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</i>, <i>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>

Rule 4.1: Truthfulness in Statements to Others
(Commission’s Proposed Rule – Clean Version)

- (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.

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

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

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.

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.”

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**RRC – Rule 4.1 [MR 4.1]
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March 10, 2010 McCurdy E-mail to Drafters (Martinez & Tuft), cc Chair, Vice-Chairs & Staff:

Rule 4.1 Drafting Team (**MARTINEZ/TUFT**):

This message provides the assignment background materials for Rule 4.1 on the March agenda. **The assignment deadline is Thursday, March 18, 2010.**

This message includes the following draft documents:

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

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

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

Attached:

- RRC - [4-1] - Dashboard - ADOPT - DFT2 (03-10-10).doc
- RRC - [4-1] - Compare - Introduction - DFT3 (12-15-09)RD.doc
- RRC - [4-1] - Compare - Rule & Comment Explanation - DFT3 (11-14-09)RM-KEM-ML.doc
- RRC - [4-1] - Rule - DFT2.1 (11-14-09)-CLEAN-LAND-ML.doc
- RRC - [4-1] - Public Comment Complete - REV (03-10-10).pdf
- RRC - [4-1] - Public Comment Chart - By Commenter - DFT1 (03-10-10)AT.doc
- RRC - [4-1] - State Variations (2009).pdf

March 11, 2010 KEM E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

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

1. My cumulative meeting notes, revised 11/27/09.
2. Full E-mail compilation, revised 1/5/10.

Please let me know if you have any questions.

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

This message provides an updated public comment compilation adding comments received since the materials I transmitted with the message below. In addition, I've attached an updated commenter chart. Please note that not all of the comments received over the past several days have been synopsisized and added to this chart. Please go ahead and add any missing comment synopses and responses yourself in the extra rows at the bottom of the table. If you run out of rows, simply press the TAB key in the last cell of the last row and a new row will appear.

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

OCTC
David Ivestor
US Attorney's Office
COPRAC

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

Attached:

RRC - [4-1] - Public Comment Complete - REV (03-15-10).pdf
RRC - [4-1] - Public Comment Chart - By Commenter - DFT1.1 (03-15-10)AT.doc

March 17, 2010 Tuft E-mail to Martinez, cc KEM:

Raul, here are my edits and comments to the public comment chart. Since you and I disagree about the efficacy of this rule, I have identified which of us is the author of a particular response to a public comment. I doubt you and I will be able to reconcile our differences on paragraph (a), so I recommend we submit our dueling responses to the Commission and let them decide.

Attached:

RRC - [4-1] - Public Comment Chart - By Commenter – DFT2 (03-17-10).doc

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

I've attached the following:

Public Comment Chart, Draft 2.1 (3/18/10).

Mark and Raul did not feel that they will be able to resolve their differences over this Rule so they have identified their respective position in the response column of the attached chart.

Please note that I've added to comments that came in late and to which neither Mark nor Raul have had an opportunity to respond - OCTC and David Ivester. I have shaded those orphan comments in forlorn gray in the attached chart. Perhaps they will have a chance to draft a response to each before next week's meeting.

Please let me know if you have any questions.

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

I tried to clean the chart up a bit. Here is what I have.

Attached:

RRC - [4-1] - Public Comment Chart - By Commenter - DFT2A (03-18-10)RM.doc

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

Thanks, Raul. It looks much better. I resorted it alphabetically and lined up the columns a bit more. I've attached new Draft 2.2 (3/18/10) of the Public Comment Chart.

Lauren, the attached is ready to go.

Attached:

RRC - [4-1] - Public Comment Chart - By Commenter – DFT2.2 (03-18-10)RM.doc

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

And here is the rule with the modifications that are in question in brackets.

Attached:

RRC - [4-1] - Rule - DFT3 (03-18-10) - Cf. to DFT2.1.doc

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

Thanks again, Raul. I've cleaned it up a bit and renamed it to keep track of the drafts for the record.

Lauren: This is ready to go.

Attached:

RRC - [4-1] - Rule - DFT3 (03-18-10) - Cf. to DFT2.1.doc

March 20, 2010 Kehr E-mail to RRC:

Here are my comments on these materials:

1. The OCTC reference to *Matter of Chestnut* is not correct. That case involved misrepresentations to a court. It hadn't occurred to me that Rule 4.1 could be read as overlapping with Rule 3.3, but the OCTC comment shows that I was wrong. This could be avoided by a cross-reference. For example, we could add to Comment [1] before the Rule 8.4 reference: "With regard to a lawyer's duty of candor to tribunals, see Rule 3.3." I also disagree with the *Harney* cite, which involved misleading a court and a client, neither of which is within Rule 4.1.
2. I will hold until the meeting any general comments on the differing views of Raul and Mark on whether to retain this rule, but I do want to comment now on Raul's citation to *Goodman v. Kennedy* at agenda p. 365. At p. 342 of its opinion, the Court set out two distinct issues. The first was whether a lawyer can be civilly liable to a non-client for negligent advice given confidentially to a client. The Court answered this in the negative, distinguishing the *Ball, Hunt* situation in which a lawyer gives an opinion to a client with the intent that it be transmitted to and relied on by non-clients. The second issue was whether, under the facts presented, the defendant lawyer was liable to the non-client for failing to make disclosures to him. The Court's analysis of this issue, at p. 344, is carefully limited: "There is no allegation that defendant made any affirmative misrepresentation to [the non-client's lawyer, with whom the defendant lawyer had spoken] or made any statements that were misleading because of alleged nondisclosures or that defendant was dealing with [the non-client's lawyer] other than at arm's length. In the absence of any claim of fraud, the allegation that the purpose of defendant's nondisclosure was to deceive [the non-client's lawyer] and to induce the sale establishes no more than that defendant determined to leave to his clients the decision of what information to volunteer in the course of the sale negotiations." In sum, I don't believe that *Goodman* provides any guidance as to whether a lawyer should be subject to professional discipline.
3. I have a suggestion with respect to the disagreement about the use of "necessarily" in Comment [1] (near the top of agenda p. 368). This is based on the assumption that Raul and Mark would agree that a lawyer does not vouch for the accuracy of a client's representations and warranties simply by drafting the agreement in which they were made. If so, perhaps we could say so directly and avoid the disagreement over "necessarily". For example: "However, by merely drafting an agreement on behalf of a client, a lawyer does not affirm or vouch for the truthfulness of representations made by the client in the agreement." Also, I believe the word "agreement" is too narrow. There are other documents, such as deeds containing warranties of title, that should be included. I would change "agreement" to: "agreement or other instrument".
4. In the dashboard (agenda p. 399), I would add a cite to section 6106.
5. In the second line of the Introduction (agenda p. 401), should "exception from" be: "exception to"?

March 21, 2010 KEM E-mail to RRC:

1. I've reviewed my notes for this Rule (see Cumulative Notes, attached). During the deliberations concerning whether the Commission should recommend adoption of paragraph (b) of the Rule, which is based on Oregon Rule 8.4(b), George Cardona noted that by placing its provision in Rule 8.4(b), the Oregon Rule has broader application, i.e., it provides:

(b) Notwithstanding paragraphs (a)(1), (3) and (4) [of Rule 8.4, the rule addressed to "professional misconduct"] and Rule 3.3(a)(1) [the rule concerning candor to a tribunal], 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 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" 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.

See 11/6-7/09 KEM Meeting Notes, III.C., at para. 2A.a.

2. Harry observed that 8.4 was already before the BOG for public comment but that we could address whether to move paragraph (b) to 8.4 when all the rules go out for public comment together. Id. at para. 2.A.b.,c. That was before the Commission implemented its current final public comment period in which Batches 1, 2, 3, 4 and 5 are currently out for the final round of public comment, with Batch 6 to join them after the BOG's May 2010 meeting. Rule 8.4 is a Batch 2 rule and is currently in the 90-day period for Batch 1-5 rules.

3. Questions:

- a. Does the Commission want to revisit this issue of moving 4.1(a) into 8.4?
- b. If the Commission so decides, how should we present the recommendation to: (i) BOG; and (ii) the public?

4. Note that these questions are in addition to the issue George Cardona raised in his public comment submission and which Mark has requested we address. See pages 370 of Agenda Materials (under "U.S. Attorney") and 394 (the full public comment).

Please let me know if you have any questions.

Attached:

RRC - [4-1] - KEM Meeting Notes - CUMUL (02-12-10).pdf

March 22, 2010 Sapiro E-mail to RRC:

1. I oppose this rule for several reasons.
2. The comments by OCTC demonstrate that, if Rule 4.1 is adopted, OCTC will apply the same standards in enforcement of this rule as apply under Rule 3.3. If my recollection is correct, both *Chestnut* and *Harney* involved misrepresentations to a court, not to a non-court third person.
3. In addition, OCTC's comments suggest that, if an incorrect statement of fact or law is made to a court, OCTC is likely to stack charges by charging by a violation of Rule 3.3 and a violation of Rule 4.1. If the Commission decides to adopt a version of Rule 4.1, we should preclude double charging by making clear in the rule or its comment that this rule does not apply to representations made to a court, which would solely be governed by Rule 3.3.
4. Perhaps the problem is in the use of the undefined phrase "third person." Does a client constitute a "third person"? Does a court or other tribunal constitute a "third person"?
5. This rule is also ambiguous, and invites disciplinary complaints against lawyers similar to SLAPP suits, by referring to "a false statement of material fact or law." If I argue what I believe is the correct interpretation of the evidence to opposing counsel, and he or she disagrees with my interpretation, can he or she accuse me of making a "false statement of material fact"? If I argue that the cases interpreting a given statute conclude one thing, and he or she disagrees, can she or he make a complaint against me for violation of Rule 4.1? Because of these concerns, I agree with Raul's recommendation. If we adopt this rule notwithstanding its potential for mischief, the *mens rea* of an intent to deceive should be a predicate for a disciplinary complaint.
6. I also agree with Raul that the word "necessarily" should be stricken from Comment [1]. However, even with that change, Comment [1] does not go far enough. For example, a lawyer arguing a client's position to a legislative body or administrative panel should not be deemed to vouch for the truthfulness of his or her client and should not be deemed to have a material nondisclosure if the lawyer argues from facts asserted by the client, unless the lawyer knows that the client has made false representations or material nondisclosures. My point is that "vouching" is not merely a problem in contracts, but as this rule is drafted vouching can be asserted as a violation of this rule in other contexts.
7. I agree with the concerns expressed by COPRAC. There is no such thing as a "generally accepted convention in negotiation."
8. I respectfully disagree with George Cardona's concern about paragraph (b). If we attempt to draft a textbook on when covert investigations are or are not permissible, the Comment to this rule will be excessively long and, even then, may unintentionally exclude circumstances that would create permissible testing or include those that, by hindsight, should not be permissible in a given case.

9. In Comment [3], more than one rule is mentioned. To make it clear, in the third line of that comment at Agenda page 362, I recommend we insert “of this Rule” after the reference to paragraph (a)(2). I would make the same change in Comment [4].

10. The table of state variations is incorrect regarding New York. New York’s version of Rule 4.1, in full, states:

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

I think that is far better than what we are now considering.

March 23, 2010 Lamport E-mail to RRC:

1. The more I study this Rule, the more it concerns me. I have no problem with the idea that a lawyer cannot advise or assist a client in a crime or fraud. I understand that such assistance would include communicating false material facts. If that is what 4.1(a)(1) said, I would be comfortable with it. But that is not what 4.1(a)(1) says. It is not linked to committing a fraud. That opens the door for a lawyer being disciplined for making a false statement that is not fraudulent (because there is no intent to deceive, there is no justifiable reliance or the statement is privileged). That leads to the concern that a lawyer could be disciplined for saying something the client legally could say, which could chill lawyer speech on behalf of a client (whether the State Bar prosecutes it or not).

If the client can say something, the lawyer, as the client's spokesperson, should be able to say the same thing. If a limit on the scope of a lawyer's representation of a client is advancing a crime or fraud, the scope of Rule 4.1(a)(1) should be coterminous, but it is not.

My preferred solution to this problem is to not adopt Rule 4.1(a)(1). This is already covered under 1.2(d)(1). The prohibition on assisting a client in engaging in conduct that is fraudulent or criminal already encompasses communications by a lawyer that would advance the crime or fraud. I am not understanding why we need two rules to say this.

My less preferred solution would be the following:

(a) Revise Rule 4.1(a)(1) to state: "make a false statement of material fact or law to a third person for the purpose of advancing a crime or fraud."

(b) Add a Comment stating, "This Rule does not apply to statements that are privileged under Civil Code section 47." More on this Comment below.

2. I am concerned about 4.1(a)(2) on two fronts. First, the Rule basically says "you must disclose the facts to avoid assisting in a crime or fraud, unless you can't under 6068(e)(1) and 1.6." More simply, "you must unless you can't." But I am having a problem imagining any situation where a lawyer could reveal the information. The only reasonable one I can come up with is where the client wants the lawyer to reveal the information; but why do we need a rule requiring a lawyer to reveal facts in that situation? I cannot conceive of any situation where the lawyer, in the course of representing a client, could reveal facts the client does not want the lawyer to reveal or which would be embarrassing or detrimental to the client, which is the most

likely scenario in which this Rule would apply. So why are we saying to lawyers, "you must reveal the facts," when they really can't reveal the facts? The whole thing is backward to me. I am also concerned that it sends the wrong message to lawyers less versed in ethics than we are that disclosure is the norm and confidentiality is the exception. We should not be sending that message.

Second, I can see a potential conflict between Rule 4.1(b)(1) and section 6068(e)(2). Under 6068(e)(2) the lawyer may, but is not required to reveal confidential information to prevent a criminal act that is likely to result in death or substantial bodily harm. Rule 4.1(b)(2) says you must reveal the information to avoid assisting in a client's criminal act, unless disclosure is prohibited under 6068(e)(1). Under section 6068(e)(2) the disclosure is not prohibited, but it is also not required. But under Rule 4.1(b)(2) the disclosure is required because it is not prohibited. Since both 4.1(b)(2) and 6068(e)(1) apply to client criminal acts, there is certainly the potential for a lawyer to be in a situation where both Rules apply. We should not be making a stressful situation even more so with conflicting rules. I agree with the OCBA concern about Comment [3] in this regard.

This leads to another question, if the policy is to permit, but not require disclosure under 6068(e)(2), why isn't that the policy in 4.1(b)(2)? Should we not be giving lawyers the same option in Rule 4.1 for the same policy reasons? If we have to have this Rule, I believe we should.

My preferred solution is to not adopt the Rule 4.1(a)(2). It sends the wrong message. It is the wrong standard. It is not necessary.

3. If we are to have this Rule, I agree with Bob's proposed addition to Comment [1]. I would like to augment that with the following: "This Rules does not apply to statements that are privileged under Civil Code section 47." This is the same language I proposed above. I agree with Bob and Jerry that there should not be an overlap between this Rule and Rule 3.3. There also should not be an overlap between this Rule and Rule 3.9. If we adopt Rule 3.9, then Bob's suggested Comment should apply to 3.9 as well. If we do not adopt Rule 3.9, as I recommend, then we need to carve out Rule 3.9 situations in this Rule so that we don't end up accomplishing indirectly what we did not decide to do directly. Since Civil Code section 47 sets out the privilege that applies in those proceedings, I suggest using that section as the basis for the carve out. Furthermore, if a statement is privileged, and, therefore permitted and not actionable, this Rule should not be prohibiting any statement that is protected under that statute.

March 23, 2010 Martinez E-mail to Lampton, cc RRC:

Neither (a)(1) nor (a)(2) contain the kinds of limitations that are placed on fraud claims, such as reliance, intent to deceive, etc. But I don't think that incorporating section 47 (b) works here. Section 47 (b) is limited to judicial and other official proceedings and provides a defense to civil actions. By incorporating section 47(b), we are suggesting that Rule 4.1 creates a standard applicable in civil cases.

My biggest concern about Rule 4.1 is that it will be used in civil cases to create a standard of care for lawyers. Typically, when a business deal goes south, the lawyers who put the deal together are the targets of litigation because they are the only remaining deep pockets. The rule, especially (a) (2), opens the door to claims by third parties that the lawyer assisted the client in a fraud by failing to disclose material facts. The Rule does not require that the lawyer

act with an intent to deceive or reliance or know that a fraud is being committed --the traditional safeguards against unfounded claims of fraud. A lawyer may knowingly fail to disclose a material fact, but unwittingly also assist the client in committing a fraud on a third party. Because the rule does not require that the lawyer act with an intent to deceive, it does not dovetail the traditional mens rea required for fraud.

"In the civil arena, an aider and abettor is called a cotortfeasor. To be held liable as a cotortfeasor, a defendant must have knowledge and intent. . . . A defendant can be held liable as a cotortfeasor on the basis of acting in concert only if he or she knew that a tort had been, or was to be, committed, and acted with the intent of facilitating the commission of that tort. ...Of course, a defendant can only aid and abet another's tort if the defendant knows what 'that tort' is."

Gerard v. Ross (1988) 204 Cal.App.3d 968, 983.

The law also requires a higher mens rea on aiders and abettors. "Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." *Saunders v. Superior Court* (1994) 27 Cal. App. 4th 832, 846.

Our proposed rule contains none of these protections. While the rule requires that the lawyer act with knowledge, it does not have an "intent to deceive" requirement or intent to facilitate the commission of a fraud. We should either make this clear in the Rule or state in a comment that the Rule does not create a civil standard.

March 23, 2010 Lamport E-mail to Martinez, cc RRC:

Remember that my preferred approach is not to have a rule, so don't lose sight of that. With respect to my proposed, less preferred approach, my thought is that by limiting (a)(1) to a statement made for the purpose of advancing a crime or fraud, we would be picking up the protections you refer to below. The reference to Civil Code section 47 is not intended to replace the need for those protections, but to extend them to situations where the privilege applies.

March 23, 2010 Tuft E-mail to RRC List:

1. OCTC objects to Rule 4.1 because it is too narrow in requiring that a lawyer knowingly make a false statement of material fact or law to a third person. OCTC's position that gross negligence supports a finding of culpability under §6068(d) and §6106 should concern opponents of Rule 4.1(a) a great deal more about the chilling effect on advocacy than the proposed rule. OCTC is incorrect, however, in relying on *Chesnut and Harney* for why Rule 4.1 is too narrow. *Chesnut* involves statements made to judges in Texas and California that respondent had personally served the opposing party in a marital dissolution case in violation of §6068(d). Culpability under §6106 was found based on the fact that respondent repeated the same false statement to each of the two judges. The situation in that case is governed by Rule 3.3(a) and not Rule 4.1(a). Nevertheless, the Review Department found that respondent's statements were "knowingly false." *Harney* dealt with respondent's ethical duties to his client

and the court to reveal the mandatory limits under MICRA in negotiating and collecting his fee. Rule 4.1 is not applicable to what a lawyer says to a client or to the court

2. OCBA agrees with the minority position that the rule should not be adopted because other statutes and rules already address an attorney's duty not to engage in fraud, deceit and criminal activity. Yet, §6068(d) employs 19th Century language that is hardly a model of clarity for lawyers in modern practice ("to employ . . . those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law"). Whatever the standard of culpability may be under this hoary statute, it does not have a knowledge of falsity or materiality requirement. It actually creates a greater risk of chilling legitimate advocacy than the Model Rule which has gained acceptance in every jurisdiction with minor revision except North Carolina and California. §6128(a) is limited to acts of deceit or collusion that constitute criminal misconduct. §6106 employs the amorphous concept of moral turpitude, dishonesty or corruption. California lawyers and the public deserve to have a rule that is more precise and provides adequate notice of conduct that is prohibited in advance of a lawyer being charged with discipline. Rule 4.1(a) does so and has been shown not to chill legitimate advocacy.

3. Stan and Raul would add a second scienter requirement that the lawyer not only knowingly make a false statement of material fact or law but that the lawyer do so with the intent to deceive. In effect, they propose that the rule only apply if there is conduct that is equivalent to actual fraud. See the definition of "fraud" in Rule 1.0.1(d). The purpose of Model Rule 4.1(a) is to forbid a lawyer from intentionally lying to a third party about a material fact or law that the lawyer knows to be false. As with other rules, the intent is to protect against actionable fraud rather than punish lawyers who actually engage in fraud. That is why civil cases such as those cited in support of the minority view do not apply and Raul's concern that the rule will be used in civil cases to create a standard of care is not borne out by the 25 years of working with the rule in other jurisdictions. *Raul's* concerns deal mainly with the language in Comment [1]. We do not need to change the basic rule to deal with those concerns. Opponents of the rule should be more concerned with the breadth of the existing State Bar Act provisions than the more narrowly defined duty under Rule 4.1(a).

4. More importantly, voting to delete Rule 4.1(a) will not eliminate the duty of California lawyers not to engage in deception against third persons. The Supreme Court has said that "deceptive acts" against third persons (such a opposing counsel) are prohibited under §6068(d). *Rodgers v. State Bar* (1989) 48 Cal. 3d. 300, 315 – " The statute requires an attorney to refrain from misleading and deceptive acts without qualification. . . It does not admit of any exceptions." Rule 4.1(a) provides a more precise professional standard and better notice to lawyers of what is prohibited than the vagaries of §6068(d).

March 23, 2010 Tuft E-mail to RRC List:

I meant to add that I also agree with George Cardona's concerns and recommendation regarding paragraph (b) of the rule.

March 23, 2010 Sondheim E-mail to RRC:

1. As with 3.9, we will briefly discuss whether to have this rule, taking into account the Commenter Table.
2. If the Commission decides to retain the rule, we will then discuss the substantive issues.

March 24, 2010 Martinez E-mail to RRC List:

My primary concern is the use of the Rule to create civil liability. I have less of a problem with using the Rule in discipline. As a compromise, and to save the rule, I would favor a comment that states: "This rule is not intended to create a standard of care in civil cases nor to abrogate case law limiting a lawyer's duties to third parties. See, e.g., *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 344."

March 24, 2010 Lamport E-mail to RRC List:

I do not agree that this Rule should be limited to a disciplinary standard. I don't think it is any more acceptable to discipline a lawyer for saying something the client could say than it is to hold the lawyer liable for it.

Mark is confusing forums here. This Rule applies to representative communications with a third person. This is different than a lawyer's duty of honesty in dealings with a client or a court, which is what Rodgers is talking about. We should not confuse the two. When we represent a client, we are the voice for that client. We stand in the shoes of the client as the client's spokesperson. We do not want to inhibit that role, by imposing burdens that limit what we can do for a client, when the client would be permitted to do it on his or her own.

The fact is that the rules are a bit different when the lawyer is communicating with a third party on behalf of a client. That is why you see all of the gymnastics about negotiations in the Comment. None of that applies when it comes to communicating with a client or a court. I don't think you can extrapolate Rodgers, or 6068(d) (which is talking about misleading courts) to the situation covered by this Rule.

If you want a Rule that is more precise, then limit it to the precise boundaries of the lawyer client relationship - assisting a client fraud or crime. The problem now is that the Rule is imprecise in that it is overbroad.

March 24, 2010 Tuft E-mail to RRC List:

The Supreme Court in *Rogers* found that respondent's deceitful dealings with opposing counsel violated section 6068(d). That is why it is cited. The case is not limited to a lawyer's dealings with the client or the court. Rule 4.1 would not apply in either of those situations but it would apply to lying to third parties, including opposing counsel. The Supreme Court has not held that Section 6068(d) applies only to misleading courts.