Rule 1.2 Scope of Representation.
[Sorted by Commenter]

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
7	California Attorneys for Criminal Justice ("CACJ")	M		1.2(a)	Our proposed modification would be to add the following language to paragraph (a) at the end/following sentence: A lawyer shall abide by a client's decision whether to settle a matter, "to the extent it is not in conflict with statutory or constitutional law."	The Commission agreed in principal and modified the last sentence of paragraph (a) as follows: "Except as otherwise expressly provided by law, ~~I~~in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered. The lawyer shall abide by the client's decision~~,~~ whether to waive jury trial and, in a criminal case, whether the client will testify."
4	California Public Defenders Association ("CPDA")	M		Cmt. [2]	CPDA's primary concern is with the Proposed Rule as developed in Proposed Comment [2]. CPDA proposes that to avoid a potential conflict with established legal practice, the second and third sentence in Comment [2] should be deleted. (Proposed deletion: "Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.") As noted in the Comment, the rich existing	The Commission disagrees with the deletion of the two sentences in Comment [2], both of which are accurate. The Commission also disagrees that the comment to the Rule should be a compendium of the law as developed in the case law. It would be impossible to capture every possible variation.

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					record of decisional law clearly defines the responsibility that lawyers have to know and practice legal obligations while respecting the client's goals. To this end, CPDA believes that it would be helpful if the Comment included references to the most common guidelines provided by established case law. CPDA believes that inclusion of these fundamental decisional references, along with deletion of the two sentences identified above, will clarify the existing ambiguities in the Proposed Rule and Comment.	
3	COPRAC	M		1.2(a)	As to paragraph (a), COPRAC agrees with the minority of the Commission and believes that it is difficult to differentiate between means and objectives. COPRAC also agrees with the minority that the language of section (a) of the rule might be read to conflict with a client's Constitutional and statutory duties to the lawyer's clients. COPRAC also notes that the last sentence of paragraph (a) raises the issue whether the lawyer can waive a jury trial on behalf of a client in a civil case.	The Commission disagrees with COPRAC's comment concerning means and objectives, the typical meaning understood is that objectives are achieved through the means utilized. Comments [1] and [2] provide guidance on this issue. The Commission, however, agrees with COPRAC's concern with the last sentence and has revised it accordingly. See Response to CACJ.
				1.2(d)	As to paragraph (d), COPRAC objects to the inclusion in paragraph (d)(1) of the proposed rule (modifying paragraph (d) of the corresponding ABA Model Rule) of the phrase referring to "a violation of any law, rule, or	The Commission disagrees. The language cited is carried forward from current rule 3-210.

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [9]	ruling of a tribunal." We believe that such language may subject lawyers to an inappropriate and unnecessarily harsh disciplinary standard. Absent fraud or criminal conduct, COPRAC does not believe such assistance should subject lawyers to possible discipline. Should the above phrase be included in the rule, we recommend a modification to Comment [9] to conform the references to this phrase. The phrase including the added scope is included in the first sentence of Comment [9]. A corresponding reference to the added scope should be included in the second sentence of Comment [9].	The Commission does not understand how adding the phrase, "to violate any rule, law, or ruling of a tribunal," would clarify the second sentence.
1	Judge, Michael P. Los Angeles County Public Defender	D		1.2(a)	We agree with the concern of the minority of the Commission regarding the intersection of the proposed rule and the provisions of Penal Code Section 1018.	The Commission agrees and has revised the last sentence of paragraph (a). See Response to CACJ.
8	Los Angeles County Bar Association ("LACBA"), Professional Responsibility and Ethics Committee	D			We oppose Proposed Rule 1.2 in its entirety because the committee believes that it is not appropriate as a disciplinary rule. Failure to follow the client's objectives may result in a malpractice action or fee dispute, but should not lead to discipline. If Rule is adopted, here are suggested amendments: Last sentence of paragraph (a) should state:	The Commission disagrees with LACBA's position. The rule not only provides important guidance to lawyer's in their relationships with clients, but also provides understandable disciplinary standards in paragraphs (a) and (d), the latter of which simply carries forward current rule 3-210. The Commission did not make the suggested

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.2(a)	"In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, whether the client will testify, *and whether to file an appeal*.	change. The language used is taken from the Model Rule and addresses client's substantial rights that are universally recognized as constitutionally based.
				1.2(d)	We suggest the following changes to 1.2(d): "A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal *or* fraudulent, *but* a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of *the* law.	The Commission did not make the suggested change. First, the Commission determined it was appropriate to carry forward the phrase, "or a violation of any law, rule, or ruling of a tribunal," from current rule 3-210. Second, the Commission concluded that dividing what is currently two sentences in rule 3-210, one stating the general rule and the other the exception, into separate subparagraphs would make the provision clearer.
				Cmt. [1]	We suggest that the following sentence be added to Comment [1]: "Paragraph (a) does not override the rules concerning mandatory or permissive withdrawal."	The Commission did not make suggested change. The Commission does not understand how paragraph (a), which sets out a lawyer's duties to abide by certain client decisions, might be construed to override the rule concerning withdrawal. Paragraph (a) is subject to paragraphs (c) and (d), the latter of which prohibits the lawyer assisting the client in criminal or fraudulent activity. A lawyer cannot be forced to assist the client if that will require the lawyer to violate the rules.
9	Office of Chief Trial Counsel ("OCTC"), State Bar of				1. OCTC is concerned that paragraphs (a) and (b) of proposed Rule 1.2, although in the	1. The Commission disagrees. See Response to LACBA.

Rule 1.2 Scope of Representation.
[Sorted by Commenter]

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
	California				Model Rules version, are not rules subject to discipline and thus do not belong in the Rules of Professional Conduct.	
				1.2(c)	2. OCTC is concerned that, while paragraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. See *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521. That may be what Comment [8] is trying to explain, but, it should be specifically in the rule, not just a comment.	2. The Commission disagrees. OCTC's proposals regarding paragraph (c) and comment [8] do not appear to reflect the views repeatedly expressed by Supreme Court Justice George, the Judicial Council, the Access to Justice Commission and others. Limited scope representation is not prohibited unless there is an exception allowing for such representation. Rather, it is permitted unless specifically prohibited or other duties have been imposed. The OCTC's reading of *Valinoti* appears overbroad and inconsistent with the goal of access to justice. Nevertheless, the Commission agrees with OCTC's suggestion regarding comment [8] and has added to Comment [7] guidance regarding duties attendant to limited scope representation.
				1.2(c)	3. OCTC also believes that the consent in paragraph (c) should be in writing. Given that limited scope representation is the exception, it would be better policy and more enforceable to require that it be in writing.	**The Commission disagrees:** The Commission voted unanimously to adopt the rule which is consistent with the Board of Governors resolution. It does not appear that limited scope/discrete task representation is an "adverse" interest or "conflict" that necessitates requiring "written" consent. To some extent, all representations have a limit to the scope. For example, someone providing only "ethics advice" limits the scope of the representation

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						to this area and would not necessarily have the expertise to suggest any or all of the civil/procedural implications of the advice given. Requiring written consent would operate as an impediment to access to justice. It places a burden on legal services attorneys and attorneys who might be willing to undertake a discrete task for a small fee, if they must also create a writing in every such matter as well. This would have a chilling effect and deter attorneys who may be making little or no money. Public protection will not be compromised since attorneys will have the burden of demonstrating that they have obtained "informed consent" - they may choose the obvious method of a writing - but it should not be discipline if they do not. Other jurisdictions have not included such a requirement.
				1.2(d)	4. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, paragraph (d), unlike current rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. While the Commission's	4. The Commission disagrees. Paragraph (d)(2) uses the Model Rule language and provides in part that a lawyer "may counsel or assist a client to make a *good faith* effort to determine the validity, scope, meaning or application of a law, rule, or ruling of a tribunal." (emphasis added). Whether it is the lawyer who make "takes appropriate steps in good

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Comments make clear that it intends to keep that defense, OCTC believes that it should be in the rule and not in a comment.	faith" to test the validity of any law, etc., or it is the lawyer who "counsel[s] or assist[s] the client to make a good faith effort" is immaterial. They mean precisely the same thing. If anything, the Model Rule language better reflects that the lawyer may take such steps only with the knowledge and consent of the client.
				Cmts. [1], [2]	5. OCTC is also concerned with Comments 1 and 2's statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. The current law is that a lawyer must advise the client of significant developments and that the client has the authority over significant matters. OCTC thinks these Comments need clarification so that only significant means should require consultation and specific communication; and that nothing is intended to change current law about who controls the presentation of cases.	5. The Commission disagrees. See Response to COPRAC, above. In addition, the Commission has included a cross-reference to Rule 1.4(a)(2), which requires that a lawyer "*reasonably* consult with the client about the means by which to accomplish the client's objectives in the representation." The lawyer does not have to consult with the client about every matter related to the representation.

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [8] Cmt. [7]	6. OCTC believes that Comment 8 needs clarification to make clear that limited scope representations are not permitted unless allowed by law. OCTC is also concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See *Janik v. Rudy, Exelrod, & Ziefff* (2004) 119 Cal.App.4'" 930, 940.)	6. See Response #2, above. The Commission has included the following statement at the end of Comment [7]: Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation. The foregoing should address OCTC's concern.
2	Orange County Bar Association	D		1.2(d) Comment [5]	The OCBA opposes the Commission's proposed Rule 1.2 and supports the adoption of ABA Model Rule 1.2.	The Commission disagrees. The proposed Rule is identical to the Model Rule except for paragraph (d). As explained in the Response to LACBA, above, the Commission revised MR 1.2(d) for two reasons: First, the Commission determined it was appropriate to carry forward the phrase, "or a violation of any law, rule, or ruling of a tribunal," from current rule 3-210. Second, the Commission concluded that dividing what is currently two sentences in rule 3-210, one stating the general rule and the other the exception, into separate subparagraphs would make the provision clearer.

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					The OCBA recommends that Comment [5] be stricken in its entirety.	The Commission disagrees. Comment [5] is identical to MR 1.2, cmt. [5]. It is consistent with legislative policy in Bus. & Prof. Code § 6068(h), which provides it is the duty of a lawyer: "(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed."
5	San Diego County Bar Association Legal Ethics Committee	A			We approve the new rule in its entirety.	No response necessary.
6	Santa Clara County Bar Association	A		1.2(c) Cmt. [8]	Approve as proposed with the exception of subsection (c), where "informed consent" should be "informed written consent." Add to Comment [8] language that would clarify that county counsel is governed by Government Code 999 et. Seq. which gives them greater authority in limiting the scope of their representation in certain situations such as settlements. Specifically, the following is suggested: "A government lawyer's authority and control over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits imposed by paragraphs (a) and (c). See for example, Cal. Gov. Code Sections 825; 995; 996." This language is the same as that used by the	**The Commission disagrees:** The Commission voted unanimously to adopt the rule which is consistent with the Board of Governors resolution. It does not appear that limited scope/discrete task representation is an "adverse" interest or "conflict" that necessitates requiring "written" consent. To some extent, all representations have a limit to the scope. For example, someone providing only "ethics advice" limits the scope of the representation to this area and would not necessarily have the expertise to suggest any or all of the civil/procedural implications of the advice given. Requiring written consent would operate as an impediment to access to justice. It places a burden on legal services attorneys and attorneys who might be willing to undertake a discrete task for a small fee, if they must also create a writing in every such matter as well. This would have a chilling effect and deter attorneys who may be making little or no

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					District of Columbia in modifying the ABA Model Rule version.	money. Public protection will not be compromised since attorneys will have the burden of demonstrating that they have obtained "informed consent" - they may choose the obvious method of a writing - but it should not be discipline if they do not. Other jurisdictions have not included such a requirement. The Commission did not make the requested change. First, it does not understand the reference to paragraph (c), which is not intended to limit a lawyer's authority. Second, the Commission recognizes that it has revised the Model Rule language from which proposed Comment [8] is derived to add reference to generally-applicable Rules of Court concerning limited scope representation. However, the Commission does not recommend the addition proposed by the commenter because it applies to only a relatively small subset of all California lawyers. It notes that such an addition might be appropriate in the District of Columbia, with its large number of government lawyers.

Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer

(Post-Public Comment Redline Version of Dft. 4.3 (1-11-10) Showing Changes to Dft. 3 (8-31-09).)

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. ~~In~~Except as otherwise expressly provided by law, in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered~~,~~. The lawyer shall abide by the client's decision whether to waive jury trial and, in a criminal case, whether the client will testify.[1]

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) (1) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.

(2) Notwithstanding paragraph (d)(1), a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule, or ruling of a tribunal.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g. Penal Code section 1018 ("No plea of guilty of a felony for which the maximum punishment is death or life without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's

[1] This change reflects the Comments by the Los Angeles Public Defenders and California Public Defenders Association regarding Penal Code section 1018 and tracks similar language used in Rule 1.11. See also revision to Comment [1], below.

counsel.")[2] A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's substantial rights or the client's claim itself. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].) Accordingly, the decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule ~~[~~1.4(c)~~]~~ for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation, provided the lawyer does not violate Business and Professions Code section 6068(e) or Rule 1.6.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

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[2] See footnote 1, above.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation.[3] See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6. See also California Rules of Court, Rules 3.35 -3.37 (limited scope rules applicable in civil matters generally), and 5.70 -5.71 (limited scope rules applicable in family law matters).

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[3] In response to the public comment by OCTC regarding *Janik v. Rudy, Exelrod, & Zieff* (2004) 119 Cal. App. 4th 930, 940.

Note/Drafters' Recommendation: At the 8/28-29/09 meeting, the RRC voted 8-4-0 to delete a proposed last sentence that included a citation to Nichols v. Keller. See 8/28-29/09 KEM Meeting Notes, III.I., at ¶. 6A. The proposed sentence had provided:

In addition, even when the client and lawyer have agreed to limit the scope of representation, the lawyer may be obligated to apprise the client of other claims or remedies that are not within the scope of representation. See *Nichols v. Keller* (1993) 15 Cal.App.4th 1672.

In light of OCTC's comment, the Drafters recommend including the substance of the deleted sentence but without a specific citation.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud or to violate any rule, law, or ruling of a tribunal. However, this Rule does not prohibit a lawyer from giving a good faith opinion about the foreseeable consequences of a client's proposed conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] The prohibition in paragraph (d)(1) applies whether or not the client's conduct has already begun and is continuing. For example, a lawyer may not draft or deliver documents that the lawyer knows are fraudulent; nor may the lawyer counsel how the wrongdoing might be concealed. The lawyer may not continue assisting a client in conduct that the lawyer originally believed was legally proper but later discovers is criminal, fraudulent, or the violation of any rule, law, or ruling of a tribunal. In any event, the lawyer shall not violate his or her duty of protecting all confidential information as provided in Business & Professions Code section 6068(e)(1). When a lawyer has been retained with respect to client conduct described in paragraph (d)(1), the lawyer shall limit his or her actions to those that appear to the lawyer to be in the best lawful interest of the client, including counseling the client about possible corrective or remedial action. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.

[11] Paragraph (d)(2) authorizes a lawyer to counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule or ruling of a tribunal. Determining the validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal, or of the meaning placed upon it by governmental authorities. Paragraph (d)(2) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes to be unjust.

[12] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by these Rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See ~~[~~Rule 1.4(a)(6)~~]~~.

Proposed Rule 1.2 [n/a]
"Scope of Representation and Allocation Of Authority Between Client and Lawyer"

(**Draft #4.3, 1/11/10**)

Summary: This rule states a requirement that a lawyer abide by a client's decisions concerning the objective of the representation and that a lawyer obtain client consent to any limited scope representation. It also provides that a lawyer's representation does not constitute an endorsement of the client's views or activities and prohibits a lawyer from counseling or assisting a client's criminal or fraudulent conduct.

Comparison with ABA Counterpart

Rule	Comment
☑ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☑ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☑ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rule	Rules 3.36 – 3.37 and 5.70 – 5.71 of the California Rules of Court
Statute	Bus. & Prof. Code § 6104
Case law	*Blanton v. Womancare Inc.* (1985) 38 Cal.App.3d 396

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☐

Favor Rule as Recommended for Adoption _____
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 on Model Rule Comparison Chart: ☑ Yes ☐ No
(See Introduction and Explanation of Changes for paragraph (a) in the Model Rule comparison chart.)

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☑ Moderately Controversial – Explanation:

See the Introduction and Explanation of Changes for paragraph (a) of the proposed Rule in the Model Rule comparison chart.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.2* Scope Of Representation And Allocation Of Authority Between Client And Lawyer

January ~~September~~ 2010~~9~~
(Draft rule to be considered for public comment)

INTRODUCTION:

Proposed Rule 1.2 largely tracks Model Rule 1.2. The only difference between the black letter of the Model Rule and the proposed Rule is found in paragraph (d), which has been divided into two subparagraphs for clarity, with subparagraph (d)(1) stating the general prohibition and subparagraph (d)(2) clarifying what a lawyer is permitted to do in providing counsel to the client.

The comments for paragraphs (a) through (c) (Comments [1]-[8]) closely follow the Model Rule comments, with citations to seminal California authority added. In particular, a reference has been added in Comment [1] to California Penal Code section 1018, Comment [8] to California Rules of Court, Rules 3.35-3.37 (limited scope representation rules applicable in civil matters generally), and 5.70-5.71 (limited scope representation rules applicable in family law matters), implemented to promote access to justice. Comment [7] advises lawyers that they may still have a duty to alert the client to reasonably apparent legal problems outside the limited scope. The comments accompanying paragraph (d) (Comments [9]-[12]), which were prepared in conjunction with the Commission's consideration of proposed Rule 1.13 ("Organization as Client") have been substantially revised to provide better guidance to lawyers in providing counsel to clients.

Minority. A minority of the Commission objects on the ground that the Rule is not suitable as a disciplinary rule. See Explanation of Changes for paragraph (a).

Variation in Other Jurisdictions. Most jurisdictions have made minor changes to Model Rule 1.2. At least four states (Maine, Missouri, New Hampshire, and Wyoming) have enhanced MR 1.2(c), limiting the scope of representation, to encourage lawyers to provide such services, thereby promoting the access to justice. See "Selected State Variations," Model Rule 1.2, from Gillers, Simon & Perlman, REGULATION OF LAWYERS: STATUTES AND STANDARDS (2009), attached.

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* Proposed Rule 1.2, Draft 4.3 (1/11/10).

ABA Model Rule **Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer**	**Commission's Proposed Rule*** **Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer**	**Explanation of Changes to the ABA Model Rule**
(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.	(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. ~~In~~ Except as otherwise expressly provided by law, in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered~~,~~. The lawyer shall abide by the client's decision whether to waive jury trial and, in a criminal case, whether the client will testify.	Paragraph (a) includes modest clarifying additions to Model Rule 1.2(a) that reflect the views of the Commission and respond to recommendations in the Public Comment. Minority. A minority of the Commission objects to the Rule on the ground that, although it might be appropriate as a statement of hortatory principles, it is wrong as a disciplinary rule and will conflict with lawyers' duties to their clients, both constitutional and statutory. The minority identifies a fundamental problem in that there is no clear distinction between the "objectives" and the "means" of representation. For example, in a criminal case, the accused has a constitutional right to have the complaining witness cross-examined. If we characterize the decision about whether to cross-examine that witness as "means" and therefore within the dominion of the lawyer, we deprive the accused of a fundamental Constitutional right. Denial of cross-examination of a witness without a waiver by the client is ". . . a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart v. Janis*, 384 U.S. 1, 3 (1966). A rule of professional conduct should not deprive a client of a Constitutional right. The majority notes that the rule does not countenance such conduct by the lawyer. As explained in Comment [1], decisions concerning a client's "substantial rights" are within the province of the client. The rule does not require a lawyer to ignore the client's interests in making decisions about how to conduct a case; rather, it emphasizes that the lawyer must be sensitive to the client's rights and interests.

* Proposed Rule 1.2, Draft 4.3 (01/11/10). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer	Commission's Proposed Rule* Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer	Explanation of Changes to the ABA Model Rule
		The minority also suggests that, even if there were a valid distinction between "objectives" and "means," as to many "means," the client should be able to instruct the lawyer. Again, the rule provides for exactly that outcome. See Comment [1]. Finally, the minority observes that, in some cases, a lawyer must be able to disagree with a client's decisions concerning the objectives of the representation and to refuse to "abide by" the client's decision as to a plea in a criminal case. The minority notes that if a lawyer believes there is a valid defense in a death penalty case, the lawyer is required to exercise independent judgment about whether to oppose the client's plea and to advocate against conviction or the death penalty. Penal Code section 1018, which states in part: "No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel." See, e.g., People v. Massie, 40 Cal. 3d 620 (1985); People v. Alfaro (2007) 41 Cal.4th 1277, cert. denied 128 S.Ct. 1476, 170 L.Ed.2d 300. The minority concludes that, if the Supreme Court approves Rule 1.2, so a lawyer who does not comply with a client's decision regarding a plea in a criminal case faces discipline, then the validity of Penal Code section 1018 is jeopardized.
(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.	(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.	Paragraph (b) is identical to Model Rule 1.2(b).

ABA Model Rule Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer	Commission's Proposed Rule* Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer	Explanation of Changes to the ABA Model Rule
(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.	(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.	Paragraph (c) is identical to Model Rule 1.2(c).
(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.	(d) (1) A lawyer shall not counsel a client to engage, or assist a client~~,~~ in conduct that the lawyer knows is criminal~~ or~~ , fraudulent, ~~but~~or a violation of any law, rule, or ruling of a tribunal. (2) (2) Notwithstanding paragraph (d)(1), a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of ~~the law~~a law, rule, or ruling of a tribunal.	Paragraph (d) is based on Model Rule 1.2(d), retaining both its substance and language. The single Model Rule paragraph has been split into two subparagraphs for clarity: subparagraph (d)(1) sets forth the general prohibition and subparagraph (d)(2) clarifies what the lawyer is permitted to do. In addition, the phrase "violation of any law, rule or ruling of a tribunal" is added to the scope of the rule for greater protection of the public and the fair administration of justice.

ABA Model Rule Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer Comment	Commission's Proposed Rule Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer Comment	Explanation of Changes to the ABA Model Rule
Allocation of Authority between Client and Lawyer [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.	**Allocation of Authority between Client and Lawyer** [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations (See e.g. Penal Code section 1018 ("No plea of guilty of a felony for which the maximum punishment is death or life without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel"). A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's substantial rights or the client's claim itself. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].) Accordingly, the ~~The~~ decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(~~a~~c)~~(1)~~ for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation, provided the lawyer does not violate Business and Professions Code section 6068(e) or Rule 1.6.	Comment [1] is based on Model Rule 1.2, cmt. [1] but makes five changes to conform the comment to California law. First, it adds language and a citation to well-settled California authority concerning the allocation of authority between lawyer and client. Second, it includes a reference to Penal Code section 1018. Third, it includes a reference to the *Blanton* case, a California Supreme Court opinion addressing the allocation of authority between lawyer and client. Fourth, it substitutes a cross-reference to proposed Rule 1.4(c), which expressly sets forth a lawyer's communication duties concerning settlement offers. Rule 1.4(c) carries forward current rule 3-510, which itself conforms to legislative policy in Bus. & Prof. Code § 6103.5. Finally, Comment [1] clarifies that acting with the client's implied authority does not include implied authority to disclose client confidential information protected by Bus. & Prof. Code section 6068(e) or rule 1.6 of these rules. By clarifying that implied authorization does not include implied disclosure of confidential information, this provides greater protection to consumers of legal services and conforms the rule to current California law and proposed Rule 1.6.

ABA Model Rule Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer Comment	Commission's Proposed Rule Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer Comment	Explanation of Changes to the ABA Model Rule
[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).	[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)~~(4).~~ Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).	Comment [2] is identical to Model Rule 1.2, cmt. [2], except that the specific reference to Model Rule 1.16(b)(4) has been deleted because the Commission recommends not adopting that subparagraph. Model Rule 1.16(b)(4) permits a lawyer to withdraw from representing a client if: "(4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the employment effectively." The Commission's recommended drafting of Rule 1.16 increases client protection by narrowing a lawyer's right to withdraw from a representation. Consequently, the Comment now generally points the lawyer to proposed Rule 1.16(b), which governs permissive withdrawal from the representation.

ABA Model Rule Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer Comment	Commission's Proposed Rule Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer Comment	Explanation of Changes to the ABA Model Rule
[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.	[3] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.	Comment [3] is identical to MR 1.2, cmt. [3], except that it clarifies that a client may authorize the lawyer to take specific action at any time during the representation.
[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.	[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.	Comment [4] is identical to MR 1.2, cmt. [3].
Independence from Client's Views or Activities [5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.	**Independence from Client's Views or Activities** [5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.	Comment [5] is identical to MR 1.2, cmt. [5]. It is consistent with legislative policy in Bus. & Prof. Code § 6068(h), which provides it is the duty of a lawyer: "(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed."

ABA Model Rule Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer Comment	Commission's Proposed Rule Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer Comment	Explanation of Changes to the ABA Model Rule
Agreements Limiting Scope of Representation [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.	**Agreements Limiting Scope of Representation** [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as ~~repugnant or~~ imprudent.	Comment [6] is nearly identical to Model Rule 1.2, cmt. [6], the only change being the deletion of "repugnant," a term found in Model Rule 1.16(b)(4), a provision the Commission recommends not adopting. See Explanation of Changes, Comment [2], above.
[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement	[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement	Comment [7] is identical to Model Rule 1.2, cmt. [7].

ABA Model Rule Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer Comment	Commission's Proposed Rule Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer Comment	Explanation of Changes to the ABA Model Rule
for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.	for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation. See Rule 1.1.	
[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.	[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6. See also California Rules of Court, Rules 3.35-3.37 (limited scope rules applicable in civil matters generally), and 5.70-5.71 (limited scope rules applicable in family law matters).	Comment [8] is based on Model Rule 1.2, cmt. [8] and is identical, except that references to the California Rules of Court on limited scope representation have been added to apprise lawyers of these important provisions for access to justice.
Criminal, Fraudulent and Prohibited Transactions [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the	**Criminal, Fraudulent and Prohibited Transactions** [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud~~. This prohibition~~ or to violate any rule, ~~however~~law, or ruling of a tribunal. However, this Rule does not ~~preclude the~~prohibit a lawyer from giving ~~an honest~~a good faith opinion about the ~~actual~~foreseeable consequences ~~that appear likely to result from~~of a client's proposed conduct. Nor	Comment [9] is based on Model Rule 1.2, cmt. [9], but adds language primarily to conform to and explain the added scope of proposed paragraph (d). Sentence 1 adds the language of the expanded scope of proposed paragraph (d) by adding "or to violate any rule, law or ruling of a tribunal."

ABA Model Rule Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer Comment	Commission's Proposed Rule Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer Comment	Explanation of Changes to the ABA Model Rule
course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.	does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.	Sentence 2 substitutes "prohibit" for "preclude" to clarify that the prohibition is mandatory. It substitutes "good faith" for "honest" to change from the subjective standard to an objective standard. The words "forseeable consequences of a client's proposed conduct" have been substituted for "actual consequences that appear likely to result from a client's conduct" for the sake of clarification, brevity and to create an objective rather than subjective standard.
[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.	[10] ~~When~~ The prohibition in paragraph (d)(1) *applies whether or not* the client's ~~course of action~~conduct has already begun and is continuing~~, the lawyer's responsibility is especially delicate~~. ~~The lawyer is required to avoid assisting the client, for~~ For example, ~~by drafting~~a lawyer may not draft or ~~delivering~~deliver documents that the lawyer knows are fraudulent~~ or by suggesting~~; nor may the lawyer counsel how the wrongdoing might be concealed. ~~A~~ The lawyer may not continue assisting a client in conduct that the lawyer originally ~~supposed~~believed was legally proper but ~~then~~later discovers is criminal ~~or~~, fraudulent~~. The lawyer must~~, ~~therefore, withdraw from~~or the ~~representation~~violation of any rule, law, or ruling of a tribunal. In any event, the lawyer shall not violate his or her duty of protecting all confidential information as provided in Business & Professions Code section 6068(e)(1). When a lawyer has been retained with respect to client conduct described in paragraph (d)(1), the lawyer shall limit his or her actions to those that appear to the lawyer to be in the best lawful interest of the client~~ in~~, including	Although the concepts contained in Model Rule 1.2, cmt. [10] have been retained, the comment has been redrafted to remove ambiguity and to create a brighter line for lawyer guidance and public protection. Sentence 1 of the Model Rule comment has been stricken because it provides no guidance (i.e., telling a lawyer that a situation is delicate provides no guidance concerning conduct). Substituted sentence 1 provides guidance by clarifying that a lawyer must comply with subparagraph (d)(1) regardless of the temporal status of the client's conduct. Sentence 2 strikes language creating ambiguity and clarifies that a lawyer may not engage in the conduct described. Sentence 3 substitutes "believed" for "supposed" and "later" for "then" to removed ambiguity and to conform with the proposed black letter rule. Sentence 4 has been added to conform the Comment to statutory duties of confidentiality.

ABA Model Rule Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer Comment	Commission's Proposed Rule Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer Comment	Explanation of Changes to the ABA Model Rule
	counseling the ~~matter. See Rule 1.16(a)~~client about possible corrective or remedial action. In some cases, ~~withdrawal alone might be insufficient. It may be necessary for~~ the ~~lawyer~~lawyer's response is limited to ~~give notice of~~ the ~~fact of withdrawal~~lawyer's right and, where appropriate, duty to ~~disaffirm any opinion, document, affirmation~~resign or ~~the like. See~~withdraw in accordance with Rule ~~4.1~~1.16.	Sentence 5 has been added to clarify that the lawyer's duties are consistent with California law. Sentence 6 retains the Model Rule Comment concept of withdrawal but clarifies that the option may be mandatory or permissive, depending upon the circumstances. The last sentence of the Model Rule Comment concerning disaffirmation of "any opinion, doclument, affirmation or the like," has been deleted to conform to California policies of confidentiality, which do not permit "noisy" withdrawals.
[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.	~~[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.~~	Model Rule 1.2, cmt. [11] has been stricken because it is ambiguous and may imply a relationship with beneficiaries that is not consistent with California law. For example, a lawyer representing a trustee generally has no duties or special obligations to the beneficiaries of a trust. [citation]
[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental	[~~12~~11] Paragraph (d) ~~*applies whether or not* the defrauded party is a party to the transaction. Hence,~~(2) authorizes a lawyer ~~must not participate in a transaction~~ to ~~effectuate criminal~~counsel or ~~fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking~~assist a ~~criminal defense incident~~client to make a ~~general retainer for legal services~~good faith effort to ~~a lawful enterprise. The last clause of paragraph (d) recognizes that determining~~determine the validity, scope, meaning or ~~interpretation~~application of a ~~statute~~law, rule or ~~regulation~~ruling of a tribunal. Determining the	Although Comment [11] retains the concepts contained in Model Rule 1.2, cmt. [12], the Model Rule comment has been substantially revised to provide better guidance to lawyers, and thus better protection to client's, concerning the scope of sub paragraph (d)(2)'s permitted conduct. In particular, in the last two sentences the revised comment expands on the last clause of subparagraph (d)(2), providing guidance to lawyers whose clients intend to engage in civil disobedience.

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authorities.	validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the ~~statute~~law, rule, or ~~regulation~~ruling of a tribunal, or of the ~~interpretation~~meaning placed upon it by governmental authorities. Paragraph (d)(2) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes to be unjust.	
[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).	[~~13~~12] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by ~~the~~these Rules ~~of Professional Conduct~~ or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See [Rule 1.4(a)(~~5~~6)].	Comment [12] is based on Model Rule 1.2, cmt. [13]. The only changes are to conform to California rules style and and to correct a cross-reference.

Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer

(Commission's Proposed Rule – Clean Version)

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise expressly provided by law, in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered. The lawyer shall abide by the client's decision whether to waive jury trial and, in a criminal case, whether the client will testify.[1]

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) (1) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.

(2) Notwithstanding paragraph (d)(1), a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule, or ruling of a tribunal.

[1] This change reflects the Comments by the Los Angeles Public Defenders and California Public Defenders Association regarding Penal Code section 1018 and tracks similar language used in Rule 1.11. See also revision to Comment [1], below.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g. Penal Code section 1018 ("No plea of guilty of a felony for which the maximum punishment is death or life without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel.")[2] A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's substantial rights or the client's claim itself. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].) Accordingly, the decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(c) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation, provided the lawyer does not violate Business and Professions Code section 6068(e) or Rule 1.6.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the

[2] See footnote 1, above.

representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation.[3] See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6. See also California Rules of Court, Rules 3.35 - 3.37 (limited scope rules applicable in civil matters generally), and 5.70 - 5.71 (limited scope rules applicable in family law matters).

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud or to violate any rule, law, or ruling of a tribunal. However, this Rule does not prohibit a lawyer from giving a good faith opinion about the foreseeable consequences of a client's proposed conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] The prohibition in paragraph (d)(1) applies whether or not the client's conduct has already begun and is continuing. For example, a lawyer may not draft or deliver documents that the lawyer knows are fraudulent; nor may the lawyer counsel how the wrongdoing might be concealed. The lawyer may not continue assisting a client in conduct that the lawyer originally believed was legally proper but later discovers is criminal, fraudulent, or the violation of any rule, law, or ruling of a tribunal. In any event, the lawyer shall not violate his or her duty of protecting all

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[3] In response to the public comment by OCTC regarding *Janik v. Rudy, Exelrod, & Zieff* (2004) 119 Cal. App. 4th 930, 940.

Note/Drafters' Recommendation: At the 8/28-29/09 meeting, the RRC voted 8-4-0 to delete a proposed last sentence that included a citation to Nichols v. Keller. See 8/28-29/09 KEM Meeting Notes, III.I., at ¶. 6A. The proposed sentence had provided:

> In addition, even when the client and lawyer have agreed to limit the scope of representation, the lawyer may be obligated to apprise the client of other claims or remedies that are not within the scope of representation. See *Nichols v. Keller* (1993) 15 Cal.App.4th 1672.

In light of OCTC's comment, the Drafters recommend including the substance of the deleted sentence but without a specific citation.

confidential information as provided in Business & Professions Code section 6068(e)(1). When a lawyer has been retained with respect to client conduct described in paragraph (d)(1), the lawyer shall limit his or her actions to those that appear to the lawyer to be in the best lawful interest of the client, including counseling the client about possible corrective or remedial action. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.

[11] Paragraph (d)(2) authorizes a lawyer to counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule or ruling of a tribunal. Determining the validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal, or of the meaning placed upon it by governmental authorities. Paragraph (d)(2) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes to be unjust.

[12] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by these Rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(6).

Rule 1.2 – Public Comment – File List

E-2009-291a LA Public Defender[1.2]

E-2009-292a OCBA [1.2]

E-2009-293a State Bar OCTC [1.2]

E-2009-310g COPRAC [1.2]

E-2009-350a CPDA [1.2]

E-2009-351a SDCBA [1.2]

E-2009-358a Santa Clara County Bar [1.2]

E-2009-368a CACJ [1.2]

E-2009-370a LACBA [1.2]

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MICHAEL P. JUDGE
PUBLIC DEFENDER

EXECUTIVE OFFICE

November 3, 2009

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

Re: **Proposed Ethical Rules (Rule 1.2 and 1.6)**

Dear Ms. Hollins,

We write to express our position to the proposed Rules:

Rule 1.2

Rule 1.2 governs the "Scope Of Representation And Allocation Of Authority Between Client And Lawyer." The rule requires that a lawyer abide by a client's decisions concerning the "objective" of the representation, and consult with the client about the "means" by which the objectives are to be pursued.

The proposed rule is opposed, according to the Discussion Draft provided by the Commission, by a minority of the Commission. We agree with the concern of the minority regarding the intersection of the proposed rule and the provisions of Penal Code section 1018. That concern is set forth in the Discussion Draft and reprinted below:

> [T]he minority observes that, in some cases, a lawyer must be able to disagree with a client's decisions concerning the objectives of the representation and to refuse to "abide by" the client's decision as to a plea in a criminal case. The minority notes that if a lawyer believes there is a valid defense in a death penalty case, the lawyer is required to exercise independent judgment about whether to oppose the client's plea and to advocate against conviction or the death penalty. Penal Code section 1018, states in part: "No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received

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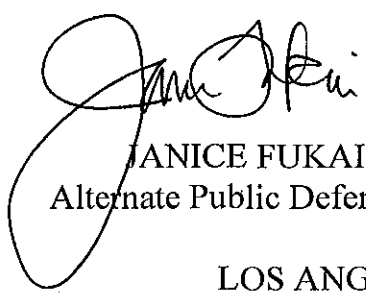
without the consent of the defendant's counsel." (See, e.g., *People v. Massie* (1985) 40 Cal.3d 620; *People v. Alfaro* (2007) 41 Cal.4th 1277, cert. denied 128 S.Ct. 1476, 170 L.Ed.2d 300.) The minority concludes that, if the Supreme Court approves Rule 1.2, so a lawyer who does not comply with a client's decision regarding a plea in a criminal case faces discipline, then the validity of Penal Code section 1018 is jeopardized.

~~**Rules 1.6**~~

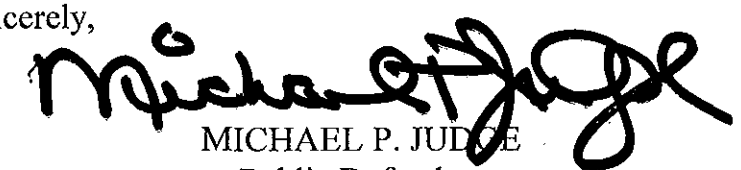
~~Rule 1.6 is mostly in accord with the protection afforded in present rule 3-100. However, we object to limiting "confidential information" to "relating to the representation" in 1.6(a). The present protection afforded in Business and Professions Code section 6068(e)(1) is "to maintain inviolate the confidence, and at every peril to himself or herself to preserve, the secrets of his or her client." This protection should not be narrowed simply because the exception, which allows but does not require disclosure to prevent a criminal act likely to result in death or substantial bodily harm, in 6068(e)(1) contains the narrower definition of "relating to the representation." The narrower definition in the exception permitting disclosure obviously is an effort to restrict the ambit of information communicated even in the face of a threat of death.~~

~~A second objection is to proposed rule 1.6(b) (4), which would allow a lawyer to reveal confidential information "to comply with a court order." Under *People v. Kor* (1954) 129 Cal.App.2d 436, the lawyer is required to resist the court order to disclose, even upon pain of contempt. Thus section (4) should be stricken, as should the part of section 1.6(d) allowing the lawyer to comply with a court order (to disclose confidential information).~~

Sincerely,



JANICE FUKAI
Alternate Public Defender



MICHAEL P. JUDGE
Public Defender

LOS ANGELES COUNTY, CALIFORNIA

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, November 06, 2009 2:53 PM
To: Hollins, Audrey
Cc: 'Garner, Scott'; 'Shawn M Harpen'
Subject: Orange County Bar Comments Re Proposed Rules of Professional Conduct
Attachments: OCBA Comments to Commission Nov 2009.pdf

Dear Ms. Hollins:

Attached are comments being sent on behalf of the Orange County Bar Association regarding ten (10) of the eleven (11) proposed new or amended Rules of Professional Conduct of the State Bar of California as developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We appreciate the work of the Commission and the opportunity to provide these comments, which are attached in PDF format.

- Proposed Rule 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer
- Proposed Rule 1.6 – Confidentiality of Information
- Proposed Rule 1.8.2 – Use of Current Client's Information Relating to the Representation
- Proposed Rule 1.8.13 – Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9, and 1.8.12
- Proposed Rule 1.9 – Duties to Former Clients
- Proposed Rule 1.10 – Imputation of Conflicts – General Rule
- Proposed Rule 1.14 – Client with Diminished Capacity
- Proposed Rule 2.1 – Advisor
- Proposed Rule 3.8 – Special Responsibilities of a Prosecutor
- Proposed Rule 8.5 – Disciplinary Authority; Choice of Law

Please let me know if you require any additional information or if you prefer that these comments are provided in a different format.

Trudy C. Levindofske, CAE
Executive Director
Orange County Bar Association
Orange County Bar Association Charitable Fund
(949)440-6700, ext. 213

MEMORANDUM

Date: October 16, 2009

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 1.2 – Scope of Representation and Allocation of Authority between Client and Lawyer**

Founded over 100 years ago, the Orange County Bar Association has over 7000 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 law 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 opposes the Commission's proposed Rule 1.2 and supports the adoption of ABA Model Rule 1.2. The Commission proposes changing paragraph (d)(1) of the Model Rule by adding "or a violation of any law, rule, or ruling of a tribunal" after "fraudulent," and by adding "rule or ruling of a tribunal" at the end of paragraph (d)(2) after "law." The OCBA believes that the additional language proposed by the Commission may introduce a degree of ambiguity into the Rule, and may make it overbroad and difficult to enforce, inasmuch as the added language could be construed to encompass rules and rulings of tribunals having no jurisdiction over the particular cause at issue. Furthermore, the added language may be unnecessary, because the remedies of contempt and sanctions are available for violations of a tribunal's rules and rulings by those practitioners before that tribunal.

In addition, the OCBA recommends that Comment [5] be stricken in its entirety. Comment [5] purports to relate to paragraph (b) of the proposed Rule. Paragraph (b) states that a lawyer's representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities." The first sentence of Comment [5] states that legal representation should not be denied to people "who are unable to afford legal services." This statement is not germane to the language of paragraph (b), which has nothing to do with ability to pay for legal services. Moreover, this part of the Comment could be construed as creating an obligation to provide legal services with little or no compensation. The rest of the Comment merely restates paragraph (b), and is thus unnecessary.

THE STATE BAR OF CALIFORNIA

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November 4, 2009

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:

Thank you for the opportunity to submit the comments of the Office of the Chief Trial Counsel (OCTC) to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in September 2009. Here are OCTC's comments:

Rule 1.2 Scope of Representation and Allocation of Authority.

1. The Office of the Chief Trial Counsel (OCTC) is concerned that paragraphs (a) and (b) of proposed Rule 1.2, although in the Model Rules version, are not really rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. OCTC believes that the Rules of Professional Conduct should only address rules that are disciplinable. Otherwise, it can create confusion among the state's lawyers and make enforcement of the rules more difficult. Further, OCTC believes that the concepts in paragraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.

2. OCTC is concerned that, while paragraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. In *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521, an attorney raised the issue of limited scope representation as a defense to charges of incompetence and failing to perform. The court rejected that defense because it found that federal law did not permit limited scope representations in immigration cases and, therefore, the attorney could not defend the charges by asserting a limited scope representation. The court concluded that because the law prohibited limited scope representations the duty to fully and competently represent the client may not be modified by an agreement between the attorney and the client even if the parties expressly noted the limited scope of the representation. That may be what Comment 8 is trying to explain, but, it should be specifically in the rule, not just a comment.

3. OCTC also believes that the consent in paragraph (c) should be in writing. There already are rules requiring that fee agreements and consent to certain fee agreements be in writing. (E.g. Business & Professions Code sections 6147 and 6148 and current Rule 2-200 of the Rules of Professional Conduct.) OCTC recognizes that Business & Professions Code sections 6147 and 6148 are not considered by themselves a basis for discipline *(In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279-280), but unless the fee agreements are in writing they are voidable and under current rule 4-200 (proposed rule 1.5) a client must be fully informed of the terms of a fee agreement. Moreover, although California has not made Business & Professions Code sections 6147 and 6148 disciplinable offenses on their own, the Model rules and many other jurisdictions have made the lack of a written agreement disciplinable for contingent fees. (See e.g. Model Rule 1.5 (c); *Statewide Grievance Comm. v. Timbers* (Conn App. Ct. 2002) 796 A.2d 565.) Likewise, current rule 2-200 of the Rules of Professional Conduct has made it a disciplinable violation when the attorney does not obtain the client's written consent to the attorney sharing fees with another attorney. Further, making it in writing prevents future arguments between the attorney and client about the scope of the representation and impresses upon the client the importance of the limitation. A similar purpose was among the purposes noted by the Supreme Court in refusing to honor a fee agreement between attorneys without the informed written consent of the client, in violation of current rule 2-200. (See *Chambers v. Kay* (2002) 29 Cal.^{4th} 142.) Given that limited scope representation is the exception, it would be better policy and more enforceable to require that it be in writing.

4. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, paragraph (d), unlike current rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. While the Commission's Comments make clear that it intends to keep that defense, OCTC believes that it should be in the rule and not in a comment.

5. OCTC is also concerned with Comments 1 and 2's statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. The current law is that a lawyer must advise the client of significant developments and that the client has the authority over significant matters, such as settling a case. However, it has never been that the attorney must consult (or advise) on every step and action, just the significant ones. In fact, it is well established that as a general rule an attorney, not a client, controls the presentation of a case. (See e.g. *People v. Hamilton* (1989) 48 Cal.3d 1142, 1163; *People v. Mattison* (1959) 51 Cal.2d 777, 788.) Proposed rule 1.4 requires reasonable consultation, but the Comments to proposed rule 1.2 could be interpreted to change the law and suggest that every means or action by the lawyers requires this consultation. OCTC thinks these Comments need clarification so that only significant means should require consultation and specific communication; and that nothing is intended to change current law about who controls the presentation of cases.

6. OCTC believes that Comment 8 needs clarification to make clear that limited scope representations are not permitted unless allowed by law. OCTC suggests that the Comment reference *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct.

Rptr. 498, 520-521 for this proposition. OCTC is also concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See *Janik v. Rudy, Exelrod, & Ziefff* (2004) 119 Cal.App.4th 930, 940.)

Rule 1.6 Confidentiality of Information.

1. OCTC is concerned that this proposed rule might create confusion and enforcement problems since Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. For example, OCTC is concerned that paragraph (a) of proposed Rule 1.6 uses the term information but not the term confidences or secrets, which is used in Business & Professions Code section 6068(e)(1). If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).

2. OCTC is further concerned that paragraph (b)(1) does not address what happens if any further changes occur to Business & Professions Code section 6068(e). Even if the Supreme Court later changed paragraph (b)(1) to be consistent with any changes in section (e) the delay would be substantial before that occurred. Paragraph (b)(1) currently mirrors the language of Business & Professions Code section 6068(e)(2), but does not specifically refer to Business & Professions Code section 6068(e)(2). To prevent the problems that would occur if the Legislature changed Business & Professions Code section 6068(e)(2) OCTC suggests that, if California is to have a Rule of Professional Conduct to cover the same concerns as already addressed in Business & Professions Code section 6068(e), paragraph (b)(1) of proposed Rule 1.6 simply state that a lawyer may reveal confidential information as permitted under Business & Professions Code section 6068(e). This would prevent conflicting rules, avoid any confusion, and allow for enforcement of this important provision.

3. OCTC agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.

4. OCTC disagrees with the removal from paragraph (b)(4) of the term "other law" and agrees with the Model Rule drafters that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes. OCTC also believes that the term court order should be in this paragraph. Thus, OCTC agrees with the majority view regarding proposed paragraph (b)(4)'s use of the term court order because an attorney should not be disobeying a court order. Such disobedience violates

Business & Professions Code section 6103, brings disrespect to the court, and demeans the profession. It also mocks the court's authority and sends a message that juries may also disobey the judge's directives and ignore the law. (See *People v. Chong* (1999) 76 Cal.App.4th 232, 244.) The Supreme Court has stated that an attorney's disobedience of a court order is one of the most serious violations of professional duties. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) Thus, no rule should permit or encourage disobedience of a court order. There should not be an exception to obeying court orders for an attorney's claim of attorney-client confidences. The court, not the lawyer, should be the final decider of what must be disclosed. Further, this type of behavior is subject to serious abuse by attorneys who simply use this as an excuse to violate court orders and frustrate the proper administration of justice, no matter how frivolous their assertions. A court, not an attorney, should be the final arbiter of when an attorney can refuse to disclose matters. In fact, OCTC has recently experienced cases in the State Bar Court where attorneys attempted to disrupt, delay, and frustrate our proceedings by refusing to obey court orders to answer questions by making frivolous claims of attorney-client confidences. Thus, unless an attorney obtains an immediate stay or a writ is granted, he or she should not be allowed to disobey a court order. The minority view would in our opinion result in chaos in and disrespect to the court and the law.

5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).

6. OCTC has some concerns about paragraph (e). It appears paragraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed paragraph (e) is too broad. It covers all of proposed paragraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed paragraph (b)'s language is much broader than current rule 3-100(B). Proposed paragraph (e), as written, unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals have been completed. It seems to OCTC that this paragraph needs clarification and that it should be a violation to disobey a court order or law.

7. OCTC also has some concerns about the Comments. In general, OCTC thinks there are too many and that some are not necessary. Further, OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.

8. Comment 15 is overly narrow and seems to imply that the rule of limited disclosure when disclosing information applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that is contrary to established law. OCTC would strike the Comment or significantly modify it. Comment 19 could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does

not explain what it means by cooperation. What if OCTC subpoenas the client? Comment 21's last sentence could be interpreted as implying that an attorney can disobey a court order or law, even if not appealing it. As previously discussed, OCTC has concerns with that. Likewise, Comment 23 has the problem that it appears to allow a lawyer to disobey a court order or a law.

Rule 1.8.2 Use of Current Client's Information Relating to the Representation.

1. The Commission has asked for comments as to whether it should exclude the term relating to the representation and whether it should require written consent. As to relating to representation, OCTC would suggest that the rule not use that term because the lawyer may learn client secrets not related to the representation but as a result of the representation or otherwise and the lawyer's duty of loyalty would still suggest that the lawyer should not be able to use it. Further, it would undermine the relationships of attorneys and clients and inhibit candid communications between the client and the lawyer. OCTC also supports the idea of written consent as it prevents future disagreement and, as the Supreme Court noted on a difference subject in *Chambers v. Kay* (2002) 29 Cal.4th 142, it impresses upon the client the importance of the decision. Moreover, the State Bar believes that it assists in the enforcement of the rule.

Rule 1.9. Duties to Former Clients.

1. OCTC is concerned with paragraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. Thus, it would appear to be a significant change in the law. Moreover, while the term "materially adverse" is in the Model Rules version, the proposed paragraph does not state what that means and why the lawyer, not the client, should decide whether it is material. That should be left to the clients to decide, not the lawyers. Further, it creates uncertainty for the lawyers and makes it more difficult to prosecute for a violation. OCTC also agrees with the Minority of the Commission that paragraph (b) might narrow the duty of confidentiality because it refers to the confidentiality rules in the Rules of Professional Conduct but not Business & Professions Code section 6068(e). OCTC believes that the rule should reference Business & Professions Code section 6068(e) as well.

2. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit . . . or when the information has become generally known" in paragraph (c)(1). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by "information generally known." Business & Professions Code section 6068(e) has traditionally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. It opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not

"generally known."

3. Further, paragraph (c)(2) references the exception to current clients. Like paragraph (c)(1), paragraph (c)(2) has the issue of whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(1), paragraph (c)(2) does not include the language "or when the information is generally known." Although this proposed language is also in the Model Rules version, OCTC is not sure when paragraph (c)(1) applies or when paragraph(c)(2) applies. This needs more clarity.

4. OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states or implies that the substantial relationship test applies in disqualification cases, but "might not be necessary" in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney's former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: "Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.) " (Id at 747.)

   If there is to be a change in the law, it should be in the rule, not a comment. Further, OCTC disagrees with the analysis in Comment 5. Comment 5 states that the reason for this suggested difference is that in a disciplinary proceeding or in civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; and so the new client can learn of them even if not present. Further, nothing prevents the new client from being present or reading the pleadings or a transcript. The new client may also be a witness.

   Moreover, the courts have held that this conclusive presumption is a "rule of necessity." Thus, the presumption exists because it is not within the power of the client (or anybody else) to prove what is in the mind of the attorney. Nor should the attorney have to engage in a subtle evaluation of the extent to which the lawyer acquired relevant information and the actual use of that knowledge and information. (*See e.g. Global Van Lines Inc v. Superior Court* (1983) 144 Cal.App.3d 483, 489; *Western Continental Operating Co v. Natural Gas Co.* (1989) 212 Cal.App.3d 752, 759.) The Commission's Comment excluding the presumption in disciplinary and civil cases would force OCTC and the other party to try to prove what was provided to the attorney and what is in the attorney's mind. It would create numerous disputes as to what the client really told the lawyer. In fact, OCTC's experience is that the lawyers often claim that no confidences were disclosed, no matter how absurd that claim is. In fact, that is exactly what attorney Lane claimed in his State Bar matter. (See *In the Matter of Lane*, supra, 2 Cal. State Bar Ct. Rptr at 747.)

Further, the conflicts rule is intended to prevent the use of confidential information, not just its disclosure, and it is also intended to prevent the attorney from being put in the position of having to resolve conflicting obligations. Thus, the presumption is just as necessary in State Bar and civil cases as in disqualification motions.

Moreover, the presumption springs from the fact that all attorney-client communications are presumptively confidential and any communication between the lawyer and the client in the first representation must necessarily have been material to the ongoing matter in which the lawyer has switched sides. (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 328.) That is, it springs from the common sense notion that clients necessarily provide confidential information material to the lawyer's representation of the client. Thus, the duty of confidentiality complements the evidentiary presumption that communications from client to attorney during their professional relationship are confidential and involves public policy of paramount importance which is reflected in various statutes as well as the Rules of Professional Conduct. (See *In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. at 189-190; *In re Jordan* (1972) 7 Cal.3d 930, 940-941.)

In addition, while the primary purpose of the presumption is to protect client confidences, the presumption also exists to preserve the attorney's duty of loyalty to the client. (See *City National Bank v. Adam, supra,* Cal.App.4th at 328; *In re I Successor Corp* (Bkrtcy S.D.N.Y. 2005) 312 B.R. 640, 656.) Any concern about tangential matters being covered by this presumption is already addressed in the presumption. In recent years, there has arisen a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. (*City National Bank v. Adams, supra,* 96 Cal.App.4th at 327-328.) There is no reason to exclude the presumption in disciplinary cases since the basis for the disqualification is the same as the basis for attorney discipline: the need to maintain ethical standards of professional responsibility. (See *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145.)

Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the rule. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) While *Woods* addresses a disqualification motion, its point is equally applicable in discipline and civil cases. Without the conclusive presumption, OCTC would be forced to require the disclosure of the very information the rule was intended to protect.

5. Comment 6 also presents some concerns for OCTC. The Comment's statement is too narrow in defining "substantially related." It, again, does not reference Business & Professions Code section 6068(e). Yet, Comment 7, unlike Comment 6, references Business & Professions Code section 6068(e). The difference in these Comments could create some confusion and uncertainty. Comment 11 refers to paragraph (c). OCTC is

concerned that, like in the proposed paragraph (c) itself, what is meant by "generally known information" and this Comment appears not consistent with the established law that Business & Professions Code section 6068(e) is broader than the attorney-client privilege. Business & Professions Code section 6068(e) has generally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) This needs to be clarified and OCTC opposes any change to the requirement that Business & Professions Code section 6068(e) precludes an attorney from disclosing or using information provided by a client to the attorney that might be in the public record.

Rule 1.10 Imputation of Conflicts.

1. OCTC is concerned that paragraph (b) leaves out a reference to Business & Professions Code section 6068(e). Further, Comment 1 simply states that whether two or more lawyers constitute a firm depends on specific facts. OCTC is concerned that the proposed rule is not a rule subject to discipline and, further, that neither the rule nor Comment 1 provides guidance as to what constitutes a law firm. OCTC believes that either California follow the Model rules version or come up with a more definitive definition, or the Commission should strike the Comment completely. Current rule 1-110 defines a " '[l]aw [f]irm' " as "two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities." The Supreme Court discussed the definition of law firm, partnership, etc in *Chambers v. Kay* (2002) 29 Cal.4th 142, although not in a conflict context, and if there is a comment on the definition of law firm the Comment might reference that case and the Supreme Court's discussion of the meaning of the term "of counsel" in *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135.)

2. OCTC is not sure what the purpose of Comment 3 is. OCTC suggests either it be clarified or stricken. Comment 4 discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people. Comment 9 seems unnecessary and is confusing to OCTC. It needs more clarification or should be stricken.

Rule 1.14 Client with Diminished Capacity.

1. OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the other confidentiality rules. OCTC is concerned that paragraph (b) leaves too much discretion to an attorney's unqualified personal assessment of a client's abilities and using that unqualified assessment to permit the attorney to reveal a client's confidences. Further, it appears to be broadening what Business & Professions Code section 6068(e) allows.

2. Comment 1 is problematic as to when and how to utilize the rule. The problem here is when and who decides when a client is not capable of making decisions - - and how and to whom does the attorney reveal this. If the client is not capable of making the decisions, is the lawyer able to give advice, take direction, or do anything on the client's behalf as to the matter? Comment 3 attempts to address this, but in such broad terms that it is vague and leaves too much discretion to the attorney. It also states that the attorney

may in appropriate situations seek the advice of a diagnostician. While this may be appealing, the Comment creates its own exception to confidentiality not specifically in the rule. OCTC believes this is not appropriate for a Comment. It either should be stated specifically in the rule or not at all. Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counsel, a priest, or some other person? If this exception is to be permitted, it should be in the rule and more specific.

3. Comment 4 states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence and decision-making authority, including explaining to the client the need to take such action and requesting the client's permission to do so. However, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult.

4. Comments 5 and 6 states the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interests foremost. Again, the question is to what extent is this consistent with Business & Professions Code section 6068(e) and this Comment may make enforcement of the confidentiality rules much more difficult. Comment 7, which is different than the Model Rules Comment 7, explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline from almost any attorney who claims that he or she revealed the confidences because they believed it was appropriate under this rule. Thus, what safeguards exist for the client?

5. Comment 8 states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (current rule 3-310.) Thus, according to this comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?

Rule 2.1 Advisor.

1. OCTC is concerned that this is not an enforceable rule. OCTC does not believe the rules should have rules that are not enforceable.

Rule 3.8 Special Responsibilities of a Prosecutor.

1. OCTC is concerned that paragraph (a) of proposed Rule 3.8 does not explain what it means by recommending for prosecution. Does a prosecutor's advice to his or her supervisor to prosecute constitute a disciplinable offense? Does this apply when the investigation is not finished? Are we going to prosecute differences in opinion? What if the opinion is based on differences about what is admissible evidence?

2. OCTC is also concerned about paragraph (b)'s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the

procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel. This section fails to address that in most situations the police, not the prosecutor is involved in this. The police, at least in California, are usually independent of the criminal prosecutor. Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them? The same concern seems to apply to section (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.

3. Likewise, OCTC is concerned with paragraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6. While in principle laudable, this Comment seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position.

4. OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.

5. OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.

6. OCTC believes that if there are Comments to this rule, the Commission might consider having a Comment to advise prosecutors and former prosecutors and their partners of their duties under Business & Professions Code section 6131. This is an important but often forgotten provision affecting prosecutors and former prosecutors and their partners.

Rule 8.5 Disciplinary Authority: Choice of Law.

1. OCTC agrees with the policy behind this rule, but has concerns that the rule as written is in conflict with Business & Professions Code section 6049.1. Business & Professions Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is rule 8.5 changing Business & Professions Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.

Again, we thank you for the opportunity to present our views. If you have any questions, please feel free to contact us.

Very truly yours,

Russell G. Weiner
Interim Chief Trial Counsel

THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2161

November 9, 2009

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 1.2

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 1.2 and offers the following comments.

As to paragraph (a), COPRAC agrees with the minority of the Commission and believes that it is difficult to differentiate between means and objectives. COPRAC also agrees with the minority that the language of section (a) of the rule might be read to conflict with a client's Constitutional and statutory duties to the lawyer's clients. COPRAC also notes that the last sentence of paragraph (a) raises the issue whether the lawyer can waive a jury trial on behalf of a client in a civil case.

As to paragraph (d), COPRAC objects to the inclusion in paragraph (d)(1) of the proposed rule (modifying paragraph (d) of the corresponding ABA Model Rule) of the phrase referring to "a violation of any law, rule, or ruling of a tribunal." Although this phrase is used in current Rule of Professional Conduct 3-210, these terms are not defined in the rules, appear to be very broad, and go well beyond the prohibition in the Model Rule on counseling or assisting with respect to criminal or fraudulent conduct by the client. We understand that the rationale for the provision is "greater protection of the public and the fair administration of justice." COPRAC believes, however, that such language may subject lawyers to an inappropriate and unnecessarily harsh disciplinary standard, where no such protections are realized. As an example, where lawyers routinely "assist" clients by making regulatory filings on their behalf, where such filings might not be in full compliance with all applicable rules (perhaps the deviation was deemed immaterial by the client, or because two rules conflict in their application preventing full compliance with both). Absent fraud or criminal conduct, COPRAC does not believe such assistance should subject lawyers to possible discipline.

Should the above phrase be included in the rule, we recommend a modification to Comment [9] to conform the references to this phrase. The phrase including the added scope is included in the first sentence of Comment [9]. A corresponding reference to the added scope should be included in the second sentence of Comment [9].

In addition, COPRAC wants to express its approval of the guidance that the proposed rule provides concerning limited scope representation, which we view as important to facilitate access to justice. We also believe that it is important to have a California rule of professional conduct that addresses lawyers' participation in crimes and frauds, particularly in the post-Enron environment.

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: NOVEMBER 13, 2009

Your Information

Professional Affiliation CALIFORNIA PUBLIC DEFENDERS ASSOCIATION

Commenting on behalf of an organization
- (●) Yes
- ( ) No

*** Name** BARTON SHEELA

*** City** SAN DIEGO

*** State** California

*** Email address** (You will receive a copy of your comment submission.) BARTON.SHEELA@SDCOUNTY.CA.GOV

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

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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* Select the Proposed Rule that you would like to comment on from the drop down list.
Rule 1.2 Scope of Representation [N/A]

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.

PLEASE SEE ATTACHED LETTER

CPDA

A Statewide Association of Public Defenders and Criminal Defense Counsel

California Public Defenders Association
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Sacramento, CA 95827
Phone: (916) 362-1690 x 8
Fax: (916) 362-3346
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November 13, 2009

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

Re: Proposed Rule 1.2

Dear Ms. Hollins:

The California Public Defenders Association is concerned that language in Rule 1.2 creates the potential for harmful conflict with long-established practices regarding the responsibilities of counsel toward their clients and their clients' cases.

The California Public Defenders Association (CPDA) is the largest public defender organization in the nation with a membership of over 4,000 public defenders and private defense counsel. Our attorney members act as legal counsel for the vast majority of indigents accused of criminal conduct in California. Established in 1969, CPDA is the state-designated continuing legal education provider for all local public defender offices in California, and also represents the interests of CPDA's criminal defense attorney members in legislative sessions and on significant issues in the appellate courts.

CPDA concurs with the objections expressed by the Minority of the Commission, principally those concerns noting the absence of any clear distinction between 'objectives' and 'means' of representation. CPDA joins in the comments and concerns expressed by Michael P. Judge, Public Defender and Janice Fukai, Alternate Public Defender of Los Angeles County in their letter dated November 3, 2009.

CPDA's primary concern is with the Proposed Rule as developed in Proposed Comment [2].

While stating a broad summary of the functional operations of the attorney-client relationship, the Comment's language muddles the attorneys' ethical obligations when making the difficult decisions inherent in practice, particularly those made during the tumult of trial.

CPDA proposes that to avoid creating a potential conflict with established legal practice, the second and third sentence in Comment [2] should be deleted. (Proposed deletion: "Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.")

Attorneys are retained (or appointed by request) by clients because of their training, expertise and skill. The client rarely has as complete an understanding of the law or legal proceedings and the attorney owes it to the client and the integrity of the justice system to insure that erroneous assumptions brought to the case by the client, or that one narrow focus defined by the client, do not prevent complete investigation and assessment of all options on behalf of the client.

As noted in the Comment, the rich existing record of decisional law clearly defines the responsibility that lawyers have to know and practice legal obligations while respecting the client's goals.

To this end, CPDA believes that it would be helpful if the Comment included references to the most common guidelines provided by established case law.

For example, in assessing their role in representing a client, the criminal trial attorney must look to the Constitutional mandates, especially case law interpreting the Sixth Amendment right to effective assistance of counsel. "[L]aw and tradition ...allocate to the counsel the power to make binding decisions of trial strategy in many areas." (*Faretta v. California* (1975) 422 U.S. 806, 820.)

Court decisions defining the attorney's strategic responsibilities stem from a recognition that the attorney's education and expertise place trial counsel in the best position to make those intelligent decisions necessary to meet the client's objective: to prevail at trial. Thus, *In re Horton* (1991) 54 Cal.2d 82 at 94-95, observed: 'In the civil context, the attorney has the authority to enter into stipulations binding on the client in all mattes of procedure, though he or she
November 13, 2009
may not stipulate in a manner to "impair the client's substantial rights or the cause of action itself"....In the criminal context, too, counsel is captain of the ship. As we said recently: "When the accused exercises his constitutional right to representation by professional counsel, it is counsel, not defendant, who is in charge of the case. By choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to *counsel's* complete control of defense strategies and tactics.".' (Citing *People v. Hamilton* (1989) 48 Cal.3d 1142, at p. 1163 and *Townsend v. Superior Court* (1975) 15 Cal.3d 774, 781.)

Thus, trial counsel's ability to control trial strategy has been recognized to include a variety of specific strategic decisions, including selection of witnesses, (*People v. Williams* (1970) 2 Cal.3d. 894, 9030906); requests for continuances, (*Townsend v. Superior Court* (1975) 15 Cal.3d 774, 780); choice of a defense where more then one defense is available, (*People v. Carlyon* (1961) 191 Cal.App.2d 617, 822); whether certain evidence should be introduced, (*People v. Murphy* (1972) 8 Cal.3d 349, 366-67); whether an objection should be made, (*People v. Lanphear* (1980) 26 Cal.3d 814, 828); and whether a trial judge should be challenged, (*People v. Jackson* (1960) 186 Cal.App.2d 307, 317-318). Trial counsel makes these decisions while respecting the client's concerns and goals, and those fundamental rights over which the client retains complete control: whether to plead guilty, (*Brookhart v. Janis* (1966) 384 U.S. 1, 7-8); whether to waive the right to trial by jury, (*People v. Holmes* (1960) 54 Cal.2d 442, 443-444); whether to waive the right to counsel, (*Faretta v. California* (1975) 422 U.S. 806, 834); and whether to waive the right to be free from self-incrimination, (*In re Tahl* (1969) 1 Cal.3d 122, 132).

CPDA believes that inclusion of these fundamental decisional references, along with deletion of the two sentences identified above, will clarify the existing ambiguities in the Proposed Rule and Comment.

Sincerely,

Bart Sheela
President,
California Public Defenders Association

SAN DIEGO COUNTY BAR ASSOCIATION

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November 11, 2009

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 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 5 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,

Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Subcommittee for Responses to Requests for Public Comment
Coversheet to Recommendations on State Bar of California Rules Revision Commission
Batch 5

Rule 1.2 Scope of Representation [N/A]
APPROVE

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]
APPROVE WITH MODIFICATIONS – see comments

Rule 1.8.2 Use of Confidential Information [3-100, 3-310]
APPROVE

Rule 1.8.13 Imputation of Personal Conflicts [N/A]
APPROVE

Rule 1.9 Duties to Former Clients [3-310]
APPROVE

Rule 1.10 Imputation of Conflicts: General Rule [N/A]
APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)

Rule 1.12 Former Judge, Arbitrator, Mediator [N/A]
APPROVE WITH MODIFICATIONS – see comments

Rule 1.14 Client with Diminished Capacity [N/A]
APPROVE

Rule 2.1 Advisor [N/A]
APPROVE

Rule 3.8 Responsibilities of a Prosecutor [5-110]
NO POSITION TAKEN – see comments

Rule 8.5 Choice of Law [1-100(D)] SIMMONS
APPROVE

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5
SDCBA Legal Ethics Committee Deadline October 8, 2009
Subcommittee Deadline October 26, 2009
State Bar Comment Deadline November 13, 2009

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: N/A

Proposed New Rule No./ Title: 1.2

QUESTIONS (please use separate sheets of paper as necessary):

(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 [X] 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 [X] 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 [X] 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 [X] No [ ]

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

CONCLUSIONS (pick one):

[X] 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.*

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: NOVEMBER 13, 2009

Your Information

Professional Affiliation Santa Clara County Bar Association

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** Jil Dalesandro

*** City** San Jose

*** State** California

***** Email address (You will receive a copy of your comment submission.) chrisb@sccba.com

---

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

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

***** Select the Proposed Rule that you would like to comment on from the drop down list.
Rule 1.2 Scope of Representation [N/A]

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.

Approve as proposed with the exception of subsection (c), where "informed consent" should be "informed written consent."

Add to Comment [8] language that would clarify that county counsel is governed by Government Code 999 et. seq. which gives them greater authority in limiting the scope of their representation in certain situations such as settlements. Specifically, the following is suggested: "A government lawyer's authority and control over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits imposed by paragraphs (a) and (c). See for example, Cal. Gov. Code Sections, 825; 995; 996. This language is the same as that used by the District of Columbia in modifying the ABA Model Rule version.

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: NOVEMBER 13, 2009

Your Information

Professional Affiliation California Attorneys for Criminal Justice (CACJ)

Commenting on behalf of an organization
- (●) Yes
- ( ) No

*** Name** Robert Sanger

*** City** Santa Ynez

*** State** California

*** Email address** (You will receive a copy of your comment submission.) rsanger@sangerswysen.com

---

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

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

---

* Select the Proposed Rule that you would like to comment on from the drop down list.
Rule 1.2 Scope of Representation [N/A]

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.

Proposed Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer:

Our proposed modification would be to add the following language to paragraph (a) at the end following sentence: A lawyer shall abide by a client's decision whether to settle a matter, "to the extent it is not in conflict with statutory or constitutional law."

LACBA

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November 12, 2009

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

Re: Comment Regarding Proposed Rule of Professional Conduct 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) has the following comments on Proposed Rule 1.2:

Opposition to Proposed Rule 1.2

PREC opposes Proposed Rule 1.2 in its entirety because the committee believes that it is not appropriate as a disciplinary rule.

Failure to follow the client's objectives [1.2(a)] may result in a malpractice action or fee dispute, but should not lead to discipline. The statement that a lawyer's representation of a client is not an endorsement of the client's views or activities [1.2(b)], is also true but has no place in a disciplinary rule. The scope of representation [1.2(c)] may be determined by agreement between the lawyer and client -- if a client does not believe that a proposed restriction on the scope of representation is reasonable, he or she does not have to retain the lawyer. Existing law deals with advising a violation of the law, rules, or rulings of a tribunal [1.2(d)]. (Bus. & Prof. Code, 6068, subds. (a), (b) & (c).)

Suggested Amendments to Proposed Rule 1.2

To the extent the rule is adopted, PREC suggests that Proposed Rule 1.2 be amended as follows:

1. **Paragraph (a)**

The last sentence of paragraph (a) should state:

> "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, ~~and~~ whether the client will testify, *and whether to file an appeal*."

When a criminal defendant desires to appeal, the lawyer must file a notice of appeal even if the lawyer believes there are no legitimate issues to appeal. In federal courts, a lawyer who believes there are no legitimate grounds for appeal is allowed to file a so-called "*Anders* brief" instead of an appellate brief. There is an analog in a state action.

2. Paragraph (d)

We suggest that ABA Model Rule 1.2(d) be adopted as is. Specifically, we suggest the following changes to Proposed Rule 1.2(d):

> (d) ~~(1)~~ A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal~~,~~ *or* fraudulent, ~~or a violation of any law, rule, or ruling of a tribunal~~.
> ~~(2) Notwithstanding paragraph (d),~~ *but* a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of *the* ~~a~~ law~~, rule, or ruling of a tribunal~~.

The additional language regarding the "violation of any law, rule, or ruling of a tribunal" makes Proposed Rule 1.2(d)(1) too broad and potentially ambiguous. For example, counseling a client that, in certain circumstances, it is okay to ignore a particular local rule of court would be a disciplinary offense. This goes too far. Limiting the prohibition to conduct "the lawyer knows is criminal or fraudulent" is sufficient. ABA Mode Rule 1.2(d) is clear and succinct, and is better for disciplinary proceedings.

Existing Rule 3-210 of the California Rules of Conduct states: "A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal."

Proposed Rule 1.2(d)(2) goes beyond the existing California rule prohibiting a lawyer from "advising" a client to violate a law, rule, or ruling – it expands the prohibition to "assisting" the client in a violation of a law, rule, or ruling. It makes sense to preclude a lawyer from assisting a client in committing a crime or fraud, but it does not make sense to prohibit a lawyer in all cases from assisting a client in violating a law or rule. Indeed, the client may have to violate the rule to have standing in court to challenge its application to the client. Proposed Rule 1.2(d)(2) recognizes this problem and would allow a lawyer to

provide assistance in making a good faith challenge to the law, rule, or ruling. Still, there may be situations were a local rule cannot be followed for practical purposes but there is no argument that the rule is invalid. For example, if a local rule requires filing a trial brief 10 days before trial but the lawyer is not able to file it until the 5th day before trial, is the lawyer subject to discipline for assisting the client in violating the local rule if the lawyer files the brief late without seeking leave of court?

The committee believes that the ABA standard is better for disciplinary purposes. We suggest that corresponding changes be made to Comments 9 and 11.

3. Comment 1

A statement should be added to Comment 1 regarding mandatory or permissive withdrawal. Comment 1 relates to Proposed Rule 1.2(a), which states in pertinent part:

> "Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation. . . ."

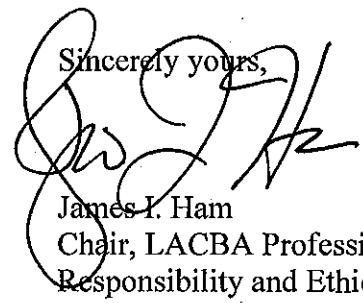
Some clients hire lawyers to pursue vengeful or unnecessary litigation. While these objectives may not be criminal, fraudulent, or unlawful, they are nevertheless improper and a lawyer should not be duty-bound to accept or continue in that representation. The committee is concerned that Proposed Rule 1.2(a) could be interpreted to impose discipline on a lawyer for failing to abide by a client's objectives, even where those objectives would give rise to either mandatory or permissive withdrawal by the lawyer.

The first sentence of Comment 1 states: "Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." We suggest that the following sentence be added: "Paragraph (a) does not override the rules concerning mandatory or permissive withdrawal."

Thank you for the opportunity to comment on this batch of proposed new and amended Rules of Professional Conduct.

We appreciate the opportunity to comment on the proposed rules.

Sincerely yours,



James I. Ham
Chair, LACBA Professional
Responsibility and Ethics Committee

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December 15, 2009 McCurdy E-mail to Drafters (Snyder, Peck, Tuft), cc Chair, Vice-Chairs & Staff:

Rule 1.2 Drafting Team (SNYDER, Peck, Tuft):

This message provides the assignment background materials for Rule 1.2 on the January agenda. **The assignment deadline is Monday, January 11, 2010.**

This message includes the following draft documents:

1. public comment compilation (full text of comment letters received)
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 (staff prepared template)
4. introduction (text of public comment version of the introduction – this should be updated if there are any recommended amendments to the rule)
5. Model Rule comparison chart (version of chart as issued for public comment)
6. clean rule text (public comment version – <u>use this clean version to make any changes to the rule</u>, 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. <u>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.</u>

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 - 3-210 [1-2] - Dashboard - PUBCOM - DFT1.1 (09-01-09)KEM.doc
RRC - 3-210 [1-2] - Compare - Introduction - DFT2.1 (09-03-09)KEM2.doc
RRC - 3-210 [1-2] - Compare - Rule & Comment Explanation - DFT2.1 (09-03-09)KEM2.doc
RRC - 3-210 [1-2] - Rule - DFT3 (09-01-09) - CLEAN-LAND.doc
RRC - 3-210 [1-2] - Public Comments Complete.pdf
RRC - 3-210 [1-2] - Public Comment Chart - By Commenter - DFT1 (12-15-09)AT.doc
RRC - 3-210 [1-2] - State Variations (2009).pdf

January 6, 2010 Snyder E-mail to Drafters, cc Chair & Staff:

Attached is a proposed revised Rule 1.2. I have read the materials and spoken with Kevin. Much of the public comment simply urges the RRC to adopt the minority view. Since the majority has voted, I cannot recommend this overwhelming revision.

However, there are a few things that may be adjusted.

1. In response to comments by Michael's Judge, the California Public Defenders Association and others, I have included a reference and revision consistent with Penal Code section 1018.

2. Several comments (including OCTC) suggest that written consent be required. Perhaps the RRC would like to revisit this but I have not included such a drastic revision in the absence of a vote by the RRC. Nevertheless, we may wish to flag it for reconsideration.

3. OCTC has raised the issue of the Valinotti case and would like us to state that "limited scope representations are not permitted unless allowed by law." However, I think this misstates the view of the Supreme Court's Presiding Justice Ronald George and the Judicial Council as I understand it. Limited scope is an Access to Justice issue and it is to be encouraged unless it is specifically prohibited - a fundamentally different approach to the issue. Accordingly, I do not recommend this shift in the limited scope section, and I doubt that it would be approved by the Supreme Court or the Board of Governors. However, I have included a reference to Janik v. Rudy, Exelrod, & Zieff (2004) 119 Cal App. 930, 940 recommended by OCTC since I think it provides guidance on the issue.

4. Some of the other comments seem to express general objections to the ABA language. LACBA objects to the rule in its entirety, or alternatively, proposes changes which have already been considered and the RRC has voted in this regard.

I look forward to any feedback that you can provide. I plan to get this out by the deadline on Monday.

My thanks, as always, to Kevin.

Attached:
RRC - 3-210 [1-2] - Rule - DFT4 (01-06-10)DS - CLEAN-LAND.doc

January 7, 2010 Peck E-mail to Drafters, Chair & Staff:

This is excellent. I join Dom in these recommendations and urge you to send it to the staff for processing.

January 8, 2010 KEM E-mail to Drafters, cc Chair & Staff:

I made several changes to the draft Dom circulated and attached revised draft 4.1 (1/8/10):

1. In paragraph (a), I've specified that the last sentence applies only in criminal cases.

2. Some formatting changes to the citation in Comment [1].

3. Substitute "lawyer" for "attorney" in Comment [7] and added to the footnote the fact that the RRC previously had voted not to include a citation to Nichols v. Keller but that the drafters are recommending inclusion of the concept of the deleted sentence in light of OCTC's comment.

4. I've also deleted the brackets around the x-references to Rule 1.4, as 1.4 has been adopted by the BOG.

Please let me know if you have any questions.

Attached:
RRC - 3-210 [1-2] - Rule - DFT4.1 (01-08-10)DS-KEM - CLEAN-LAND.doc

January 8, 2010 Peck E-mail to KEM, cc Drafters, Chair & Staff:

I like what you have done----but just have a quick question before I send out my approval.
I agree that in a criminal case, the lawyer must abide by the client's decision re putting the client on as a witness and that in a civil case, a lawyer can refuse to put the potentially perjuring client on the witness stand. *But in a civil case, isn't the client's decision for a jury trial a decision only the client can make???????

If so, should the words "in a criminal case" be moved, for example to read:

*The lawyer shall abide by the client's decision whether to waive jury trial and, in a criminal case, whether the client will testify.

If I am wrong, then let me know and I will approve your draft forthwith.
All the best, Ellen

January 8, 2010 KEM E-mail to Peck, cc Drafters, Chair & Staff:

I agree with your suggestion, see, e.g., Bird concurrence in Blanton, 38 Cal.3d 396, 411 (The right to trial by jury, in both civil and criminal matters, is "a basic and fundamental part of our system of jurisprudence." [citations omitted].) and have inserted it in the attached Draft 4.2 (1/8/10).

Attached:
RRC - 3-210 [1-2] - Rule - DFT4.2 (01-08-10)DS-KEM - CLEAN-LAND.doc

January 8, 2010 Difuntorum E-mail to Drafters, cc Staff:

Attached is a revised Rule/Comment Comparison Explanation Chart based on Draft 4.2 of Rule 1.2. I’ve highlighted two explanation cells that should be updated prior to the meeting, namely the cells opposite para. (a) and Cmt. [1]. Also attached for possible updating are the introduction and the response to public comment chart. (Note that the attached version of the response to public comment chart includes the OCTC comment that was not yet included in the version of the chart that was distributed with the original assignments.)

I recognize that there are some outstanding issues that need final decision by the full Commission but some of the changes that already have the full support of the drafting team probably should be implemented in the Introduction and the response to public comment chart. Often these types of changes are deemed approved by Harry prior to the meeting and Harry likes to see all the various documents in the agenda materials even when there are some open issues.

Attached:
RRC - 3-210 [1-2] - Compare - Introduction - DFT2.1 (09-03-09)KEM.doc
RRC - 3-210 [1-2] - Compare - Rule & Comment Explanation - DFT3.1 (01-08-10)-ML-KEM-RD.doc

January 8, 2010 Tuft E-mail to Drafters, cc Chair & Staff:

Unless we intend our comments to be restatement of the law on standard of care, reintroducing the concept in Comment [7] based on Janik and Nickols takes us far afield from the intended scope of rule 1.2.

January 8, 2010 Snyder E-mail to Tuft, cc Drafters, Chair & Staff:

I was delighted to hear from you. I understood you were gone until the 17th and would not be commenting.

We seem to have a philosophical difference. While I disagree with OCTC that this should form the basis of discipline (so I do not believe these concepts should be included in the rule), nevertheless, I think that the information provides lawyers with guidance. I do not intend nor am I recommending anything more expansive. I think Kevin has pointed out there has been an RRC vote on Nichols.

January 8, 2010 Peck E-mail to Tuft & Snyder, cc Chair & Staff:

I hope that you are well. I understand your point, Mark. However, I agree with Dom that the comment is helpful. I like the rule as redrafted by Kevin.

January 9, 2010 Snyder E-mail to Drafters, cc Chair & Staff:

I have revisted my thinking about whether to flag the "written" consent issue in light of the public comment - and I think it is unnecessary to call for another vote.

First, it was a unanimous vote by the Commission consistent with the Board resolution (according Toby when we voted on the issue).

Second, it does not appear to me that limited scope/discrete task representation is an "adverse" interest or "conflict" that rises to the level of requiring written consent. To some extent, all representations limit the scope and as Kevin mentioned to me yesterday - he engages in this by limiting his advice to "ethics" advice. On another practical note, I am concerned that such a requirement would operate as an impediment to access to justice. It places a burden on legal

services attorneys and attorneys who might be willing to undertake a discrete task for a small fee - but who are now overburdened with obtaining "written" consent as well. This could have a chilling effect. Why bother taking the matter at all if you are making so little money inthe first place? Do you do another writing every time the scope changes?

Lastly, I do not believe that public protection will be compromised as OCTC fears. Attorneys will have the burden of demonstrating that they have obtained "informed consent"- they may choose the obvious route of a writing - but it should not be discipline if they do not. Other jurisdictions have seen fit not to include such a requirement.

So, if you agree - I would indicate that we disagree with this public comment. It has been voted on and we have little time as it is. I think we can concentrate on other matters without revisiting unanimous votes by the RRC, and I believe that if there are six members who want to take this up - it can still be done.

Please let me know what you think. If you still believe we should flag this for a revote - I will do so. I welcome Harry's input as well.

January 9, 2010 Peck E-mail to Drafters, cc Chair & Staff:

I agree with your reasoning and your proposed course of action. Unless your hear from Harry otherwise, I think you should proceed as you have outlined.

January 9, 2010 Sondheim E-mail to Drafters, cc Chair & Staff:

I agree with the reasoning set forth by Dom, but I believe the Commission should have the benefit of that reasoning. If, after consideration of that reasoning at least 5 members want a revote, then and only then will we have a revote.

January 11, 2010 Snyder E-mail to Difuntorum & KEM:

I've now added a redline revision to the Introduction. Is this everything with the prior documents? I don't want to hold you up.

Attached:
RRC - 3-210 [1-2] - Rule - DFT4.2 (01-08-10)DS-KEM - CLEAN-LAND.doc
RRC - 3-210 [1-2] - Public Comment Chart - By Commenter - DFT3 (01-10-10)DS-KEM.doc
RRC - 3-210 [1-2] - Compare - Introduction - DFT3.1 (01-11-10)KEM-DS.doc

January 12, 2010 Difuntorum E-mail to Snyder & KEM, cc McCurdy & Lee:

Attached please find the following slightly revised Rule 1.2 documents. Unless I hear otherwise, these documents will be used for the agenda.

1. CLEAN RULE DRAFT 4.3 (01-11-10). I revised the clean version to add a missing closed parenthesis in Cmt.[1] and to correct some spacing issues probably caused by the redlining. I

also removed all redline and strikeout markings as this version is designated as a "clean" version. I numbered the draft as "4.3."

2. ABA MODEL RULE COMPARISON EXPLANATION CHART. I implemented and cleaned-up all of the my edits that Dom accepted on Friday (I deleted the CAPS text, highlighting etc. . . .). I numbered the chart as "3.2."

3. INTRODUCTION. I updated the notation to indicate that this Introduction applies to Draft 4.3 of the rule. I numbered the revised Introduction as "3.2."

4. PUBLIC COMMENTER CHART. I made some minor formatting changes to adjust the alignment of the notations in the "Rule Paragraph" column. I deleted the highlighting. I numbered the chart as "3.1."

For the Dashboard, I don't think there are any edits at this time, so for the agenda we will use the attached version where the only change is to the caption that now refers to Draft 4.3 of the rule.

Attached:
RRC - 3-210 [1-2] - Rule - DFT4.3 (01-11-10)DS-KEM-RD - CLEAN-LAND.doc
RRC - 3-210 [1-2] - Compare - Rule & Comment Explanation - DFT3.2 (01-11-10)-ML-KEM-RD-DS-RD.doc
RRC - 3-210 [1-2] - Compare - Introduction - DFT3.2 (01-11-10)KEM-DS-RD.doc
RRC - 3-210 [1-2] - Public Comment Chart - By Commenter - DFT3.1 (01-11-10)DS-KEM-RD.doc
RRC - 3-210 [1-2] - Dashboard - ADOPT – DFT2 (01-11-10).doc

January 11, 2010 Snyder E-mail to Difuntorum, cc McCurdy, Lee & KEM:

I'm fine with this - I only left the redline so that you could see what I had done. Unless Kevin thinks we need some further revision, it appears ready to go. Thanks for everything.

January 11, 2010 Difuntorum E-mail to Snyder, cc McCurdy, Lee & KEM:

We'll add a post-public comment redline to the materials (comparing the version that was distributed for public comment with the latest version DFT 4.3). This will allow the Commission members to see what is being recommended apart from the comparison to MR 1.2 that is found in the chart.

January 11, 2010 Difuntorum E-mail to Snyder, cc McCurdy, Lee & KEM:

Here is the Rule 1.2 post-public comment redline (footnotes intact).

Attached:
RRC - 3-210 [1-2] - Rule - DFT4.3 (01-11-10)ML-RD - Cf. to DFT3.doc

January 11, 2010 Snyder E-mail to Difuntorum, cc McCurdy, Lee & KEM:

There seem to be additional spaces in paragraph (d) - perhaps they don't show up on your version. Just thought I'd mention it.

January 12, 2010 KEM E-mail to Difuntorum, cc Snyder, McCurdy, Lee:

If it's not too late, I've attached draft 2.1 (1/12/10) of the Dashboard, w/ footer inserted.

January 14, 2010 Kehr E-mail to RRC:

Here are my comments on these materials:

1. The separation of the last sentence of paragraph (a) into two sentences disconnects "after consultation" from jury trial waiver and client testimony. Unless I've missed something in the commenter chart, this was not intended.

2. I do not see the need to add the "except as provided by law" language. That could be included in most every Rule, and I think it adds nothing that isn't adequately covered by the first sentence of Comment [1].

3. I don't agree with the effort to disconnect "in a criminal case" from client testimony. While it certainly is true that there are issues of client control in civil cases that somewhat parallel those in criminal matters, a criminal defendant's right to determine whether to testify has a constitutional significance that doesn't exist in the civil setting. There are two ways of handling this. One is to fully develop the civil side of this. I would not expand the MR in this major way. A lawyer's violation of a criminal defendant's constitutional rights in this way is a thing quite apart from the consequence of a lawyer acting beyond proper limits in a civil matter (partly b/c of the actual innocence standard for criminal malpractice actions). If the Commission agrees with COPRAC that the reference to criminal matters suggests lawyers might have a higher level of authority in civil matters, we could: (i) cover it with a comment sentence; or (ii) remove the last sentence (now the last two sentence) of paragraph (a) under the theory that they are covered by its first sentence and add an explanatory Comment. I prefer the former, and we've already done this in Comment [1] in the sentence that precedes the cite to *Womancare*.

4. LACBA recommended adding to Comment [1] a reference to Rule 1.16. I would say in the response to this that the reference already is found in Comment [2].

5. I'm generally ok with the suggested addition to Comment [7], but I would insert the word "civil" at the beginning of the penultimate line. There should be no suggestion that a lawyer is subject to professional discipline because of a single instance of negligence that does not rise to the required under our Rule 1.1.

6. I would add the new Penal Code section 1018 reference to the Dashboard.

7. In the commenter chart response to LACBA, I would not refer to guidance. This is a disciplinary rule, and we need to be able to defend it on that basis. My view is that Rule

1.2(a) describes conduct that reflects on a lawyer's fitness to practice law because it describes an aspect of the duty of undivided loyalty that is subject to proof in the disciplinary process. Paragraph (b) could be in a Comment b/c it cannot be the basis for discipline or for there not being discipline. However, it creates no risk, and therefore there is no great need to depart from the MR. Paragraphs (c) and (d) describe important disciplinary issues. I think that LACBA is entitled to a fuller reply.

8. Depending on what the Commission does with paragraph (a), the second sentence of the response to O.C. Bar might not be correct. This arises also in the second sentence of the Introduction.

9. I don't understand the first sentence of the first paragraph of the response to the Santa Clara Bar, beginning with "which". Perhaps the entire sentence can be removed.

January 15, 2010 Sondheim E-mail to RRC:

1.Nit: Page 6, second full paragraph:: "it should not be discipline" should read "they should not be subject to discipline."

2. Page 7, item 5: I do not agree that requiring a lawyer to "reasonably consult with the client" means that "the lawyer does not have to consult with the client about every matter...." If we intend the latter we should say so explicitly since "reasonably" consulting can be interpreted, for example, that the attorney has to spend a reasonable amount of time with the client or give the client a reasonable explanation. Therefore I recommend that some language be adopted to respond to the concern of OCTC.

3. Page 10, second full paragraph: Just because the language proposed by the SCCBA would only apply to a "relatively small subset of all California lawyers" is not an adequate justification for our rejection of the concern expressed. In other instances we have taken into account matters that may affect a small portion of the profession. All lawyers are entitled to recognition of how a rule may impact them, regardless of the size of the constituency. We should give further consideration to the proposal of this bar association.

January 18, 2010 Tuft E-mail to RRC List:

1. In paragraph (a), remove the comma after "law" and before "in a criminal case" in the new penultimate sentence.

2. It is sufficient in Comment [1] to cite Penal code section 1018 without having to include what the section states. We do not do that in respect to other citations to statutes and there is no reason to do so here.

3. I continued to be concerned with the new sentence at the end of Comment [7]. Nichols and Janik are standard of care cases. By including this practice pointer in the comment and citing Rule 1.1, we suggest that failing to abide by the holdings in these civil negligence cases can result in discipline under the competence rule.