

## McCurdy, Lauren

---

**From:** Kevin Mohr [kemohr@charter.net]  
**Sent:** Wednesday, September 30, 2009 9:03 PM  
**To:** McCurdy, Lauren; Difuntorum, Randall; Lee, Mimi  
**Cc:** Paul Vapnek; Ellen Peck; Mark Tuft; Harry Sondheim; Kevin Mohr G  
**Subject:** RRC - 1-120X [8.4] - III.B. - October 16-17, 2009 Meeting Materials  
**Attachments:** RRC - 1-120X [8-4] - Dash, Intro, Rule, Comment, Pub Com, Variatoinis - COMBO- DFT2 (09-30-09)PV-KEM.pdf; RRC - 1-120X [8-4] - Public Comment Chart - By Commenter - DFT2 (09-30-09)KEM-RD.doc; RRC - 1-120X [8-4] - Dashboard - ADOPT - DFT2 (09-30-09)PV-KEM.doc; RRC - 1-120X [8-4] - Compare - Comment Explanation - DFT5.1 (09-30-09)PV-KEM.doc; RRC - 1-120X [8-4] - Compare - Introduction - DFT5.1 (09-30-09)PV-KEM.doc; RRC - 1-120X [8-4] - State Variations (2009).doc; RRC - 1-120X [8-4] - Compare - Rule Explanation - DFT5.1 (09-30-09)PV-KEM.doc; RRC - 1-120X [8-4] - Rule - DFT9 (09-30-09) - Cf. to DFT8.1.doc

Greetings Lauren:

To make your job a little easier, I've attached all the materials you need for 8.4 in a single, scaled PDF file. The ingredients of the attached file are also attached, in Word. This took a bit longer than I expected. Originally, I had only planned to switch paragraph (e) to the end of the rule as (g). However, when I went into the comment chart, I saw that we intended to do several things before rule finalization, to wit, renumber the comment paragraphs so they match up w/ the Model Rule Comment numbers before "finalization". We were also going to revisit Comment [5] to the Model Rule before "finalization." Well, I think finalization is upon us. These are being submitted to BOG for adoption. That means we probably won't be seeing them again, or be able to do more than update cross-references, etc. So I think we need to do these things now.

See footnote 1 to Comment [5] in the attached Comment chart for my proposal to revise MR 8.4, cmt. [5]. I've also attached new rule draft 9, redline, compared to Draft 8.1, the draft on which Paul's 9/26/09 charts were based, so you can easily see the changes I've made.

In addition to the combination PDF file, here is what I've attached, all in Word:

1. Dashboard, Draft 2 (9/30/09)-PV-KEM. Changed cross-reference to (g) in summary and ticked "Vote" instead of "Consent" in the Voting section. We can fill in the vote after the October meeting.
2. Introduction, Draft 5.1 (9/30/09)-PV-KEM. Changed cross-reference to (g).
3. Rule Chart, Draft 5.1 (9/30/09)-PV-KEM. Made the paragraph (e) to (g) switch. Otherwise the same.
4. Comment Chart, Draft 5.1 (9/30/09)-PV-KEM. Moved Comment [9] in the previous draft to [4] and renumbered the comments to match the MR numbers. I've also added note 1 and removed that part of the Explanation that discusses our intent to renumber the comment paragraphs.
5. Public Comment Chart, Draft 2 (9/30/09)-KEM-RD. Last column is now filled in.

6. State Variations (2009). No change.
7. Rule, Draft 9 (9/30/09), redline, compared to Draft 8.1 (7/5/07).

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

Kevin

--  
Kevin E. Mohr  
Professor  
Western State University College of Law  
1111 N. State College Blvd.  
Fullerton, CA 92831  
714-459-1147  
714-738-1000 x1147  
714-525-2786 (FAX)  
[kevin\\_e\\_mohr@compuserve.com](mailto:kevin_e_mohr@compuserve.com)  
[kevinm@wsulaw.edu](mailto:kevinm@wsulaw.edu)

# Proposed Rule 8.4 [RPC 1-120] “Misconduct”

(Draft #9, 9/30/09)

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

<b>Comparison with ABA Counterpart</b>	
<b>Rule</b>	<b>Comment</b>
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted  <input type="checkbox"/> ABA Model Rule substantially rejected  <input checked="" type="checkbox"/> Some material additions to ABA Model Rule  <input type="checkbox"/> Some material deletions from ABA Model Rule  <input type="checkbox"/> No ABA Model Rule counterpart	<input checked="" type="checkbox"/> ABA Model Rule substantially adopted  <input type="checkbox"/> ABA Model Rule substantially rejected  <input checked="" type="checkbox"/> Some material additions to ABA Model Rule  <input type="checkbox"/> Some material deletions from ABA Model Rule  <input type="checkbox"/> No ABA Model Rule counterpart

## Primary Factors Considered

Existing California Law

Rules	Rule 1-120
Statute	Business and Professions Code §§6100 et seq.
Case law	See Comment chart, Comment [2A], [2B] and [2C].

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

Other Primary Factor(s)

---

## Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

---

Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution

Vote (see tally below)

Favor Rule as Recommended for Adoption \_\_\_\_\_

Opposed Rule as Recommended for Adoption \_\_\_\_\_

Abstain \_\_\_\_\_

Approved on Consent Calendar

Approved by consensus

Minority/Position Included on Model Rule Comparison Chart:  Yes  No

---

## Stakeholders and Level of Controversy

---

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

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

Not Controversial

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 8.4\* Misconduct

October 2009

(Draft rule following consideration of initial public comment)

### *INTRODUCTION:*

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

Many of the Comments are based on corresponding comments in ABA Model Rule 8.4, but have been revised for brevity and clarity, and to conform to the differences in the Rule text. In addition, several comments have been added to apprise California lawyers of statutory and decisional law that might provide bases for discipline beyond that in Rule 8.4.

---

\* Proposed Rule, Draft 9 (9/30/09).

<p align="center"><u>ABA Model Rule</u> Rule 8.4 Misconduct</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 8.4 Misconduct</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>It is professional misconduct for a lawyer to:</p> <p>(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;</p>	<p>It is professional misconduct for a lawyer to:</p> <p><del>(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;</del></p> <p>(a) <u>knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act;</u></p>	<p>There are two principal changes in paragraph (a). First, paragraph (a) removes "... violate ... the Rules of Professional Conduct ...". The reason for this change is that any conduct that violates any Rule already is subject to discipline, so the quoted Model Rule language has no consequence except to create the risk that lawyers will be charged twice for every alleged Rule violation.</p> <p>Second, paragraph (a) eliminates an "attempt" to violate a Rule as a general disciplinary offense. It was the consensus of the Commission that during the drafting process, it should address on a rule-by-rule basis whether an attempted violation should be a basis for professional discipline. As a result, the Commission decided not to include attempts to violate as a general rule of discipline.</p>

\* Proposed Rule 8.4, Draft 9 (9/30/09). Redline/strikeout showing changes to the ABA Model Rule.

<p align="center"><u>ABA Model Rule</u> Rule 8.4 Misconduct</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 8.4 Misconduct</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;</p>	<p>(b) commit a criminal act <u>that (i) involves moral turpitude or that (ii)</u> reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer <del>in other respects</del>;</p>	<p>The Commission added moral turpitude to the Model rule to maintain conformity with the broader public protection afforded by the Business and Professions Code, specifically, section 6106. The Model Rules deleted moral turpitude as a basis for discipline that had been in the ABA Model Code. See Explanation concerning Model Rule 8.4, Comment [2], below. Some states have retained that standard, or have interpreted the rest of section (b) as being the equivalent of moral turpitude. However, the long and evolving history of case law in California interpreting moral turpitude has expanded the scope of public protection beyond the factors set forth in Model Rule 8.4(b). For these reasons, the Commission decided to add "moral turpitude" to the proposed rule.</p> <p>In addition, there is a long history in California of referrals of attorneys who have been convicted in criminal matters to the State Bar for discipline pursuant to Business and Professions Code sections 6101 and 6102. Moral turpitude is a critical component of those referrals for interim suspension or summary disbarment upon proof of conviction.</p> <p>The Commission also recommends deletion of the phrase "in other respects" as surplusage.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.4 Misconduct</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 8.4 Misconduct</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;</p>	<p>(c) engage in conduct involving dishonesty, fraud, deceit, or <u>intentional</u> misrepresentation;</p>	<p>The addition of "intentional" is intended to clarify that negligent misrepresentation is not regarded as dishonesty that triggers this Rule. The Commission believes this clarification is consistent with the intended scope of the ABA's rule and with the interpretation in disciplinary proceedings in states that have adopted the rule. (See, e.g., <i>State ex rel. Oklahoma Bar Ass'n v. Besly</i> (Okla., 2006) 136 P.3d 590 [2006 OK 18] and <i>In re Clark</i> (Ariz., 2004) 207 Ariz. 414 [87 P.3d 827].</p>
<p>(d) engage in conduct that is prejudicial to the administration of justice;</p>	<p>(d) engage in conduct <u>in connection with the practice of law</u> that is prejudicial to the administration of justice;</p>	<p>The addition of "in connection with the practice of law" was added because of concern that the vagueness of the language might not overcome facial Constitutional challenges under the First Amendment. The Commission sought to delimit the scope of conduct proscribed under paragraph (d) by clarifying in advance that the specific conduct that might be at issue in connection with a charge of prejudice to the administration of justice had to be connected to the practice of law.</p> <p>A minority of the Commission disagrees with the language limiting the paragraph's scope to conduct "in connection with the practice of law" because a lawyer's fitness to practice law is called into question by conduct prejudicial to the administration of justice in whatever capacity the lawyer acts.</p> <p>Finally, a related issue was recently raised about whether a lawyer appearing <i>in propria persona</i> might not be engaging "in connection with the practice of law," and therefore would be immune under this provision. The Commission intends to resolve this issue before finalization of the Rule.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.4 Misconduct</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 8.4 Misconduct</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or</p>	<p>(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate <del>the</del>these Rules of Professional Conduct or other law; or</p>	<p>Paragraph (e) is substantively identical to Model Rule 8.4(e). The Commission has adopted the convention of referring to the Rules of Professional Conduct as "these Rules." Curiously, the ABA mostly refers to the Model Rules collectively as "these Rules" in its blackletter and comment, only occasionally (as here) referring to them as "the Rules of Professional Conduct." An inquiry to the Model Rules drafters (reporters) confirmed that no substantive meaning should be attached to the varied usages.</p>
<p>(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.</p>	<p>(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.</p>	<p>Paragraph (f) is identical to Model Rule 8.4(f).</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.4 Misconduct</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 8.4 Misconduct</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(g) <a href="#">knowingly manifest, by words or conduct, bias or prejudice on the basis of race, sex, religion, national origin, disability, age or sexual orientation, if prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not constitute a violation of this Rule.</a></p>	<p>Paragraph (g) is not found in the Model Rules. This provision, which tracks much of the language of MR 8.4, cmt. [3], was originally included in proposed Rule 8.4.1 [the counterpart to current California rule 2-400] during Rule 8.4.1's drafting process. After deliberation, the Commission determined the misconduct described in this provision was better placed in proposed Rule 8.4.</p> <p>In part, paragraph (g) was added because of the rule provisions in a few jurisdictions that have chosen to regulate this conduct (e.g., Illinois). This provision is also a response to the decision by the Ninth Circuit that invalidated Business and Professions Code section 6068(f) relating to "offensive personality" on constitutional grounds and the subsequent legislative deletion of that section. Because the standard used in paragraph (g) is similar to the standard used in current California rule 2-400, it is expected to survive constitutional challenge.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.4 Misconduct Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.4 Misconduct Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.</p>	<p>[1] <del>Lawyers are</del> <u>Under paragraph (a), a lawyer is</u> subject to discipline <del>when they violate or attempt to violate the Rules for a violation of Professional Conduct these Rules, and for</del> knowingly <del>assist</del> <u>assisting</u> or <del>induce</del> <u>inducing</u> another to do so or <del>to</del> do so through the acts of another, as when <del>they request a lawyer requests or instruct</del> <u>instructs</u> an agent to do so on the lawyer's behalf. <del>Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.</del></p>	<p>The language has been clarified and attempted violation eliminated, as in the rule itself. See Explanation for paragraph (a), above.</p> <p>The substance of the deleted last sentence of the Model Rule comment is the subject of proposed Rule 1.2(d), the counterpart to current rule 3-210. See Comment [4].</p>
	<p>[1A] <u>Paragraph (a) is also intended to apply to the acts of entities. (See, e.g., Bus. &amp; Prof. Code, sections 6160 - 6172 (Law Corporations); Bus. &amp; Prof. Code, section 6155 (Lawyer Referral Services).)</u></p>	<p>Comment [1A] is new. It clarifies the applicability of the Rule to law corporations and similar entities.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.4 Misconduct Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.4 Misconduct Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.</p>	<p>[2] <del>Many</del> <u>Regarding paragraph (b), many</u> kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. <del>Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law.</del> Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. <del>A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.</del></p>	<p>The second sentence was deleted as an unnecessary because the Commission has retained "moral turpitude" in the Rule, for all the reasons set out in the Explanation for paragraph (b), above. At one point during the drafting process for this Rule, the Commission crafted a statement, based on the stricken sentence, that was intended to clarify that "offenses concerning some matters of personal morality" were not within the scope of the Rule. However, as it was unclear that such conduct, e.g., adultery, remains a criminal offense in California, the sentence was deleted as potentially confusing.</p> <p>The Commission deleted the last sentence of MR. 8.4, cmt.[2] because the proposition stated is unclear in the absence of a definition of what is considered a "minor" offense. This ambiguity could give rise to interpretations that grant less public protection than the existing protection afforded by California's standards of moral turpitude, discipline under Business and Professions Code section 6068(a), and conviction referrals under Business and Professions Code section 6101. A lawyer's conviction of a single misdemeanor charge could be construed as a "minor" offense under the ABA language; however, a pattern of that misconduct might not be a prerequisite for discipline under California's standards.</p>

<p align="center"><b><u>ABA Model Rule</u></b>  <b>Rule 8.4 Misconduct</b>  <b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b>  <b>Rule 8.4 Misconduct</b>  <b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
	<p>[2A] <a href="#">Regarding paragraph (b), a lawyer may be disciplined for criminal acts as set forth in Article 6 of the State Bar Act, (Business &amp; Professions Code, sections 6101 et seq.), or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See e.g., <i>In re Kelley</i> (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]; <i>In re Rohan</i> (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] [wilful failure to file a federal income tax return]; <i>In re Morales</i> (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] [twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer].)</a></p>	<p>This Comment was added because there is a substantial body of case law that has confirmed discipline for "other conduct warranting discipline," as set out in the Supreme Court cases cited.</p>

<p align="center"><b><u>ABA Model Rule</u></b>  <b>Rule 8.4 Misconduct</b>  <b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b>  <b>Rule 8.4 Misconduct</b>  <b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
	<p>[2B] <a href="#">Regarding paragraph (b), a lawyer may be disciplined for acts of moral turpitude which constitute gross negligence. (<i>Gassman v. State Bar</i> (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]; <i>Jackson v. State Bar</i> (1979) 23 Cal.3d 509 [153 Cal.Rptr. 24]; <i>In the Matter of Myrdall</i> (Review Dept. 1995 ) 3 Cal. State Bar Ct. Rptr. 363 [habitual disregard of clients' interests]; <i>Grove v. State Bar</i> (1967) 66 Cal.2d 680 [58 Cal.Rptr. 564]. See also <i>Martin v. State Bar</i> (1978) 20 Cal.3d 717 [144 Cal.Rptr. 214]; <i>Selznick v. State Bar</i> (1976) 16 Cal.3d 704 [129 Cal.Rptr. 108]; <i>In the Matter of Varakin</i> (Review Dept. 1994) 3 Cal State Bar Rptr 179 [pattern of misconduct]; <i>In re Calloway</i> (1977) 20 Cal.3d 165 [141 Cal.Rptr. 805 [act of baseness, vileness or depravity in the private and social duties which a man or woman owes to fellow human beings or to society in general, contrary to the accepted and customary rule of right and duty between human beings]; <i>In re Craig</i> (1938) 12 Cal.2d 93 [82 P.2d 442].)</a></p>	<p>This Comment is intended to alert lawyers to the expansive case law on moral turpitude.</p>

<p align="center"><b><u>ABA Model Rule</u></b>  <b>Rule 8.4 Misconduct  Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b>  <b>Rule 8.4 Misconduct  Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
	<p><a href="#">[2C] Paragraph (d) is not intended to prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution. See, e.g., <i>Ramirez v. State Bar</i> (1980) 28 Cal 3d 402, 411 [169 Cal. Rptr 206] (a statement impugning the honesty or integrity of a judge will not result in discipline unless it is shown that the statement is false and was made knowingly or with reckless disregard for truth); <i>Matter of Anderson</i> (Rev. Dept 1997) 3 State Bar Court Rptr 775 (disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); <i>Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman</i> (9th Cir. 1995) 55 F.3d 1430, 1443 (a lawyer's statement unrelated to a matter pending before the court may be sanctioned only if the statement poses a clear and present danger to the administration of justice).</a></p>	<p>The Commission believed that it is important to stress the protection of constitutional rights in connection with discipline so that activities protected by the First Amendment do not become the subject of disciplinary proceedings. See also Explanation of Changes at paragraph (d), above.</p>

<p align="center"><b><u>ABA Model Rule</u></b> <b>Rule 8.4 Misconduct</b> <b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b> <b>Rule 8.4 Misconduct</b> <b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.</p>	<p>[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, <del>or sexual orientation or socioeconomic status</del>, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of <del>this rule</del><a href="#">paragraph (b)</a>.</p>	<p>This comment is intended to clarify the scope of proposed Rule 8.4(g).</p>
<p>[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.</p>	<p>[4] <del>A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the</del> <a href="#">validity, scope, meaning or application of the any law, rule, or ruling of a tribunal is governed by Rule 1.2(d). Rule 1.2(d) is also intended to</a> apply to challenges <del>of legal</del><a href="#">regarding the</a> regulation of the practice of law.</p>	<p>Model Rule 8.4, cmt. [4], has been revised for brevity and clarity. This Comment is intended as a cross-reference to another rule that is applicable to related conduct. It is the second sentence to Model Rule 8.4, Comment [4], revised and split into two sentences for clarity. No change in meaning was intended.</p> <p>The first sentence ("A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists.") was deleted because it was not for the protection of the public, inconsistent with Bus. &amp; Prof. Code section 6068(a), and over broad with respect to what a lawyer may do to challenge a law that he or she believes is invalid.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.4 Misconduct Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.4 Misconduct Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.</p>	<p><del>[5] [RESERVED] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.</del></p>	<p>The Commission originally deleted this Comment because it does not have any predicate in the Rule. No paragraph in the Rule refers to misconduct by a public official who is a lawyer, the subject of the first sentence. However, upon further reflection, the second sentence concerning fiduciaries, appears to have a rule predicate in paragraph (b) (criminal act "that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer") and paragraph (c) ("conduct involving dishonesty, fraud, deceit, or intentional misrepresentation"). Before finalization of the Rule, the Commission intends to revisit whether the second sentence or some variant of it should be retained.<sup>1</sup></p>
	<p><a href="#">[6] Alternative bases for professional discipline may be found in Article 6 of the State Bar Act, (Bus. &amp; Prof. Code, sections 6100 et seq.), and the published California decisions interpreting the relevant sections of the State Bar Act. This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act.</a></p>	<p>This Comment, which has no counterpart in the Model Rule, is intended as a clarification and to advise lawyers that there are bases for discipline for professional misconduct other than the Rules.</p>

<sup>1</sup> **Consultant's Note:** Now is the finalization of the Rule, as BOG intends to adopt the Rules for submission for S.Ct. approval. I recommend that we include Model Rule 8.4, cmt. [5], as revised below:

~~[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of~~ A lawyer's abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization, ~~can suggest an inability to fulfill the professional role of lawyers.~~



**Rule 8.4 Misconduct.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = 1  
Disagree = 0  
Modify = 3  
NI = 1

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	Falk, Richard A.	NI			<p>The only form of deceit that is allowed is passive deceit</p> <p>A defense attorney is specifically allowed to commit fraud in not telling the prosecution of evidence of their client's guilt.</p>	<p>The rule broadly encompasses dishonesty, fraud, deceit, intentional misrepresentation, and crimes of moral turpitude.</p> <p>The Commission recognizes that duty of confidentiality is a competing public protection policy.</p>
1	Konig, Alan	M			<p>Rule will not survive constitutional challenge if it includes the vague phrase "prejudicial to the administration of justice".</p>	<p>This standard is similar to the standard used in current California Rule 2-400 which has not been the subject of constitutional challenge.</p>
2	Los Angeles County Bar Association	M			<p>In paragraph (b) and related comments, the concept of "moral turpitude" should be deleted to be consistent with the ABA rule.</p> <p>In paragraph (c) the language incorrectly suggests that "misrepresentation" requires scienter.</p> <p>In paragraph (c) the phrase "prejudicial to the administration of justice" is too vague and could lead to inconsistent exercise of</p>	<p>Commission did not make the suggested revisions as California has a long and evolved history of case law that relies on the standard. Also, other states have retained moral turpitude or interpreted Rule 8.4 as an equivalent.</p> <p>Commission intends that this language clarify that negligent misrepresentation is not regarded as dishonesty that triggers the rule.</p> <p>This standard is similar to the standard used in current California Rule 2-400 which has not been the subject of constitutional challenge.</p>

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

**Rule 8.4 Misconduct.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = 1  
Disagree = 0  
Modify = 3  
NI = 1

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>prosecutorial discretion.</p> <p>All of paragraph (f) should be deleted, or if not, the term “imply” should be deleted.</p> <p>Paragraph (g) should be clarified with a new comment.</p> <p>Comment [5] incorrectly equates “gross negligence” with “moral turpitude’.</p> <p>Comment [6] should be revised to refer to peremptory challenges of a “juror” and not of a “judge”.</p>	<p>This paragraph adopts the Model Rule standard.</p> <p>A new comment was not added, in part, because the Model Rule does not include a comment.</p> <p>The comment is intended to alert lawyers to the expansive case law on moral turpitude.</p> <p>This topic is now in Comment [7] and addresses a judge’s finding that a peremptory challenge was exercised on a discriminatory basis.</p>
3	Orange County Bar Association	M			<p>In paragraph (e), the phrase “by words or” should be deleted so that the rule does not constrain lawyer speech.</p> <p>In Comment [6], the references to paragraphs (b) and (d) should be corrected to refer to paragraph (e), and in the last sentence, the word “alone” should be deleted.</p>	<p>Commission did not make the requested revision but added Comment [7] to clarify the scope of paragraph (e).</p> <p>This topic is now in Comment [7] and the included cross references are to paragraphs track Comment [3] to the Model Rule.</p>
4	San Diego County Bar Association	A			Support as drafted.	No action needed

## Rule 8.4: Misconduct

### STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman. The text relevant to proposed Rule 8.4 is highlighted.)

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

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

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

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

(1) hiring, promoting, discharging or otherwise determining the conditions of employment of any person; or

(2) accepting or terminating representation of any client.

(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this

rule unless and until a tribunal of competent jurisdiction, other than, a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

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

Also, Business & Professions Code §490.5 permits the State to suspend a lawyer's license if the lawyer “is not in compliance with a child support order or judgment.” Finally, Rule 290(a) of the Rules of Procedure of the California State

Bar provides that (unless otherwise ordered by the Supreme Court) a member of the bar “shall be required to satisfactorily complete the State Bar Ethics School in all dispositions or decisions involving the imposition of discipline, unless the member previously completed the course within the prior two years.”

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

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

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

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

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

marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.

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

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

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

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

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

the Constitution of the United States or constitution of this state shall be a violation of the oath.

**Georgia** deletes ABA Model Rule 8.4(b) in favor of two subparagraphs making it a violation to be “convicted of a felony’ or to be “convicted of a misdemeanor involving moral turpitude where the underlying conduct relates to the lawyers fitness to practice law.” Rule 8.4(a)(4)-Georgia's equivalent to ABA Model Rule 84(c)-makes it improper to engage in “professional” conduct involving dishonesty, fraud, deceit or misrepresentation. Georgia adds a Rule 8.4(a)(5) that makes it improper for a lawyer to “fail to pay any final judgment or rule absolute rendered against such lawyer for money collected by him or her as a lawyer within ten (10) days after the time appointed in the order or judgment.” A Rule 8.4(d) provides that Rule 8.4(a)(1) “does not apply to Part Six of the Georgia Rules of Professional Conduct” (which covers pro bono work, court appointments, legal service organizations, and law reform organizations), Georgia deletes ABA Model Rules 8.4(d), (e), and (f).

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

**Illinois:** Rule 8.4(a)(9)(A) provides that a lawyer shall not “violate a Federal, State or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer.” Rule 8.4(a)(5) prohibits “adverse discriminatory treatment of litigants, jurors, witnesses, lawyers, and others, based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.”

Illinois Rule 8.4(a)(B) provides that a lawyer shall not “avoid in bad faith the repayment of an education loan guaranteed by the Illinois Student Assistance Commission or other governmental entity.” Subparagraph (a)(8) does not prohibit a lawyer from discharging a student loan in a bankruptcy proceeding, but does provide that “the discharge shall not preclude a review of the attorney's conduct to determine if it constitutes bad faith.”

Illinois Rule 8.4(b)(3) adds that a lawyer holding public office shall not “represent any client, including a municipal corporation or other public body, in the promotion or defeat of legislative or other proposals pending before the public body of which such lawyer is a member or by which such lawyer is employed.”

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

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

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

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

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

(a) A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment. (b) A lawyer serving as an adjudicative officer shall, without regard to a person's race, gender, or other protected personal characteristic, treat every person fairly, with courtesy and respect. To the extent possible, the lawyer shall require staff and others who are subject to the adjudicative officer's direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the adjudicative tribunal.

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

(A) The following acts or omissions by an attorney, individually or in concert with another person, are

misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:

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

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

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

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

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

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

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

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

(9) violation of an order of discipline.

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

imposition of identical discipline in Michigan would be clearly inappropriate.

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

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

**New Jersey:** Rule 8.4(g) makes it professional misconduct for a lawyer to “engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socio-economic status, or handicap, where the conduct is intended or likely to cause harm.” The Supreme Court’s comment states that the rule

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

unless it has resulted in either an agency or judicial determination of discriminatory conduct.

**New York:** DR 1-102 provides that a lawyer “or law firm” shall not:

- (1) Violate a Disciplinary Rule.
- (2) Circumvent a Disciplinary Rule through actions of another....
- (6) Unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable, and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.
- (7) Engage in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer.

In addition, New York’s DR 9-101(C), which is comparable to ABA Model Rule 8.4(e), provides that a lawyer “shall not state or imply that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.”

**North Carolina:** Rule 8.4(e) omits the clause “or to achieve results by means that violate the Rules of

Professional Conduct or other law,” and a Rule 8.4(g) makes it professional misconduct for a lawyer to “intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3.” North Carolina also adds a Rule 6.6, which prohibits lawyers who hold “public office” from abusing their public positions.

**Ohio** adds Rules 8.4(g) and (h), which make it professional misconduct for a lawyer to:

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

(h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law, of constitutional or civil rights when authorized by law.”

Ohio also adds an unusual Comment 2A, which provides that Rule 8.4(c) “does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations

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

lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.”

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

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

(a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph

(b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.” (b) Paragraph (a) does not apply to a lawyer's decision whether to represent a particular person in connection with an adjudicatory proceeding, nor to the process of jury selection, nor to communications protected as “confidential information” under these Rules. See Rule 1.05(a), (b). It also does not preclude advocacy in connection with an adjudicatory proceeding involving any of the factors set out in paragraph (a) if that advocacy:

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

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

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

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

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

**RRC – Rule 8.4 [1-120X]  
Selected E-mails – Revised (10/13/2009)**

January 23, 2007 Difuntorum E-mail to RRC:.....	34
January 23, 2007 Lamport E-mail to RRC:.....	34
January 23, 2007 Peck E-mail to RRC: .....	38
January 23, 2007 Foy E-mail to RRC: .....	38
January 23, 2007 Martinez E-mail to RRC: .....	39
January 23, 2007 Tuft E-mail to RRC:.....	39
January 23, 2007 Ruvolo E-mail to RRC:.....	40
January 23, 2007 Snyder E-mail to RRC:.....	40
January 24, 2007 Tuft E-mail to Snyder & RRC:.....	40
March 6, 2007 Sapiro E-mail to RRC:.....	41
March 6, 2007 SeLegue E-mail to RRC:.....	41
November 3, 2008 Mimi Lee E-mail to Drafters (Peck, Vapnek, Tuft):.....	42
November 4, 2008 KEM E-mail #1 to Drafters, cc RRC & Staff: .....	42
November 4, 2008 KEM E-mail #2 to Drafters, cc RRC & Staff: .....	42
November 5, 2008 KEM E-mail #1 to RRC:.....	44
November 5, 2008 KEM E-mail #2 to Drafters, cc RRC & Staff: .....	44
November 6, 2008 Difuntorum E-mail to RRC:.....	45
November 7, 2008 KEM E-mail to Drafters, cc Chair & Staff: .....	45
November 10, 2008 Sondheim E-mail to Drafters, cc Staff: .....	46
November 10, 2008 Vapnek E-mail to Sondheim, cc Drafters & Staff: .....	46
November 10, 2008 Lee E-mail to Drafters, cc Sondheim & Staff:.....	46
November 12, 2008 Vapnek E-mail to Drafters, cc Chair & Staff: .....	46
November 12, 2008 Peck E-mail to Drafters, cc Chair & Staff: .....	46
November 12, 2008 Vapnek E-mail to Peck, cc Drafters, Chair & Staff:.....	46
November 13, 2008 Difuntorum E-mail to KEM, cc Chair & Staff:.....	46
November 14, 2008 McCurdy E-mail to RRC: .....	47
November 16, 2008 KEM E-mail to Difuntorum, cc Drafters, Chair & Staff:.....	47
November 17, 2008 Peck E-mail to KEM, cc Drafters, Chair & Staff: .....	49
November 17, 2008 Difuntorum E-mail to KEM, cc Drafters, Chair & Staff:.....	49
November 17, 2008 Difuntorum E-mail to Drafters, cc Chair & Staff:.....	50
November 18, 2008 KEM E-mail to Difuntorum, cc Drafters, Chair & Staff:.....	50
November 18, 2008 Difuntorum E-mail to RRC, cc Staff:.....	50
November 18, 2008 Ruvolo E-mail to Difuntorum, cc RRC & Staff: .....	50
November 18, 2008 Difuntorum E-mail to Ruvolo & Drafters, cc RRC: .....	51
November 24, 2008 Sondheim E-mail to RRC: .....	52
November 30, 2008 Sapiro E-mail to RRC List: .....	53
December 1, 2008 Brad Henschel E-mail to RRC List: .....	54
December 7, 2008 Sondheim E-mail to RRC: .....	54
December 8, 2008 Kehr E-mail to RRC:.....	55
December 15, 2008 KEM E-mail to Difuntorum, cc McCurdy & Lee: .....	56
December 18, 2008 Difuntorum E-mail to Sondheim, Vapnek, Tuft, cc McCurdy, Lee & KEM: .....	57
August 27, 2009 McCurdy E-mail to Vapnek, cc Chair, Vapnek, Tuft & Staff: .....	59
August 27, 2009 McCurdy E-mail to Peck, cc Chair, Vapnek, Tuft & Staff: .....	61
September 18, 2009 McCurdy E-mail to Drafters (Vapnek, Peck, Tuft), cc RRC: .....	63

**RRC – Rule 8.4 [1-120X]  
Selected E-mails – Revised (10/13/2009)**

September 26, 2009 Vapnek E-mail to Drafters (Peck, Tuft), cc McCurdy & KEM:.....	63
September 30, 2009 Peck E-mail to Drafters, cc Staff: .....	63
September 30, 2009 Tuft E-mail to Drafters, cc Staff: .....	64
September 30, 2009 Vapnek E-mail to McCurdy, cc Drafters & KEM:.....	64
September 30, 2009 KEM E-mail to Drafters, cc Staff: .....	64
September 30, 2009 Vapnek E-mail to Drafters, cc Staff: .....	64
September 30, 2009 Peck E-mail to Drafters, cc Staff: .....	64
September 30, 2009 Difuntorum E-mail to Drafters, cc Staff:.....	64
September 30, 2009 KEM E-mail to Drafters, cc Staff: .....	64
September 30, 2009 KEM E-mail to Drafters, cc Staff: .....	64
October 3, 2009 Kehr E-mail to RRC:.....	65
October 6, 2009 Sondheim E-mail to RRC: .....	66
October 7, 2009 Sapiro E-mail to RRC: .....	66
October 7, 2009 Sondheim E-mail to RRC: .....	67
October 8, 2009 Diane Karpman E-mail to RRC List: .....	67
October 10, 2009 Tuft E-mail to RRC List: .....	67
October 12, 2009 Lamport E-mail #1 to RRC: .....	69
October 12, 2009 Lamport E-mail #2 to RRC List (re paragraph (g)):.....	69
October 12, 2009 Melchior E-mail to RRC:.....	70

**September 18, 2009 McCurdy E-mail to Drafters (Vapnek, Peck, Tuft), cc RRC:**

Paul & Codrafters (Peck & Tuft):

This message provides the assignment background materials for Rule 8.4 on the October agenda. **The assignment deadline is Wednesday, September 30, 2009.**

As previously indicated, the materials provided are templates or drafts. Please don't hesitate to ask for further assistance or additional materials.

***Attachments:***

- Dashboard, Draft Template (9/18/09)
- Introduction, Draft 4 (12/12/08)
- Rule Chart, Draft 4 (12/12/08)
- Comment Chart, Draft 4 (12/12/08)
- Public Comment Chart, Draft 1 (9/18/09)
- State Variations (2009)

**September 26, 2009 Vapnek E-mail to Drafters (Peck, Tuft), cc McCurdy & KEM:**

Fellow drafters: Here is my rework of the materials for this rule. Mostly minor changes in the language of the explanations for the comments. I have also tried my hand at writing the Dashboard. Please pay close attention to it.

If all is well, please let me know so that we can advise Lauren by our September 30 deadline. Let me know if you have any comments or suggestions.

***Attachments:***

- Dashboard, Draft 1 (9/26/09)
- Introduction, Draft 5 (9/26/09)PV
- Rule Chart, Draft 5 (9/26/09)PV
- Comment Chart, Draft 5 (9/26/09)PV
- Public Comment Chart, Draft 1 (9/26/09)
- State Variations (2009)

**September 30, 2009 Peck E-mail to Drafters, cc Staff:**

Paul: Great job. This some how slipped by me. You have my approval to send it in.

**September 30, 2009 Tuft E-mail to Drafters, cc Staff:**

I also approve including the background materials in the agenda. However, I want to be on record as opposing the decision to including moral turpitude in proposed rule 8.4(b).

**September 30, 2009 Vapnek E-mail to McCurdy, cc Drafters & KEM:**

Lauren: The material attached, that was sent to you last Saturday, has been approved by the drafters. It is ready for inclusion in the agenda package.

**September 30, 2009 KEM E-mail to Drafters, cc Staff:**

I should have jumped in on this earlier but there seem to be a lot of balls in the air. With your permission, I will move paragraph (e) to the end of the Rule in the chart so that we have the same lettering as the Model Rule for the remainder of the Rule (this has already been approved - I believe at last December's meeting).

**September 30, 2009 Vapnek E-mail to Drafters, cc Staff:**

That's fine with me.

**September 30, 2009 Peck E-mail to Drafters, cc Staff:**

Fine with me too.

**September 30, 2009 Difuntorum E-mail to Drafters, cc Staff:**

Attached is a revised public commenter chart for Rule 8.4. I have designated it "DFT2" in the filename.

**September 30, 2009 KEM E-mail to Drafters, cc Staff:**

Thanks very much. I'll be sending on the other 8.4 materials in a bit. They took a bit longer than anticipated

**September 30, 2009 KEM E-mail to Drafters, cc Staff:**

To make your job a little easier, I've attached all the materials you need for 8.4 in a single, scaled PDF file. The ingredients of the attached file are also attached, in Word. This took a bit longer than I expected. Originally, I had only planned to switch paragraph (e) to the end of the rule as (g). However, when I went into the comment chart, I saw that we intended to do several things before rule finalization, to wit, renumber the comment paragraphs so they match up w/ the Model Rule Comment numbers before "finalization". We were also going to revisit Comment [5] to the Model Rule before "finalization." Well, I think finalization is upon us. These

**RRC – Rule 8.4 [1-120X]  
Selected E-mails – Revised (10/13/2009)**

are being submitted to BOG for adoption. That means we probably won't be seeing them again, or be able to do more than update cross-references, etc. So I think we need to do these things now.

See footnote 1 to Comment [5] in the attached Comment chart for my proposal to revise MR 8.4, cmt. [5]. I've also attached new rule draft 9, redline, compared to Draft 8.1, the draft on which Paul's 9/26/09 charts were based, so you can easily see the changes I've made.

In addition to the combination PDF file, here is what I've attached, all in Word:

1. Dashboard, Draft 2 (9/30/09)-PV-KEM. Changed cross-reference to (g) in summary and ticked "Vote" instead of "Consent" in the Voting section. We can fill in the vote after the October meeting.
2. Introduction, Draft 5.1 (9/30/09)-PV-KEM. Changed cross-reference to (g).
3. Rule Chart, Draft 5.1 (9/30/09)-PV-KEM. Made the paragraph (e) to (g) switch. Otherwise the same.
4. Comment Chart, Draft 5.1 (9/30/09)-PV-KEM. Moved Comment [9] in the previous draft to [4] and renumbered the comments to match the MR numbers. I've also added note 1 and removed that part of the Explanation that discusses our intent to renumber the comment paragraphs.
5. Public Comment Chart, Draft 2 (9/30/09)-KEM-RD. Last column is now filled in.
6. State Variations (2009). No change.
7. Rule, Draft 9 (9/30/09), redline, compared to Draft 8.1 (7/5/07).

Please let me know if you have any questions.

**October 3, 2009 Kehr E-mail to RRC:**

Here are my comments on these materials:

1. A nit: in the second paragraph of the paragraph (a) explanation, third line, I would insert a comma after "that" and before "during".
2. I would like to discuss whether the drafting of Comment [1A] might be read as saying that law firms (or at least law corporations) generally are subject to discipline. As I understand B&P C § 6169, the Bar has the authority only to issue cease and desist orders against a law corporation and suspend or revoke a law corporation's registration. If the point of Comment [1A] is that a lawyer can be disciplined for knowingly assisting, soliciting, or inducing any violation of these Rules or the State Bar Act by a law corporation, then I think the Comment should say so directly. If the Comment is intended to mean something else, I would like to know what that is.

3. In the first line of the Comment [2] explanation, the word “an” is out of place and should be removed.
4. I agree with most of Kevin’s fn. 1 suggest for a Comment [5]. However, I don’t agree with the use of the MR’s “can suggest an inability to fulfill the professional role of lawyers.” My reasoning is that this language is not connected to anything in the Rule and therefore does not fulfill the Comment purpose of explaining the Rule. Because the conduct described in [5] could come within several of the Rule paragraphs, I suggest: “... can involve conduct prohibited by this Rule.”
5. In the Commenter chart, I suggest for the second paragraph of the Response to the Richard Falk comment: (i) add the word “the” after “that” and before “duty” in the first line; and (ii) add at the end of the second paragraph: “... and that its application is affected by the Constitutional rights of criminal defendants.”
6. Again in the Commenter chart, I suggest adding to the first paragraph of the Response to the L.A. County Bar: “Lawyers already are subject to a moral turpitude standard under B&P C § 6106; including it in this Rule will allow lawyers to more easily locate the requirement and understand their duties without substantively changing California law.”

**October 6, 2009 Sondheim E-mail to RRC:**

Let me just add a few additional nits to those set forth by Bob. Given the 5 changes noted in the Introduction (agenda materials, p.39, I do not think we should say on the Dashboard that we have "substantially adopted" the ABA rule. Further, I think we should check the "Some material deletions" box in light of items (i), (iii) and (iv) in the Introduction.

**October 7, 2009 Sapiro E-mail to RRC:**

1. If, as suggested by Kevin in footnote 1, this is the last time we will see this rule, I recommend that we bring it back for further consideration and therefore reluctantly vote “no.”
2. I agree with Bob Kehr’s comments. I will not address them here.
3. To me, proposed Comment [1A] is unclear. We do not have discipline of law firms in California. By Comment [1A], do we mean that all lawyers in a firm will be subject to discipline if the firm violates an aspect of this rule? If not, what does this comment mean?
4. In proposed Comment [2], we should delete the third sentence. It is unintelligible and incorrect. See *In re Kelley* (1990) 52 Cal. 3d 487. And, as reflected in proposed Comment [2A], a lawyer who commits other misconduct may be entirely capable of practicing law but nevertheless subject to discipline for violating laws not related to the practice of law.
5. I would delete the last sentence in the explanation of changes at page 5 of 5 referring to paragraph (g). We should not hold ourselves out as authorities on the First Amendment. I can think of many good arguments why this rule might be subject to constitutional challenge. Has current Rule 2-400 been subject to constitutional challenge? If so, and if it has survived, we should explain that, and then the sentence could remain. If it has not been

**RRC – Rule 8.4 [1-120X]  
Selected E-mails – Revised (10/13/2009)**

exposed to constitutional challenge, then we should not use the absence of such challenge as authority for it being constitutional. That subject has not been decided if no one has challenged the rule.

6. In terms of drafting nits, in the Introduction, in the first paragraph, fifth line, after the word “discipline” I would insert the phrase “under paragraph (c)” and delete from that same line the phrase “in paragraph (c).”
7. In the explanation of changes for paragraph (a), second paragraph, third line, I would move the word “that” so it follows the word “process” and delete the comma after the word “process.”
8. In the explanation of changes column for paragraph (d), in the next to last line of the first paragraph, I would change the phrase “had to” to the word “must.”
9. In the explanation of changes column for Comment [2C], I would change the word “believed” to the word “believes.”

**October 7, 2009 Sondheim E-mail to RRC:**

Since this rule is not a consent item, Jerry's concerns will be discussed at the meeting.

Clarification--we will not discuss Jerry's nits unless someone objects on or before Oct.12.

**October 8, 2009 Diane Karpman E-mail to RRC List:**

It's possible that I may have missed some of the email dialogue on this topic however I would urge that we clarify the absence of law firm discipline in California. As you know law firm discipline, only officially exists in New York and New Jersey. It is my understanding, that the existence of law firm discipline, in New York was part of the reason that the "Milberg" the firm was subject to prosecution.

Therefore I would urge that this be crystal clear.

**October 10, 2009 Tuft E-mail to RRC List:**

My comments on Proposed Rule 8.4:

1. Explanation of Changes to Paragraph (d): Shouldn't "delimit" in the second sentence be "limit."?

The last paragraph should be changed to reflect our resolution of this issue.

This issue points up the problem with the limitation we have imposed on paragraph (d). How do we reconcile having a rule that says it is professional misconduct to commit a misdemeanor that involves moral turpitude but has nothing to do with the practice of law, while at the same time saying it is not a violation to engage in conduct that is prejudicial to the administration of justice unless the conduct is in connection with the practice of

**RRC – Rule 8.4 [1-120X]  
Selected E-mails – Revised (10/13/2009)**

law. Lawyers have duties to the judicial system apart from representing clients. (ABA Preamble; Bus. & Prof Code 6068(b)). Engaging in conduct that is prejudicial to the administration of justice as a pro per litigant violates that duty and lawyers should not be immune from this provision.

The solution is to conform to the Model Rule by deleting the limitation we imposed in paragraph (d). Short of that, the comment should say lawyers are not immune from the rule by representing themselves. It would be preposterous for a lawyer to appear in pro per for himself or his firm in the fee dispute and have immunity under this rule.

2. Explanation of Changes to Paragraph (g): We should include the citation to the Ninth Circuit case referenced in the second paragraph: (Committee of the US Central District Court v. Wunsch).

I disagree with the last sentence in the second paragraph. The standard used in current 2-400 applies in the management and operation of a law practice and not in litigation and has a predicate that bars discipline if not satisfied. Many jurisdictions in the past, including California, have been reluctant to adopt this standard as a rule in view of cases raising first amendment and other constitutional concerns. That is one reason, the Model Rule places this standard in Comment [3] as conduct that violates paragraph (d). A number of courts, including the Ninth Circuit in *Wunsch*, confirm that conduct prejudicial to the administration of justice does not suffer from facial vagueness. We should tell the Board and the Supreme Court that having this as a separate standard rather than as conduct that violates paragraph (d) could raise constitutional challenges. It is not prudent for us to convey the impression that this is not an issue I could be dissuaded if there is legal authority upholding the constitutionality of this wording in other jurisdictions.

3. Comments: Better to use headings such as "Paragraph (a)," etc. for comments pertaining to each paragraph of the rule instead of repeatedly saying "Regarding paragraph (b) etc."
4. Comment [1]: It is incorrect to say that a lawyer is subject to discipline under paragraph (a) for a violation of these Rules. We changed paragraph (a) to eliminate that possibility.
5. Comment [2]: Eliminate "kinds of" at the beginning of the second sentence and simply say " However, some offenses . . . "
6. Comment [2A] ([3]?): It would be better to begin the comment with "A lawyer may be disciplined under paragraph (b) for criminal acts . . . " rather than "Regarding paragraph (b) . . . "
7. Comment [2B] ([4]?): The comment may true be generally, but it does not accurately explain proposed rule (b). A lawyer may be disciplined under paragraph (b) by committing a *criminal act* that involves moral turpitude and moral turpitude is not limited to intentional acts but may also constitute an act of gross negligence. Or the comment can tell lawyers that apart of paragraph (b), lawyer may also be subject to discipline for acts of moral turpitude that involve gross negligence. However, as written, the comment is misleading.
8. Comment [3] ([5]?): This comment *must* be referring to paragraph (g) and not (d). Otherwise, are we intending to say that a violation of paragraph (g) is also a violation of

**RRC – Rule 8.4 [1-120X]  
Selected E-mails – Revised (10/13/2009)**

paragraph (d)? If legitimate advocacy does not violate paragraph (d), it would not violate paragraph (g) (I hope). I assume the reference to paragraph (b) at the end of the comment should also be paragraph (g).

9. MR Comment [5]: I agree we should include a variation of MR. Comment [5]. Whether a lawyer is abusing public office is relevant in determining whether the conduct violates paragraph (b) or perhaps (c). I would amend Kevin's proposed draft by beginning the sentence with the phrase: "A lawyer's abuse of public office held by the lawyer or abuse of positions of private trust . . . ."
10. Comment [6]: Delete "the" before "published California decisions."

Substitute "a single act of misconduct" for "a single illegal act."

**October 12, 2009 Lampport E-mail #1 to RRC:**

I agree with Bob's comments 2 and 4. I think Comment [2] should be deleted. The introductory sentence to this Rule states, "it is professional misconduct for a lawyer to..." There is nothing in the Rule that talks about an entity's acts. Nor is there anything in the Rule that correlates an entity's act to the misconduct of a lawyer constituent of that entity, unless the lawyer engages in the conduct. I have additional concerns with this Rule that I am appending to Mark Tuft's email.

**October 12, 2009 Lampport E-mail #2 to RRC List (re paragraph (g)):**

1. I share Mark's objections to Paragraph (g). Paragraph (g) should be deleted. In light of paragraph (d), paragraph (g) is redundant. If (g) applies only when "words, or conduct" manifest bias or prejudice when prejudicial to the administration of justice, then this is an administration of justice rule. It would be covered by the paragraph (d) prohibition on conduct that is prejudicial to the administration of justice (in connection with the practice of law). If the conduct in (g) also would be a violation of (d), what does (g) cover that is not covered by (d)? The answer had better be nothing. Otherwise we are talking about two different standards for applying the "prejudicial to the administration of justice" standard and not telling anybody and we are running afoul of the 1st Amendment. If everything that is disciplinable in (g) is disciplinable under (d), we don't need (g). It should be deleted.
2. I agree with Mark that there are significant constitutional concerns with having paragraph (g), which is directly focused on a category of speech that inherently has 1st Amendment implications. I agree with Mark that Rule 2-400 is not a precedent for the prohibition in paragraph (g).
3. If paragraph (g) is deleted, Comment [3] should be deleted as well. (Mark correctly points out that the Comment should be referring to paragraph (g) instead of (d).) While I am no apologist for people who manifest bias or prejudice, I respect our 1st Amendment right to express our opinions, even if they are disgusting and repugnant. I don't think any person (lawyers included) should have that speech chilled by a rule that would call out this category of speech as a potential grounds for discipline. Other than because prejudice and bias are unpopular expressions of views, why are we calling out this category of speech? As Comment [5] notes, there is a heightened level of scrutiny when the targeted conduct under paragraph (d) involves constitutionally protected categories of speech, which (g) does not

account for. The focus should be on conduct prejudicing the administration of justice and not on categories of speech.

4. If we are going to keep paragraph (g), Comment [5] should be revised to include a reference to paragraph (g) in addition to the reference to paragraph (d).

**October 12, 2009 Melchior E-mail to RRC:**

**Rule 8.4:** “that involves moral turpitude or . . . reflects adversely [etc]” strikes me as duplicative. Also, the explanation relates these standards to discipline for criminal convictions, though the same paragraph explains that such matters are referred for discipline under statute, so that there is no need for this reference, in the rule (where it is duplicative and thus violates the line we have drawn elsewhere against language which simply invites double charging) or in the explanation.

Since the ABA has taken the courageous step of deleting the “moral turpitude” standard, we should do the same. It is not a standard at all, but a way of allowing the disciplinarians to condemn what they don’t like in a given situation. How would you argue that some conviction is not one of moral turpitude? Think about that! And in the comment, p. 48, we cite “baseness, vileness or depravity,” apparently in private non-criminal conduct: where are the definitions and boundaries for that sort of thing? Or is this Potter Stewart’s “I know it when I see it”?

p. 43: last paragraph of explanation leaves an open issue we should resolve before we let this go forward.

P. 44, (g): talk about double charging: Here we impose a “non-prejudice” rule which does not require a prior adjudication as we have preserved in 2-400. Aren’t we doing here exactly what we said we would not do? See also comment 3: same point

p. 45, Comment 1A: How do we propose to enforce this rule against entities, which are not being regulated? And if we do so, what about law partnerships, which are not recited.

p. 50, after comment 3: where do we say what kinds of work a lawyer may refuse because he/she does not like the prospective client or does not feel good about the client?