

Lee, Mimi

From: Marlaud, Angela
Sent: Monday, November 23, 2009 9:17 AM
To: CommissionerJ2@gmail.com; Difuntorum, Randall; hbsondheim@verizon.net; ignazio.ruvolo@jud.ca.gov; jsapiro@sapirolaw.com; kemohr@charter.net; kevin_e_mohr@csi.com; kevinm@wsulaw.edu; kmelchior@nossaman.com; Lee, Mimi; linda.foy@jud.ca.gov; Marlaud, Angela; martinez@lbbslaw.com; McCurdy, Lauren; mtuft@cwclaw.com; pecklaw@prodigy.net; pwvapnek@townsend.com; rlkehr@kscllp.com; slamport@coxcastle.com; snyderlaw@charter.net
Subject: FW: Final RRC agenda submission for December 2009 agenda item IV.C., Rule 1.0.1
Attachments: RRC - 1-100 [1-0-1] - Dash, Intro, Rule, Comment, Redline, Variations - COMBO- DFT2.2 (11-22-09).pdf

From: Kevin Mohr [mailto:kemohr@charter.net]
Sent: Sunday, November 22, 2009 7:29 PM
To: Robert L. Kehr
Cc: Marlaud, Angela; Jerome Sapiro Jr.; CommissionerJ2@gmail.com; Harry Sondheim; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; Kevin Mohr G
Subject: Re: Final RRC agenda submission for December 2009 agenda item IV.C., Rule 1.0.1

Angela & Bob:

To save a little time, I've attached the following:

A single, scaled PDF file that includes the following documents for the Rule:

1. Dashboard, Draft 2.2 (11/22/09)RLK-KEM;
2. Introduction, Draft 1.2 (11/22/09)RLK-KEM;
3. Rule & Comment Chart, Draft 1.2 (11/22/09)RLK-KEM;
4. Rule 1.0.1, Draft 3 (11/14/09), redline, compared to MR 1.0;
5. State Variations Chart (2009).

A few notes (I've highlighted any changes I'm suggesting):

1. Dashboard: I've added the final clause to the summary that Bob included in his e-mail, below. I've also added a reference to MR 1.0 in the summary and a reference the Michigan definition of "person" we adopted in the "Primary Factors Considered" section.
2. Introduction: I've added a reference to MR 1.0, a brief section on "Variations in other jurisdictions," and a "Note on the Rule Number".
3. Rule & Comment Chart: Mostly some formatting changes but I also re-lettered the first

paragraph (h) ("person") as paragraph (g-1).

4. Draft 3 (11/14/09), redline. I've also re-lettered the first paragraph (h) in this document.

5. I thought it wouldn't hurt to add the State Variations.

To avoid confusion over what should be included in the agenda mailing, I'll send on the underlying Word documents later.

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

Kevin

Robert L. Kehr wrote:

Angela: I have attached Draft 3 of the Rule and Comment, the Rule and Comment comparison chart (all footnotes are in Draft 3 rather than in this chart), the Introduction, and the dashboard.

Commission:

I'm not at all certain how to handle the Introduction. This rule doesn't resemble any of the others for which we have written introductions, and what we have done in other places doesn't make much sense here. You'll see how I have chosen to handle this, but you might have other suggestions.

The dashboard has the inflexible boxes that do not expand to allow the text to fit, so I am going to place here:

Summary: Proposed Rule 1.0.1 defines 14 terms used in other Rules in order to place these definitions in a single location for ease of reference (it also cross-references one definition that is located in another Rule and one definition defined in California by statute). Eleven of these definitions substantial or entirely track the Model Rule definitions; the remaining definitions differ from the Model Rule, as is explained in the comparison chart.

State variations: This is incomplete, but I'm not going to try to finish it. The reason is that Kevin yesterday or so sent me a message about the theory behind the state variation box, but I can't locate the message. We'll have to pick this up later.

Robert L. Kehr
Kehr, Schiff & Crane, LLP
12400 Wilshire Blvd. 13th Fl.
Los Angeles, CA 90025
310/820-3455 (tele)
310/820-4414 (fax)

Proposed Rule 1.0.1 [1-100]

“Terminology”

(Draft #3, 11/14/09)

Summary: Proposed Rule 1.0.1, which is based on Model Rule 1.0 (“Terminology”), defines 14 terms used in other Rules in order to place these definitions in a single location for ease of reference (it also cross-references one definition that is located in another Rule and one definition defined in California by statute). Eleven of these definitions substantially or entirely track the Model Rule definitions; the remaining definitions differ from the Model Rule counterpart, as explained in the Comparison Chart.

Comparison with ABA Counterpart

Rule	Comment
<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 checked="" 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 checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

- Existing California Law

Rule

RPC 3-310(A)

Statute

Evid. C. section 250

Case law

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

Michigan Rule 1.0.1(b) (definition of “person”).

- Other Primary Factor(s)

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.0.1* Terminology

November 2009

(Draft rule to be considered for public comment.)

INTRODUCTION:

Proposed Rule 1.0.1 is based on Model Rule 1.0. For convenience of reference, this Rule is the repository for most of the defined terms used in other rules. It contains 14 separate definitions. In addition, it incorporates the Evidence Code definition of “writing”. Finally, it contains a cross-reference to the definition found in another rule of the term “confidential information relating to the representation”. The Commission has chosen to use this cross-reference because the term is particularly important and is used in several other rules, and it is believed this cross-reference will make it more easily available.

Variations in other jurisdictions. There is a wide range of variation among the jurisdictions in their adoption of Model Rule 1.0. Although nearly every jurisdiction has adopted the Model Rule number (Alaska is an exception), many have revised, added, or deleted terms within the Rule. See “Selected State Variations,” below.

A Note on the Rule Number. Because the Commission has recommended and the Board of Governors has adopted, Rule 1.0, which sets forth the purpose and scope of the Rules of Professional Conduct, the Commission recommends re-numbering the Terminology section as “Rule 1.0.1”.

* Proposed Rule 1.0.1, Draft #3 (11/14/09).

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.0.1 Terminology</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.</p>	<p>(a) "Belief" or "believes" denotes<u>means</u> that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.</p>	<p>The Commission voted to change "denotes" to "means" throughout the definitions in order to be more specific and definite. At least Maine made the same change in its Rules.</p>
<p>(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.</p>	<p>(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.</p>	<p>The phrase "confirmed in writing" is not used in the proposed Rules and therefore has been removed. The proposed Rules use either the Model Rule term "informed consent" [see paragraph (e), below] or California's higher standard of "informed written consent" [see paragraph (e-1), below].</p>
	<p>(b) <u>"Confidential information relating to the representation" is defined in Rule 1.6, Comments [3] - [6].</u></p>	<p>The threshold use of the term "confidential information relating to the representation" is in the basic confidentiality rule, Rule 1.6, and the Commission proposes to keep the definition in that rule. It has added this cross-reference merely to simplify locating the definition. New York and North Carolina similarly cross-reference their Rule 1.6 definitions. Oregon has changed its term to "information relating to the representation of a client", and Wyoming uses the Model Rule term, but both have placed their definitions in Rule 1.0.</p>

* Proposed Rule 1.0.1, Draft 3 (11/14/09).

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.0.1 Terminology</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.</p>	<p>(c) "Firm" or "lawLaw firm" denotes a lawyer or lawyers inmeans a law partnership; a a professional law corporation; a sole proprietorship or otheran association authorized toengaged in the practice of law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, a government entity or other organization.</p>	<p>This proposal modifies the Model Rule definition in several non-substantive ways, including referring to governmental law offices (this is not stated in the Model Rule but is intended, as is shown by the Model Rule Comment). This change emphasizes the need to comply with the California principle that all lawyers are bound by the Rules of Professional Conduct, specifically including government lawyers. See <i>People ex rel. Deumkejian v. Brown</i> (1981) 29 Cal.3d 150). The substitution of "engage in" for "authorized to" is to assure that the requirements of the Rules apply to everyone acting as a law firm even if not authorized to do so [at least Maryland, Michigan, and South Carolina similarly have removed "authorized to"]. The remaining changes are for clarity. In addition, The Commission intends to use the single term "law firm" and therefore recommends dropping the reference here to "firm".</p>
<p>(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.</p>	<p>(d) "Fraud" or "fraudulent" denotesmeans conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.</p>	<p>This proposal is nearly identical to the Model Rule definition but removes "substantive or procedural" because of difficulty with the concept that a procedural requirement can define fraud. These three words also have been removed in Alaska, Florida, North Dakota, Ohio and Tennessee, often with substantial additional changes. There are other substantive changes to the definition in the versions adopted in New York, North Carolina, South Carolina, Washington, and Wyoming.</p>
<p>(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.</p>	<p>(e) "Informed consent" denotes the agreement bymeans a personperson's agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the reasonably foreseeable material risks of, and reasonably available</p>	<p>The re-ordering of the first portion of this definition is for clarity. The same change has been made at least in Maine. The addition of "reasonably foreseeable" conforms the definition to California case law that a lawyer's disclosure only needs to include reasonably foreseeable consequences. See, e.g., <i>Sharp v. Next Entertainment, Inc.</i> (2008) 163 Cal. App. 4th 410, 429-31. There</p>

<p align="center">ABA Model Rule Rule 1.0 Terminology</p>	<p align="center">Commission's Proposed Rule* Rule 1.0.1 Terminology</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
	<p>alternatives to, the proposed course of conduct.</p>	<p>are substantive changes to the definition in Alaska, Maine Rule, Michigan Missouri; New York, North Carolina, Oregon, Penn., South Carolina, and Wyoming.</p>
	<p>(e-1) "Informed written consent" means that the communication and consent required by paragraph (e) both must be in writing.</p>	<p>The Commission has added this definition of California's higher standard of written disclosure and written consent. The use of Model Rule language is not intended to substantively change California's current rule 3-310(A) definition.</p>
<p>(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.</p>	<p>(f) "Knowingly," "known," or "knows" denotesmeans actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.</p>	<p>This proposal is identical to the Model Rule definition except for the single change previously explained.</p>
<p>(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.</p>	<p>(g) "Partner" denotesmeans a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.</p>	<p>This proposal is identical to the Model Rule definition except for the single change previously explained.</p>
	<p>(g-1) "Person" means a natural person or an organization recognized as such by law.</p>	<p>The Commission voted to add this definition in order to avoid any possibility that "person" might be read as referring only to natural persons. There are six other jurisdictions that have adopted definitions of "person"; the Commission's proposal is almost identical to the one adopted in Michigan.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.0.1 Terminology</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.</p>	<p>(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes<u>means</u> the conduct of a reasonably prudent and competent lawyer.</p>	<p>This proposal is identical to the Model Rule definition except for the single change previously explained.</p>
<p>(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.</p>	<p>(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes<u>means</u> that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.</p>	<p>This proposal is identical to the Model Rule definition except for the single change previously explained.</p>
<p>(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.</p>	<p>(j) "Reasonably should know" when used in reference to a lawyer denotes<u>means</u> that a lawyer of reasonable prudence and competence would ascertain the matter in question.</p>	<p>This proposal is identical to the Model Rule definition except for the single change previously explained.</p>
<p>(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.</p>	<p>(k) "Screened" denotes<u>means</u> the isolation of a lawyer from any participation in a matter through, <u>including</u> the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.</p>	<p>This proposal is identical to the Model Rule definition but makes two changes. First, the substitution of "including" for "through" reflects the variability of what is needed to impose an effective screen, as is discussed in Comment [10], below. Also, the removal of "reasonably" is to avoid the suggestion that half-way measures will suffice. The imposition of a non-consensual screen by a law firm is an extremely serious matter.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.0.1 Terminology</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.</p>	<p>(l) "Substantial" when used in reference to degree or extent denotes<u>means</u> a material matter of clear and weighty importance.</p>	<p>This proposal is identical to the Model Rule definition except for the single change previously explained.</p>
<p>(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.</p>	<p>(m) "Tribunal" denotes<u>means: (i) a court, an arbitrator</u> in a binding arbitration proceeding, or a legislative body, an administrative agency or other body<u>law judge acting in an adjudicative capacity. A legislative body, administrative agency and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other body acts in an adjudicative capacity when</u> person to whom a neutral official, after the presentation of evidence<u>court refers one or legal argument by a party</u> more issues and whose decision or parties, will render a recommendation can be binding legal judgment directly affecting a party's interests in a particular matter<u>on the parties if approved by the court.</u></p>	<p>This proposal materially alters the Model Rule definition. The purpose of the changes is to distinguish the extremely high standards that apply to a lawyer's conduct as a client representative in a court of law or its equivalent, which is labeled as a "tribunal" by this definition (see Rule 3.3), from the more limited but still important duty of honesty that applies when a lawyer appears in a representative capacity before a legislative or administrative body (see Rule 3.9). The Commission concluded that this distinction is important because First Amendment protections apply in dealing with legislative and administrative bodies, involved in such things as writing statutes and administrative regulations and granting and denying governmental licenses and permits. First Amendment considerations do not similarly apply to court proceedings. Also, a lawyer's representative work with legislative and administrative bodies involves an element of contractual and other negotiations that are not present in courts, and that role is more akin to a lawyer serving as an advocate in non-governmental negotiations.</p>
<p>(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with</p>	<p>(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with</p>	<p>Because California has a statutory definition of "writing", the Commission proposes to substitute a reference to it in place of the Model Rule definition. Although this statutory and the Model Rule definition are substantially the same, it is believed that this will avoid confusion by California lawyers who are familiar with the statutory definition.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.0.1 Terminology</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>a writing and executed or adopted by a person with the intent to sign the writing.</p>	<p>a writing and executed or adopted by a person with the intent to sign the writing.</p>	
	<p>(n) <u>"Writing" or "written" has the meaning stated in Evidence Code section 250.</u></p>	

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Confirmed in Writing</p> <p>[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.</p>	<p>Confirmed in Writing</p> <p>[1]— If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.</p>	<p>The Commission has removed this Comment because the term is not used in the proposed Rules.</p>
<p>Firm</p> <p>[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule</p>	<p>Firm</p> <p>[2] <u>A sole proprietorship is a law firm for purposes of these Rules.</u> Whether two or more lawyers constitute a <u>law</u> firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should<u>may</u> be regarded as a <u>law</u> firm for purposes of the<u>these</u> Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is</p>	<p>This Comment is much the same as the Model Rule Comment but has the following differences: First, the Commission has added the first sentence in order to track the language of paragraph (c), which in both the Model Rule and proposed versions include a sole proprietorship within the definition of "law firm". The Commission recommends removal of the last Model Rule sentence because it does not serve to explain the defined term but instead muses about other legal issues.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.</p>	<p>relevant in doubtful cases to consider the underlying purpose of the Rule<u>rule</u> that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.</p>	
<p>[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.</p>	<p>[3]—With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.</p>	<p>The Commission recommends the removal of this Model Rule paragraph. The first sentence contradicts the plain language of paragraph (c). The second sentence does not help explain the rule but instead muses to no effect on the question of who a lawyer's client is.</p>
	<p><u>[2] Whether a lawyer who is denominated as "of counsel" should be deemed a member of law firm can also depend on the specific facts. The term "of counsel" implies that the lawyer so designated has a relationship with the firm, other than as a partner or associate, or officer or shareholder, that is close, personal, continuous, and regular. Thus, to the extent the relationship between a law firm and a</u></p>	<p>The Commission recommends the addition of this paragraph in order to express a pertinent rule of California law.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>lawyer is sufficiently “close, personal, regular and continuous,” such that the lawyer is held out to the public as “of counsel” for the law firm, the relationship of the firm and “of counsel” lawyer will be considered a single firm for purposes of disqualification. See, e.g., <i>People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.</i> (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816]. On the other hand, even when a lawyer has associated as “of counsel” with another lawyer and is providing extensive legal services on a matter, they will not necessarily be considered the same firm for purposes of dividing fees under Rule 1.5.1 [2-200] where, for example, they both continue to maintain independent law practices with separate identities, separate addresses of record with the State Bar, and separate clients, expenses, and liabilities. See, e.g., <i>Chambers v. Kay</i> (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].</p>	
<p>[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.</p>	<p>[43] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.</p>	<p>This is the Model Rule paragraph without change.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[4] This Rule is not intended to authorize any person or entity to engage in the practice of law in this state except as otherwise permitted by law.</p>	<p>The Commission recommends the addition of this paragraph in order to prevent the definition of "law firm" from being misread as an authorization to practice law. The consequence is that anyone acting as a law firm has all the duties of law firms even if not authorized to practice law.</p>
<p>Fraud</p> <p>[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.</p>	<p>Fraud</p> <p>[56] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.</p>	<p>This is the Model Rule paragraph, changed only to track the change in paragraph (d).</p>
<p>Informed Consent</p> <p>[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving</p>	<p>Informed Consent <u>and Informed Written Consent</u></p> <p>[67] Many of the Rules of Professional Conduct require the<u>a</u> lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. <u>Other Rules require a lawyer to obtain informed written consent.</u> See, e.g., Rules 1.2(c), 1.6(a), and 1.7(b). The communication necessary to obtain such consent</p>	<p>This paragraph has been modified to cover the paragraph (e) and (e-1) definitions of "informed consent" and "informed written consent". The removal of "ordinarily" clarifies that the obligation to disclose exists invariably. The addition of "reasonably available" tracks the change in paragraph (e), explained above. The removal of the two sentences beginning "In some circumstances ..." sentence removes practice tips that do not explain the Rule. The removal of the last sentence is to avoid its suggestion that a lawyer has no disclosure obligation to a client that is independently represented.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent</p>	<p>will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily <u>In any event</u>, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's or other person's <u>reasonably available</u> options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving</p>	

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>the consent should be assumed to have given informed consent.</p>	
<p>[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).</p>	<p>[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a A lawyer may not assume consent from a client's or other person's silence. Consent However, except where the standard is one of informed written consent, consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7 paragraph (bn) and 1.9(a). For a for the definition of "writing" and "confirmed in writing, written" see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).</p>	<p>The Commission recommends the changes in the first and second sentences to clarify that an affirmative response always is need in obtaining informed consent. The remaining changes conform the Comment to the paragraph (e) definition.</p>
<p>Screened</p> <p>[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.</p>	<p>Screened</p> <p>[89] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules [1.10, 1.11, 1.12 or 1.18].</p>	<p>The Commission recommends no change in the Model Rule except in the cross-references, in order to conform to recommended changes in other Rules.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.</p>	<p>[9]10 The purpose of screening is to assure the affected parties <u>[client, former client, or potential client]</u> that confidential information known by the personally disqualified prohibited lawyer remains protected <u>is neither disclosed to other law firm lawyers or non-lawyer personnel or used to the detriment of the person to whom the duty of confidentiality is owed</u>. The personally disqualified prohibited lawyer should <u>shall</u> acknowledge the obligation not to communicate with any of the other lawyers <u>and non-lawyer personnel</u> in the firm with respect to the matter. Similarly, other lawyers <u>and non-lawyer personnel</u> in the firm who are working on the matter should <u>promptly shall</u> be informed that the screening is in place and that they may not communicate with the personally disqualified prohibited lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers <u>firm personnel</u> of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter, and periodic</p>	<p>This proposed paragraph generally tracks the Model Rule Comment but makes several changes: First, this replaces “parties” in the first sentence because a lawyer’s duty of confidentiality is owed only to clients, former clients, and potential clients and not to anyone else that might be called a “party”. Second, to conform to proposed language in the applicable confidentiality rules, “disqualified” has been replaced throughout the paragraph with “prohibited”. Third, this eliminates an internal inconsistency in the Model Rule Comment by stating on each occasion that screening involves both all other law firm lawyers and all non-lawyer personnel. Fourth, the obligation of the screened lawyer to acknowledge the existence of the screen is stated in mandatory (“shall”) rather than permissive (“should”) terms. Fifth, the obligation to inform other law firm personnel of the screen is made mandatory and, to conform to the paragraph (k) requirement of timeliness, the requirement is to do so “promptly”. This mandatory statement also appears in the Connecticut Comment, and the mandatory language also appears in the N.Y. Comment.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>reminders of the screen to the screened lawyer and all other firm personnel.</p>	
<p>[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.</p>	<p>[10]^[11] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.</p>	<p>The Commission proposed no change in the Model Rule paragraph.</p>
	<p><u>Tribunal</u></p> <p>[12] <u>This definition is limited to courts and their equivalent in order to distinguish the special and heightened duties that lawyers owe to courts from the important but more limited duties of honesty and integrity that a lawyer owes when acting as an advocate before a legislative body or administrative agency. Compare Rule 3.3 to Rule 3.9.</u></p>	<p>This paragraph has been added as a brief explanation for the narrow definition of "tribunal". See the paragraph (m) explanation, above.</p>
	<p><u>Writing and Written</u></p> <p>[13] <u>These Rules utilize California' statutory definition to avoid confusion by California lawyers familiar with it. It is substantially the same as the definitions in the ABA Model Rules and most other jurisdictions.</u></p>	<p>See the paragraph (n) explanation, above.</p>

1 **Rule 1.0.1 Terminology**
2

3 | (a)¹ “Belief” or “believes” means² that the person involved actually supposed the fact
4 in question to be true. A person’s belief may be inferred from circumstances.
5

6 (b)^{2A} “Confidential information relating to the representation” is defined in Rule 1.6,
7 Comments [3] – [6], ~~and is not limited to information that relates to the subject of the~~
8 ~~representation.~~

9
10 ~~(b)³ “Disclosure” means informing the client or former client of the relevant~~
11 ~~circumstances and of the actual and reasonably foreseeable adverse consequences to~~
12 ~~the client or former client.”~~

13
14 (c)⁴ “Law firm” means a law partnership; a professional law corporation; a sole
15 proprietorship or an association engaged in the practice of law; or lawyers employed in
16 a legal services organization or in the legal department, division or office of a
17 corporation, a government entity or other organization.
18

19 | (d)⁵ “Fraud” or “fraudulent” means conduct that is fraudulent under the ~~substantive or~~
20 ~~procedural~~ law of the applicable jurisdiction and has a purpose to deceive.
21

¹ This definition was deemed approved at the Commission’s August 28-29, 2009 meeting.

The partial draft of this Rule considered at the Commission’s November 2009 meeting included extensive footnotes describing the jurisdictional variations of the defined terms on which the Commission had not yet made decisions. We have removed those footnotes so that the current draft won’t become too unwieldy. For the same reason, this draft does not carry forward the marked editing in the Rule but shows edits only to those definitions on which the Commission reached decisions at the November 2009 meeting.

² The Commission at its August 28-29, 2009 meeting voted 11-0-0 to substitute throughout this rule the word “means” in place of the Model Rule’s less definite “denotes”. With this change, paragraph (a) was deemed approved. See 8/28-29/09 KEM Meeting Notes, III.A., at ¶¶ 4 and 7A. I want to note for future reference that at least Maine has made the same change in its new Rules effective 8/1/09.

^{2A} The Commission at its November 6-7, 2009 meeting voted 10-0-0 to adopt this definition. With this change, paragraph (b) was deemed approved. See 11/6-7/09 KEM Meeting Notes, IV.A., at ¶¶ 1A.

³ The Commission at its November 6-7, 2009 meeting voted 7-0-3 to move this definition to a Comment as part of an explanation of the “adequate information” that a lawyer is required to communicate in order to obtain “informed consent”. See 11/6-7/09 KEM Meeting Notes, IV.A., at ¶¶ 2C. See Comment [7], below.

⁴ This is the post-public comment draft as previously approved by the Commission.

⁵ This definition was deemed approved at the Commission’s August 28-29, 2009 meeting. The Commission then voted 8-2-0 to delete “substantive or procedural” from the definition. See 8/28-29/09 KEM Meeting Notes, III.A., at ¶¶ 9 and 9A.

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22 | (e)⁶ “Informed consent” means a person’s the agreement by a person to a proposed
23 | course of conduct after the lawyer has communicated adequate information and
24 | explanation about the reasonably foreseeable material risks of, and reasonably
25 | available alternatives to, the proposed course of conduct.

26 |
27 | (e-1) “Informed written consent” means that the communication and consent required
28 | by paragraph (e) both must be in writing.

29 |
30 | (f)⁷ “Knowingly,” “known,” or “knows” means actual knowledge of the fact in question.
31 | A person’s knowledge may be inferred from circumstances.

⁶ The Commission at its November 6-7, 2009 meeting voted 10-0-0 to insert “reasonably foreseeable”. See 11/6-7/09 KEM Meeting Notes, IV.A., at ¶¶ 2A. The commas in the first sentence were inserted at the direction of the Chair. See 11/6-7/09 KEM Meeting Notes, IV.A., at ¶¶ 2A.b. A motion to place “informed consent” and “informed written consent” in separate paragraphs passed by a vote of 5-4-1. See 11/6-7/09 KEM Meeting Notes, IV.A., at ¶ 4A. A motion to delete “reasonably available alternatives” was defeated by a vote of 1-9-0. See 11/6-7/09 KEM Meeting Notes, IV.A., at ¶ 4C. The following revision of what now is paragraph (e-1) was deemed approved at the Commission’s November 6-7, 2009 meeting: “‘Informed written consent’ means that the communication and consent provided in paragraph (e) both must be in writing.” The drafters have taken the liberty of changing “provided in” to the more specific and emphatic “required by”.

⁷ This definition was deemed approved at the Commission’s August 28-29, 2009 meeting. See 8/28-29/09 KEM Meeting Notes, III.A., at ¶11. At the Commission’s November 6-7, 2009 meeting, Raul Martinez raised a possible inconsistency between the use of “fact” in paragraph (f) and “matter” in the paragraph (i) and (j) definitions. See 11/6-7/09 KEM Meeting Notes, IV.A., at ¶ 5A. The Consultant provided a copy of an ABA memo on scienter and made the following observation and recommendation:

After reviewing the ABA memo, I'm satisfied that the ABA has it right. A fact can be "known," but you need a little wiggle room to address the issue of "reasonably believes" and "reasonably should know," which are conclusions that are typically reached after a consideration of numerous facts and the surrounding circumstances. For example, in 1.13, we require a lawyer to "know" of the purported misconduct of the constituent, but we impose a higher standard on the lawyer to "know or reasonably should know" that the organization will suffer a substantial injury. You can't know that an injury will result; you can only reach such a conclusion after a consideration of all the surrounding circumstances. The same is true as to a reasonable belief that your course of action will be (or is) in the best lawful interests of the organization. I would leave the Model Rule definitions exactly the way they are.

RLK response: I reach the same conclusion and make the same recommendation. In addition to Kevin’s observation about how changing the defined terms would alter the Rule 1.13 standard, the Model Rules appear to me to be consistent in using the “reasonable” and “reasonably” where the lawyer’s knowledge cannot easily be described as being knowledge of a fact but rather speaks to the lawyer’s opinion or perception. For example, our Rule 1.1(c) speaks of associating in a lawyer who the first lawyer reasonably believes is competent. As another example, our Rule 1.6(b) allows a lawyer to disclose confidential client information if the

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- 32
33 | (g)⁸ “Partner” means a member of a partnership, a shareholder in a law firm
34 organized as a professional corporation, or a member of an association authorized to
35 practice law.
36
37 | (g-1)^{8-A} “Person” means a natural person or an organization recognized as such
38 by law.
39
40 | (h)⁹ “Reasonable” or “reasonably” when used in relation to conduct by a lawyer
41 | means the conduct of a reasonably prudent and competent lawyer.
42
43 | (i)¹⁰ “Reasonable belief” or “reasonably believes” when used in reference to a lawyer
44 | means that the lawyer believes the matter in question and that the circumstances are
45 such that the belief is reasonable.
46
47 | (j)¹¹ “Reasonably should know” when used in reference to a lawyer means that a
48 lawyer of reasonable prudence and competence would ascertain the matter in question.
49
50 | (k)¹² “Screened” means the isolation of a lawyer from any participation in a matter,
51 including through the timely imposition of procedures within a firm that are ~~reasonably~~

lawyer reasonably believes doing so is needed to prevent a criminal act, etc. I don't see these as involving facts, and I think the Model Rule use of “matter” is right.

⁸ This definition was deemed approved at the Commission's August 28-29, 2009 meeting. See 8/28-29/09 KEM Meeting Notes, III.A., at ¶12.

^{8-A} The definition was adopted by a vote of 9-0-1. See 11/6-7/09 KEM Meeting Notes, IV.A., at ¶18A.

⁹ This definition was deemed approved at the Commission's August 28-29, 2009 meeting. See 8/28-29/09 KEM Meeting Notes, III.A., at ¶13.

¹⁰ This definition was deemed approved at the Commission's August 28-29, 2009 meeting. See 8/28-29/09 KEM Meeting Notes, III.A., at ¶14.

¹¹ This definition was deemed approved at the Commission's August 28-29, 2009 meeting. See 8/28-29/09 KEM Meeting Notes, III.A., at ¶15.

¹² A motion to adopt the Model Rule definition was defeated by a vote of 5-5-0. See 11/6-7/09 KEM Meeting Notes, IV.A., at ¶10B. A motion to adopt the Model Rule definition without “reasonably” was approved by a vote of 6-4-0. See 11/6-7/09 KEM Meeting Notes, IV.A., at ¶10C. A subsequent motion to adopt a modified definition was defeated by a vote of 5-5-0. The proposed modified definition is: “Screened” means the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to ~~protect~~ prevent the use or disclosure of information that the isolated lawyer is obligated to protect under these Rules or other law.” See 11/6-7/09 KEM Meeting Notes, IV.A., at ¶10D. The above definition then was adopted by a vote of 10-0-0. See 11/6-7/09 KEM Meeting Notes, IV.A., at ¶10E. A subsequent motion to change “protect” to “prevent the use or disclosure of” was defeated by a vote of 5-5-0. See 11/6-7/09 KEM Meeting Notes, IV.A., at ¶10F. A motion to include in screening a requirement that the

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52 adequate under the circumstances to protect information that the isolated lawyer is
53 obligated to protect under these Rules or other law.

54

55 | (l)¹³ “Substantial” when used in reference to degree or extent means a material
56 matter of clear and weighty importance.

57

58 | (m)¹⁴ “Tribunal” means: (i) a court, an arbitrator, or an administrative law judge ~~in a~~
59 ~~binding arbitration proceeding or a legislative body, administrative agency or other body~~
60 acting in an adjudicative capacity and authorized to make a decision that can be binding
61 on the parties involved; or (ii) a special master or other person to whom a court refers
62 one or more issues and whose decision or recommendation can be binding on the
63 parties if approved by the court. ~~A legislative body, administrative agency or other body~~
64 ~~acts in an adjudicative capacity when a neutral official, after the presentation of~~
65 ~~evidence or legal argument by a party or parties, will render a binding legal judgment~~
66 ~~directly affecting a party’s interests in a particular matter.~~

67

68 | (n)¹⁵ “Writing” or “written” has the meaning stated in Evidence Code section 250
69 means ~~a tangible or electronic record of a communication or representation, including~~
70 ~~handwriting, typewriting, printing, photostating, photography, audio or videorecording~~
71 ~~and e-mail. A “signed” writing includes an electronic sound, symbol or process attached~~
72 ~~to or logically associated with a writing and executed or adopted by a person with the~~
73 ~~intent to sign the writing.~~

74

75 **Comment¹⁶**

76

isolated lawyer not be able to share directly or indirectly in resulting fees was defeated by a vote of 2-8-0. See 11/6-7/09 KEM Meeting Notes, IV.A., at ¶10H and I. Stan Lamport urged, and JoElla Julian supported, that the Comment should make clear that an adequate screen will protect against both the use and disclosure of confidential information. See Comment [10] and fn. 26, below.

¹³ This definition was deemed approved at the Commission November 6-7, 2009 meeting. See 11/6-7/09 KEM Meeting Notes, IV.A., at ¶6.

¹⁴ This definition was deemed approved at the Commission November 6-7, 2009 meeting. See 11/6-7/09 KEM Meeting Notes, IV.A., at ¶7 subject to adoption of a Comment that clarifies the significance of the Commission’s narrowing of the Model Rule definition. See Comment [12] and fn. 27, below.

¹⁵ The Commission at its November 6-7, 2009 meeting voted 9-0-1 to replace the Model Rule definition with a reference to California’s statutory definition. See 11/6-7/09 KEM Meeting Notes, IV.A., at ¶8A.

¹⁶ The drafters now have addressed the Comments on all definitions. Note that not all definitions have Comments. Quite a few jurisdictions adopted the Model Rule Comment with little or no change, and a number of other jurisdictions have no Comment to the definitions (as was true of the 1983 Model Rules).

77 **Confirmed in Writing**

78

79 ~~[1]— If it is not feasible to obtain or transmit a written confirmation at the time the client~~
80 ~~gives informed consent, then the lawyer must obtain or transmit it within a reasonable~~
81 ~~time thereafter. If a lawyer has obtained a client’s informed consent, the lawyer may act~~
82 ~~in reliance on that consent so long as it is confirmed in writing within a reasonable time~~
83 ~~thereafter.~~¹⁶⁻¹

84

85 **Firm**

86

87 ~~[1]~~¹⁷ A sole proprietorship is a law firm for purposes of these Rules. Whether
88 two or more lawyers constitute a law firm can depend on the specific facts. For
89 example, two practitioners who share office space and occasionally consult or assist
90 each other ordinarily would not be regarded as constituting a firm. However, if they
91 present themselves to the public in a way that suggests that they are a firm or conduct
92 themselves as a firm, they may be regarded as a law firm for purposes of these Rules.
93 The terms of any formal agreement between associated lawyers are relevant in
94 determining whether they are a firm, as is the fact that they have mutual access to
95 information concerning the clients they serve. Furthermore, it is relevant in doubtful
96 cases to consider the underlying purpose of the rule that is involved.

97

98 ~~[2]~~ ~~[3]~~ Whether a lawyer who is denominated as “of counsel” should be deemed a
99 member of law firm can also depend on the specific facts. The term “of counsel” implies
100 that the lawyer so designated has a relationship with the firm, other than as a partner or
101 associate, or officer or shareholder, that is close, personal, continuous, and regular.
102 Thus, to the extent the relationship between a law firm and a lawyer is sufficiently
103 “close, personal, regular and continuous,” such that the lawyer is held out to the public
104 as “of counsel” for the law firm, the relationship of the firm and “of counsel” lawyer will
105 be considered a single firm for purposes of disqualification. See, e.g., *People ex rel.*
106 *Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th
107 1135 [86 Cal.Rptr.2d 816]. On the other hand, even when a lawyer has associated as
108 “of counsel” with another lawyer and is providing extensive legal services on a matter,
109 they will not necessarily be considered the same firm for purposes of dividing fees
110 under Rule 1.5.1 [2-200] where, for example, they both continue to maintain
111 independent law practices with separate identities, separate addresses of record with
112 the State Bar, and separate clients, expenses, and liabilities. See, e.g., *Chambers v.*
113 *Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].

114

115 ~~[3]~~ ~~[4]~~ Similar questions can also arise with respect to lawyers in legal aid and legal
116 services organizations. Depending upon the structure of the organization, the entire
117 organization or different components of it may constitute a firm or firms for purposes of
118 these Rules.

¹⁶⁻¹ The proposed Rules do not use the Model Rule term “confirmed in writing”.

¹⁷ This is the post-public comment draft as previously approved by the Commission.

119
120 [4] [5] This Rule is not intended to authorize any person or entity to engage in the
121 practice of law in this state except as otherwise permitted by law.
122

123
124 **Fraud**
125

126 [6] [5] When used in these Rules, the terms “fraud” or “fraudulent” refer to conduct that
127 is characterized as such under the ~~substantive or procedural~~ law of the applicable
128 jurisdiction and has a purpose to deceive. This does not include merely negligent
129 misrepresentation or negligent failure to apprise another of relevant information. For
130 purposes of these Rules, it is not necessary that anyone has suffered damages or relied
131 on the misrepresentation or failure to inform.¹⁸
132

133 **Informed Consent and Informed Written Consent**
134

135 [7] [6] Many of the Rules of Professional Conduct require a the lawyer to obtain the
136 informed consent of a client or other person (e.g., a former client or, under certain
137 circumstances, a prospective client) before accepting or continuing representation or
138 pursuing a course of conduct. Other Rules require a lawyer to obtain informed written
139 consent. See, e.g., Rules 1.2(c), 1.6(a), and 1.7(b). The communication necessary to
140 obtain such consent will vary according to the Rule involved and the circumstances
141 giving rise to the need to obtain informed consent. The lawyer must make reasonable
142 efforts to ensure that the client or other person possesses information reasonably
143 adequate to make an informed decision. Ordinarily In any event, this will require
144 communication that includes a disclosure of the facts and circumstances giving rise to
145 the situation, any explanation reasonably necessary to inform the client or other person
146 of the material advantages and disadvantages of the proposed course of conduct, and a
147 discussion of the client’s or other person’s reasonably available options and
148 alternatives. ~~In some circumstances it may be appropriate for a lawyer to advise a~~
149 ~~client or other person to seek the advice of other counsel.~~¹⁹ ~~A lawyer need not inform a~~
150 ~~client or other person of facts or implications already known to the client or other~~
151 ~~person; nevertheless, a lawyer who does not personally inform the client or other~~
152 ~~person assumes the risk that the client or other person is inadequately informed and the~~
153 ~~consent is invalid.~~²⁰ In determining whether the information and explanation provided
154 are reasonably adequate, relevant factors include whether the client or other person is

¹⁸ This Comment was deemed approved at the Commission’s November 6-7, 2009 meeting. See 11/6-7/09 KEM Meeting Notes, IV.A., at ¶9.

¹⁹ This sentence is correct but merely a practice pointer, and one that might cause confusion about whether Rule 1.8.1 really requires advice to seek independent counsel. The addition of “reasonably available” in the preceding sentence is to accurately track the language of the Rule.

²⁰ This is intended as a substantive change. The Comment should not suggest the possibility of cutting corners. It is no great hardship to require a lawyer to repeat what the person already knows.

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155 experienced in legal matters generally and in making decisions of the type involved, and
156 whether the client or other person is independently represented by other counsel in
157 giving the consent. ~~Normally, such persons need less information and explanation than~~
158 ~~others, and generally a client or other person who is independently represented by other~~
159 ~~counsel in giving the consent should be assumed to have given informed consent.~~²¹
160

161 [8] [7] Obtaining informed consent will usually requires an affirmative response by the
162 client or other person. ~~In general, a~~ A lawyer may not assume consent from a client's or
163 other person's silence. However, except where the standard is one of informed *written*
164 consent, ~~C~~consent may be inferred, ~~however,~~ from the conduct of a client or other
165 person who has reasonably adequate information about the matter.²² ~~A number of~~
166 ~~Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and~~
167 ~~1.9(a). For a definition of "writing" and "confirmed in writing," s~~See paragraphs (n) and
168 ~~(b) for the definition of "writing" and "written". Other Rules require that a client's consent~~
169 ~~be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a~~
170 ~~definition of "signed," see paragraph (n).~~

171
172 **Screened**

173
174 [9] [8] This definition applies to situations where screening of a personally disqualified
175 lawyer is permitted to remove imputation of a conflict of interest under Rules [1.10, 1.11,
176 1.12 or 1.18].²³
177

178 [10] [9] The purpose of screening is to assure the affected parties [client, former client,
179 or potential client]²⁴ that confidential information known by the personally disqualified

²¹ This is intended as a substantive change. The sentence elides the person's understanding of the significance of giving consent with the person's knowledge of facts that might be considered in giving consent. A lawyer's obligation to disclose the facts is not altered when the person who is asked to give consent is represented by independent counsel. Note that D.C. Comment [2] (its version of Model Rule Comment [6]) adds: [In all circumstances, the client's consent must be not only informed but also uncoerced by the lawyer or by any other person acting on the lawyer's behalf.](#)

²² The edits to the first three sentences are intended to mean that a lawyer must obtain some affirmative response, but the response might be by action rather than by word.

²³ The Rule cross-references have been bracketed for possible future correction depending on which Rules permit non-consensual screening. Note that Washington has added a Comment that cross references other Rules with special screening requirements: [See Rules 1.10 and 6.5 for specific screening requirements under the circumstances covered by those Rules.](#) We should check for that as part of final editing.

²⁴ This change is to avoid the risk that someone might read the Comment as implying that a lawyer has pertinent duties to anyone who is not a current, former, or potential client. Those terms have been placed in brackets so that it can be made consistent with the cross-references in Comment [9]. See fn. 23.

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180 prohibited²⁵ lawyer is neither disclosed to other law firm lawyers or non-lawyer
181 personnel or used to the detriment of the person to whom the duty of confidentiality is
182 owed²⁶ ~~remains protected~~. The personally disqualified prohibited lawyer ~~should~~ shall
183 acknowledge the obligation not to communicate with any of the other lawyers and non-
184 lawyer personnel in the firm with respect to the matter^{26-A}. Similarly, other lawyers and
185 non-lawyer personnel in the firm who are working on the matter ~~should~~ promptly shall
186 be informed that the screening is in place and that they may not communicate with the
187 personally prohibited ~~disqualified~~ lawyer with respect to the matter. Additional
188 screening measures that are appropriate for the particular matter will depend on the
189 circumstances. To implement, reinforce and remind all affected ~~lawyers~~ firm personnel
190 of the presence of the screening, it may be appropriate for the firm to undertake such
191 procedures as a written undertaking by the screened lawyer to avoid any
192 communication with other firm personnel and any contact with any firm files or other
193 materials relating to the matter, written notice and instructions to all other firm personnel
194 forbidding any communication with the screened lawyer relating to the matter, denial of
195 access by the screened lawyer to firm files or other materials relating to the matter, and
196 periodic reminders of the screen to the screened lawyer and all other firm personnel.

197
198 [11] [40] In order to be effective, screening measures must be implemented as soon as
199 practical after a lawyer or law firm knows or reasonably should know that there is a
200 need for screening.

201

202 **Tribunal**

203

204 [12]²⁷ This definition is limited to courts and their equivalent in order to distinguish the
205 special and heightened duties that lawyers owe to courts from the important but more
206 limited duties of honesty and integrity that a lawyer owes when acting as an advocate
207 before a legislative body or administrative agency. Compare Rule 3.3 to Rule 3.9.

208

209 **Writing and Written**

210

²⁵ The change from “disqualified” to “prohibited” was made to track the parallel changes in other Rules.

²⁶ The preceding phrase is in response to Stan Lampport’s request described above in fn. 12

^{26-A} The Model Rule is inconsistent in referring only to lawyers in the first portion of the Comment and to all personnel later in the Comment. The change from “should” to “shall” is found in Connecticut Comment [9], but it also add: “... to the client” The mandatory “shall” also has been substituted in the sentence that follows with the addition of “promptly” (which is found in the N.Y. Comment).

²⁷ This is an intentionally limited explanation of the reasons for our proposed limited definition of “tribunal”. There is much more that could be said about the First Amendment right to petition government and how a lawyer’s role in non-adjudicative proceedings differs from a lawyer’s role in court.

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211 [13] These Rules utilize California' statutory definition to avoid confusion by California
212 lawyers familiar with it. It is substantially the same as the definitions in the ABA Model
213 Rules and most other jurisdictions.

Rule 1.0:

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.)

Connecticut adds: 'Client' or 'person' as used in these Rules includes an authorized representative unless otherwise stated.

District of Columbia defines "matter" as "any litigation, administrative proceeding, lobbying activity, application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a negotiation, estate or family relationship practice issue, or any other representation, except as expressly limited in a particular rule."

Illinois retains the 1983 version of the ABA Terminology, retains the definitions of "confidence" and "secret" derived from DR 4-101(A) of the ABA Model Code of Professional Responsibility, and adds the following terminology:

"Contingent fee agreement" denotes an agreement for the provision of legal services by a lawyer under which the amount of the lawyer's compensation is contingent in whole or in part upon the successful completion of the subject matter of the agreement, regardless of whether the fee is established by formula or is a fixed amount.

"Disclose" or "disclosure" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Person" denotes natural persons, partnerships, business corporations, not-for-profit corporations, public and quasi-public corporations, municipal corporations, State and Federal governmental bodies and agencies, or any other type of lawfully existing entity.

Massachusetts: Rule 9.1 retains the 1983 version of the ABA Terminology and adds a definition of a qualified legal assistance organization." Amended Comment 3 to Rule 9.1 provides as follows: "The final category of qualified legal assistance organization requires that the organization 'receives no profit from the rendition of legal services: That condition refers to the entire legal services operation of the organization; it does not prohibit the receipt of a court-awarded fee that would result in a 'profile from that particular lawsuit.'

New York defines "fraud" as follows:

"Fraud" does not include conduct, although characterized as fraudulent by statute or administrative rule, which lacks an element of scienter. deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another.

New York also defines "domestic relations matters," and defines "tribunalar' to include "all courts, arbitrators and other adjudicatory bodies.'

Ohio: Rule 1.0 defines "fraud!! and "fraudulent" as denoting "conduct that has an intent to deceive and is either of the following:

(1) an actual or implied misrepresentation of a material fact that is made either with knowledge of its falsity or with such utter disregard and recklessness about its falsity that knowledge may be inferred; (2) a knowing concealment of a material fact where there is a duty to disclose the material fact. **Illinois** includes language from DR 7-102(A)-(B) as paragraphs (f)-(h), and adds the following paragraph (based on DR 7-105) as Rule 1.2(e): "A lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional disciplinary actions to obtain an advantage in a civil matter."

Oregon adds or alters the meaning of a number of phrases, including "electronic communication, "informed consent," "law firm," "knowingly," and "matter."

Texas generally retains the 1983 version of the ABA Terminology, but modifies some of the 1983 definitions and adds others that are neither in the 1983 nor current versions of the ABA Terminology. Specifically, Texas includes the following definitions:

"Adjudicatory Official" denotes a person who serves on a Tribunal.

"Adjudicatory Proceeding" denotes the consideration of a matter by a Tribunal.

"Competent" or "Competence" denotes possession or the ability to timely

acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

"Firm" or "Law firm" denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.

"Fitness" denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

"Should know" when used in reference to a lawyer denotes that a reasonable lawyer under the same or similar circumstances would know the matter in question.

"Substantial" when used in reference to degree or extent denotes a matter of meaningful significance or involvement.

"Tribunal" denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. "Tribunal" includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter; but it does not include jurors, prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity.

Virginia retains the 1983 version of the Terminology section and adds:

"Should' when used in reference to a lawyer's action denotes an aspirational rather than a mandatory standard."

Wisconsin: Wisconsin adds or alters the meaning of a number of phrases, including "consultation," "firm," "misrepresentation," and "prosecutor."