

### **Rule 1.0.1 [1-100(B)] Terminology**

#### **(Commission's Proposed Rule Adopted on January 22 – 23, 2016 – Clean Version)**

- (a) “Belief” or “believes” means that the person involved actually supposes the fact in question to be true. A person’s belief may be inferred from circumstances.
- (b) [Reserved]
- (c) “Firm” or “law firm” means a law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.
- (d) “Fraud” or “fraudulent” means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.
- (e) “Informed consent” means a person’s agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.
- (e-1) “Informed written consent” means that the disclosures and the consent required by paragraph (e) must be in writing.
- (f) “Knowingly,” “known,” or “knows” means actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.
- (g) “Partner” means 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.
- (g-1) “Person” means a natural person or an organization.
- (h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.
- (i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
- (j) “Reasonably should know” when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.
- (k) “Screened” means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm that are adequate under the circumstances (i) to protect information that the isolated lawyer is

obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and nonlawyer personnel communicating with the lawyer with respect to the matter.

- (l) “Substantial” when used in reference to degree or extent means a material matter of clear and weighty importance.
- (m) “Tribunal” means: (i) a court, an arbitrator, an administrative law judge, or an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.
- (n) “Writing” or “written” has the meaning stated in Evidence Code § 250. A “signed” writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person with the intent to sign the writing.

## **Comment**

### *Firm\* or Law Firm\**

[1] Practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a law firm.\* However, if they present themselves to the public in a way that suggests that they are a law firm\* or conduct themselves as a law firm,\* they may be regarded as a law firm\* for purposes of these 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.

[2] The term “of counsel” implies that the lawyer so designated has a relationship with the law firm,\* other than as a partner\* or associate, or officer or shareholder, that is close, personal, continuous, and regular. Whether a lawyer who is denominated as “of counsel” or by a similar term should be deemed a member of a law firm\* for purposes of these Rules will also depend on the specific facts. Compare *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816] with *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].

### *Fraud\**

[3] When the terms “fraud”\* or “fraudulent”\* are used in these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform because requiring the proof of those elements of fraud\* would impede the purpose of certain rules to prevent fraud\* or avoid a lawyer assisting in the perpetration of a fraud,\* or otherwise frustrate the imposition of discipline on lawyers who engage in fraudulent\* conduct. The term “fraud”\* or “fraudulent”\* when used in these Rules does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information.

*Informed Consent\* and Informed Written Consent\**

[4] The communication necessary to obtain informed consent\* or informed written consent\* will vary according to the rule involved and the circumstances giving rise to the need to obtain consent.

*[Screened\*]*

[5] The purpose of screening is to assure the affected client, former client, or prospective client that confidential information known\* by the personally prohibited lawyer is neither disclosed to other law firm\* lawyers or nonlawyer personnel nor used to the detriment of the person\* to whom the duty of confidentiality is owed. The personally prohibited lawyer shall acknowledge the obligation not to communicate with any of the other lawyers and nonlawyer personnel in the law firm\* with respect to the matter. Similarly, other lawyers and nonlawyer personnel in the law firm\* who are working on the matter promptly shall be informed that the screening is in place and that they may not communicate with the personally 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 law firm\* personnel of the presence of the screening, it may be appropriate for the law firm\* to undertake such procedures as a written\* undertaking by the personally prohibited lawyer to avoid any communication with other law firm\* personnel and any contact with any law firm\* files or other materials relating to the matter, written\* notice and instructions to all other law firm\* personnel forbidding any communication with the personally prohibited lawyer relating to the matter, denial of access by that lawyer to law firm\* files or other materials relating to the matter, and periodic reminders of the screen to the personally prohibited lawyer and all other law firm\* personnel.

[6] 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.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.0.1  
(Current Rule 1-100(B))  
Terminology**

**EXECUTIVE SUMMARY**

In connection with consideration of current rule 1-100 (Rules of Professional Conduct, In General), the Commission for the Revision of the Rules of Professional Conduct (“Commission”) has reviewed and evaluated current rule 1-100(B) (Definitions) in accordance with the Commission Charter, with a focus on the function of the entire set of rules as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, ABA Model Rule 1.0 (Terminology), as well as the Terminology section of the California Code of Judicial Ethics. The result of this evaluation is proposed rule 1.0.1 (Terminology) which expands upon the five definitions currently contained in rule 1-100(B). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

The proposed rule provides a global terminology section with definitions of terms that are used throughout the proposed Rules of Professional Conduct. Similar to the ABA Model Rules and the California Code of Judicial Ethics, proposed rule 1.0.1 would provide a central location for significant terms whose meaning is critical to understanding the duties contained in the proposed Rules of Professional Conduct. Adoption of proposed rule 1.0.1 would obviate a lawyer’s need to consult case law or ethics opinions to comprehend the legal standard with which he or she must comply, thereby enhancing both enforcement and compliance with the rules.

The content of the definitions is derived from ABA Model Rule 1.0 where the Model Rule and California meanings of a term are aligned. The Commission believes adopting the Model Rule definition will remove unnecessary differences between the California rule and the corresponding rule in other jurisdictions, an important consideration in regulating lawyers from other jurisdictions who practice in California under one of the multijurisdictional practice rules of court.<sup>1</sup> However, where the Model Rule definition and California law or settled public policy are not aligned, the Commission revised those definitions to reflect California law or policy to ensure continuation of important public policies, including client protection, that are reflected in the California approach.<sup>2</sup>

Paragraph (a) of proposed rule 1.0.1 defines “belief” of “believes” and is nearly identical to ABA Model Rule 1.0(a). The only changes are non-substantive and they include substituting “means”

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<sup>1</sup> See, e.g., California Rules of Court 9.45 – 9.48.

<sup>2</sup> An example of this is California’s approach to “informed written consent” which is a heightened standard requiring that both the client’s consent, as well as the attorney’s disclosure to the client of the relevant circumstances and the material risks, including reasonably foreseeable adverse consequences, be in writing. The Model Rules approach is for the client to confirm in writing that the lawyer orally communicated adequate information and explanation regarding the material risks of and reasonably available alternatives to the proposed course of conduct.

for “denotes,”<sup>3</sup> and the present tense “supposes” for “supposed” to correspond to the tense of “believes.”

Paragraph (c) defines “firm” or “law firm” and is derived from ABA Model Rule 1.0(c). The proposed rule includes a reference to a government organization. This addition emphasizes the need to comply with the California principle that all lawyers are bound by the Rules of Professional Conduct, including government lawyers.<sup>4</sup> The proposed rule substitutes “engaged in” for “authorized to,” as stated in the Model Rule, to assure that the requirements of the rules apply to everyone acting as a law firm even if not authorized to do so.<sup>5</sup>

Paragraph (d) defines “fraud” or “fraudulent” and is nearly identical to ABA Model Rule 1.0(d). The Commission believes it is appropriate that the components of fraud under paragraph (d) be determined under the law of the applicable jurisdiction.<sup>6</sup> In addition, Comment [3], discussed below, clarifies that neither damages nor reliance need to be proven because that would frustrate the rule’s intent to prevent the fraud or avoid the lawyer providing assistance to the defrauder.

Paragraph (e) provides a definition for “informed consent” and differs from ABA Model Rule 1.0(e) by, among other things, adding the term “relevant circumstances” and the phrase “actual and reasonably foreseeable” to the required disclosure points for obtaining informed consent. These terms are consistent with California policy and case law. (See, e.g., current rule 3-310(A)(1) and *Sharp v. Next Entertainment, Inc.* (2008) 163 Cal.App.4<sup>th</sup> 410, 429-31.)

Paragraph (e-1) defines “informed written consent” which has no counterpart in the Model Rule. The definition is based on current rule 3-310(A)(2). Unlike the Model Rules, or the jurisdictions that have largely adopted the Model Rules approach to consent, California has a heightened standard that requires a client’s consent not only be informed, but also in writing. This means that not only must the client’s consent be in writing but also that the disclosure be in writing. California’s current approach to this standard is more client protective.

Paragraph (f) defines “knowingly,” “known,” or “knows” and is nearly identical to ABA Model Rule 1.0(f).

Paragraph (g) defines “partner” and is nearly identical to ABA Model Rule 1.0(g).

Paragraph (g-1) defines “person” which has no counterpart in the Model Rule. The proposed definition will eliminate potential confusion over whether the term “person” when used throughout the rules includes an organization. Six other jurisdictions have adopted a definition for the term “person.”

Paragraph (h) defines “reasonable” or “reasonably” and is identical to ABA Model Rule 1.0(h).

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<sup>3</sup> The Commission has substituted “means” for “denotes” throughout the rule because the Commission believes “means” is more specific and definite than “denotes.”

<sup>4</sup> See, *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150.

<sup>5</sup> Maryland, Michigan, and South Carolina have similarly removed the phrase “authorized to.”

<sup>6</sup> See, proposed rule 8.5(b), concerning choice of law.

Paragraph (i) defines “reasonable belief” or “reasonably believes” and is identical to ABA Model Rule 1.0(i).

Paragraph (j) defines “reasonably should know” and is identical to ABA Model Rule 1.0(j).

Paragraph (k) defines “screened” and modifies ABA Model Rule 1.0(k) primarily by adding the clause “(ii) to protect against other law firm lawyers and non-lawyer personnel communicating with the lawyer with respect to the matter.”

Paragraph (l) defines “substantial” and is identical to ABA Model Rule 1.0(l).

Paragraph (m) defines “tribunal” and differs from ABA Model Rule 1.0(m). There was debate as to whether the definition should reference “an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved” for fear that imposing the same duties of candor on lawyers appearing before such a body as they owe courts of general jurisdiction may violate the lawyer’s client’s right of petition. Ultimately, the Commission determined that the proposed definition would not inhibit a client’s right of petition because the definition is limited to administrative bodies acting in an adjudicative capacity. The Commission could not find anything to suggest that the right to petition is different in scope when a court, arbitrator, or administrative law judge is acting in an adjudicative capacity versus when an administrative body is acting in an adjudicative capacity. The Commission is not aware of any issues relating to the right to petition in the numerous jurisdictions that have adopted the ABA Model Rule definition of “tribunal.”

Paragraph (n) defines “writing” or “written” which is based on Evidence Code section 250 and includes a second sentence clarifying that an elective signature (or other modern forms of signature) are sufficient to establish that a writing is “signed.”

There are six comments to the rule. Comment [1] provides interpretative guidance for determining whether a grouping of lawyers might constitute a law firm. Comment [2] provides interpretative guidance concerning use of the term “of counsel.” Comment [3] provides important qualifications on what constitutes fraud for purposes of the rules and also provides an explanation for the qualifications. Neither damages nor reliance need to be proven because as the term “fraud” is typically used in these rules, it is as a “trigger” for imposing a lawyer’s duty to prevent fraud or avoid assisting a client in perpetrating a fraud. Comment [4] clarifies the term “informed consent” and “informed written consent.” Comments [5] and [6] provide guidance on the implementation of an effective ethical screen for purposes of these rules.

**Rule 1.0.1 [1-100(B)] ~~Rules of Professional Conduct, in General~~ Terminology**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

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- (a) “Belief” or “believes” means that the person involved actually supposes the fact in question to be true. A person’s belief may be inferred from circumstances.
- (B) ~~Definitions.~~
- (1) ~~“Law Firm” means:~~
- (a) ~~two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or~~
- (b) ~~a law corporation which employs more than one lawyer; or~~ [Reserved]
- (c) ~~a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or~~ “Firm” or “law firm” means a law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.
- (d) ~~a publicly funded entity which employs more than one lawyer to perform legal services~~ “Fraud” or “fraudulent” means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.
- (e) “Informed consent” means a person’s agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.
- (e-1) “Informed written consent” means that the disclosures and the consent required by paragraph (e) must be in writing.
- (f) “Knowingly,” “known,” or “knows” means actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.
- (2g) “MemberPartner” means a member of the State Bar of California a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
- (3) ~~“Lawyer” means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to~~

~~practice before the bar of the highest court of, a foreign country or any political subdivision thereof.~~

- (g-1) “Person” means a natural person or an organization.
- (h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.
- (i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
- (4) ~~“Associate” means an employee or fellow employee who is employed as~~Reasonably should know” when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.
- (5) ~~“Shareholder” means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.~~
- (k) “Screened” means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm that are adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and nonlawyer personnel communicating with the lawyer with respect to the matter.
- (l) “Substantial” when used in reference to degree or extent means a material matter of clear and weighty importance.
- (m) “Tribunal” means: (i) a court, an arbitrator, an administrative law judge, or an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.
- (n) “Writing” or “written” has the meaning stated in Evidence Code § 250. A “signed” writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person with the intent to sign the writing.

## **Comment**

### *Firm\* or Law Firm\**

[1] Practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a law firm. However, if they present themselves to the public in a way that suggests that they are a law firm\* or conduct

themselves as a law firm,\* they may be regarded as a law firm\* for purposes of these 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.

[2] The term “of counsel” implies that the lawyer so designated has a relationship with the law firm,\* other than as a partner\* or associate, or officer or shareholder, that is close, personal, continuous, and regular. Whether a lawyer who is denominated as “of counsel” or by a similar term should be deemed a member of a law firm\* for purposes of these Rules will also depend on the specific facts. Compare *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816] with *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].

### Fraud\*

[3] When the terms “fraud”\* or “fraudulent”\* are used in these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform because requiring the proof of those elements of fraud would impede the purpose of certain rules to prevent fraud\* or avoid a lawyer assisting in the perpetration of a fraud,\* or otherwise frustrate the imposition of discipline on lawyers who engage in fraudulent\* conduct. The term “fraud”\* or “fraudulent”\* when used in these Rules does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information.

### Informed Consent\* and Informed Written Consent\*

[4] The communication necessary to obtain informed consent\* or informed written consent\* will vary according to the rule involved and the circumstances giving rise to the need to obtain consent.

### [Screened\*]

[5] The purpose of screening is to assure the affected client, former client, or prospective client that confidential information known\* by the personally prohibited lawyer is neither disclosed to other law firm\* lawyers or nonlawyer personnel nor used to the detriment of the person\* to whom the duty of confidentiality is owed. The personally prohibited lawyer shall acknowledge the obligation not to communicate with any of the other lawyers and nonlawyer personnel in the law firm\* with respect to the matter. Similarly, other lawyers and nonlawyer personnel in the law firm\* who are working on the matter promptly shall be informed that the screening is in place and that they may not communicate with the personally 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 law firm\* personnel of the presence of the screening, it may be appropriate for the law firm\* to undertake such procedures as a written\* undertaking by the personally prohibited lawyer to avoid any communication with other law firm\* personnel and any contact with any law firm\* files or other materials relating to the matter, written\* notice and

instructions to all other law firm\* personnel forbidding any communication with the personally prohibited lawyer relating to the matter, denial of access by that lawyer to law firm\* files or other materials relating to the matter, and periodic reminders of the screen to the personally prohibited lawyer and all other law firm\* personnel.

[6] 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.

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**Discussion:**

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~~Law firm, as defined by subparagraph (B)(1), is not intended to include an association of lawyers who do not share profits, expenses, and liabilities. The subparagraph is not intended to imply that a law firm may include a person who is not a member in violation of the law governing the unauthorized practice of law.~~