

To: RRC

From *Kehr
SeLegue
Foy
Melchior

Re: Rule 1.16 né 3-700

Date: February 3, 2006 meeting

Introduction: MR 1.16 and Rule 3-700 generally are consistent in approach and purpose. Nevertheless, a comparison shows a number of drafting differences, some of which are substantive. This memo will identify those substantive differences in Part 1 and provide the drafting teams specific recommendations. Part 2 will add additional comments and suggestions based on public comment and the Restatement. There are several other differences between MR 1.16 and Rule 3-700 that might not be considered substantive, and we will not discuss them until we present a draft rule to the Commission.

1. Substantive differences between 1.16 and 3-700:
 - a. Rule 3-700 covers only the termination of a representation. MR 1.16 also covers the acceptance of a representation by saying in substance in MR 1.16(a)(1) that a lawyer shall not accept a representation if the circumstances of a mandatory withdrawal exist. Restatement §32(2) is to the same effect as MR 1.16(a)(1). We believe this broader approach is not essential because it probably goes without saying that a lawyer could not accept a representation if the lawyer would be obligated to withdraw from it. Nevertheless, we recommend the broader approach because it is logically complete. This also is consistent with the OCTC recommendation in its memo to the Commission dated September 27, 2001.

- b. MR 1.16(a)(1) mandates termination of a representation if the representation “will” result in a violation of the Rules. Restatement §32(2)(a) is to the same effect. Rule 3-700(B)(2), on the other hand, contains a standard with broader reach, which is that the lawyer must terminate a representation if the lawyer “... knows or should know that continued employment will result in violation” We recommend that we retain our current wording as the MR phrasing effectively exempts the lawyer from the duty to withdraw unless the future violation is certain.
- c. MR 1.16(a)(1) and Restatement §32(2)(a) both phrase the mandatory withdrawal in terms of a violation of the rules of professional conduct “or other law.” Rule 3-700(B)(2) is narrower in having included only the rules of professional conduct and the State Bar Act. We request the Commissions directions on whether to expand our rule in this way. OCTC recommends the addition of “or other law.”
- d. MR 1.16(a)(2) states as a reason for declining or terminating a representation that the lawyer’s physical or mental condition materially impairs te he lawyer’s ability to represent the client. Rule 3-700(B)(3) is to the same effect, with the difference that 1.16(a)(2) talks of a “... condition [that] materially impairs the lawyer’s ability to represent the client ...” while 3-700(B)(3) is in terms of a “... condition [that] renders it unreasonably difficult to carry out the employment effectively.” We believe that MR 1.16(a)(2) is needed because MR 1.1 states competence in aspirational terms. California’s competence Rule is specific, being written in narrow disciplinary terms, and we therefore question whether the current 3-700(B)(3) is needed. Is it right to single out competence for special handling in 3-700? Is the treatment of competence in (B)(3) inconsistent with 3-110 because the two state competence in different ways, so that a lawyer could be required to terminate a representation even though the lawyer would not violate Rule 3-110? We request the Commission’s direction on this point (but notice that the (B)(3) language also appears in (C)(4), where it has a different meaning because of the permissive rather than mandatory context).
- e. MR 1.16(a)(3) adds as a reason for withdrawing from a representation the

fact that “the lawyer is discharged.” The same change was part of the Commission’s 1992 proposal, which was withdrawn after the Supreme Court identified an ambiguity. Restatement §32 (2) similarly says that “... a lawyer may not represent a client or, where representation has commence, must withdraw from the representation of a client if: ... (c) the client discharges the lawyer.”

- f. There is a substantive difference between Model Rules and the Restatement, on the one hand, and 3-700(C), on the other hand. MR 1.16(b)(1) and Restatement §32(3)(a) state identically that a lawyer may withdraw if the “... withdrawal can be accomplished without material adverse effect on the interests of the client;” Thus, the starting point for examining a permissive withdrawal under the Model Rules and the Restatement is identifiable harm to the client. Rule 3-700(C) has no such provision, so the starting point under 3-700 is that a lawyer who accepts an engagement has the duty to see it through except if one of the identifiable causes exists. We recommend that we not adopt the Model Rule and Restatement provision because we believe the Rule should presume, in effect, that any withdrawal materially harms the reputation of lawyers to be loyal to their clients, so that withdrawal should be allowed only in the specific situations identified in the Rule. These are situations in which the lawyer has a reasonable basis for terminating the representation, and which therefore should not be seen as situations in which the lawyer has been disloyal.
- g. MR 1.16(b)(3) has as a basis for permissive withdrawal: “the client has used the lawyer's services to perpetrate a crime or fraud;” There is no equivalent of this in 3-700(C). Restatement §32(3)(e) adds to this the client’s threat to use the lawyer’s services to perpetrate a crime or fraud. We believe the client’s use or threat to use the lawyer’s services to commit a crime or fraud might so interfere with the lawyer’s trust in the client that it serves as a proper basis for permissive withdrawal.¹ We

¹ “[The] values that underlie the professional relationship [are] the fiduciary qualities of *mutual* trust and confidence ...” *General Dynamics Corp. v. Superior Court*, 7 Cal. 4th 1164 (1994) (emphasis added). “That the relationship between attorney and client is one of an unusual character has been [routinely] affirmed.... [A]t its foundation

recommend they be added to our Rule.

- h. MR 1.16(B)(4) has as a basis for permissive withdrawal that the client insists on taking an action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. This also appears in the OCTC memo. Restatement §32(3)(f) alters this to “repugnant or imprudent.” We recommend that the MR language not be used because it seems to us to be too robust an invitation (or excuse) for a lawyer to drop a client. This effectively would expand the competence rule by allowing a lawyer to withdraw even if the lawyer is able to represent the client competently. We believe also believe the standard of imprudence is wildly exaggerated and should be rejected. The client’s decisions might be imprudent but still lawful and rational.

- i. MR 1.16(b)(5) permits withdrawal if “... the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled” Restatement §32(3)(g) improves on the MR by reordering expression so the lawyer may withdraw if “... the client fails to fulfill a substantial financial or other obligation to the lawyer ...” Our corresponding provision is 3-700(C)(1)(f), which permits withdrawal if the client “... breaches an agreement or obligation to the member as to expenses or fees;” There are two substantive differences between the two. First, the Model Rule and the Restatement refer to any substantial failure by the client to fulfill an obligation - or a failure to fulfill a substantial obligation - to the lawyer while our Rule refers only to the client’s failure to pay expenses or fees. The Model Comment and the Restatement give no explanation or examples of what non-fee or expense obligation might serve as the basis for permissive withdrawal, but one example might be the client’s failure to cooperate in discover. If this is what they had in mind, it would be covered by our (C)(1)(d), and we then recommend that (C)(1)(f) not be changed. Second, the Model Rule and the Restatement both require the lawyer to give “reasonable warning” to the client, and the OCTC memo also recommends this. We are not aware of any rule or

[are] the elements of trust and confidence on the part of the client and undivided loyalty and devotion on the part of the attorney....” *In re Dunn*, 98 N.E. 914, 915 (NY 1912).

statute in California that obligates a warning (there is no such requirement in Rule 376 of the Rules of Court), although it is customary and advisable. Leaving aside drafting issues raised by the Model Rule and Restatement phrasing, we believe the warning requirement should be added to our Rule.

- j. MR 1.16(b)(6) permits withdrawal if the representation “... will result in an unreasonable financial burden on the lawyer” This is not our corresponding provision, which is (C)(1)(d) or in Restatement §32. We recommend that we not add it to our Rule.

2. Other possibilities:

- a. Restatement §32(4) imposes on all permissive withdrawals a balancing test that can override the listed bases for permissive withdrawal. This test is that the “... lawyer may not withdraw if the harm that withdrawal would cause significantly exceeds the harm to the lawyer or others in not withdrawing.” We recommend against adopting this balancing test for at least the following reasons (although it should be considered when the Comment is drafted):
 - i. The listed bases each is important enough so that the lawyer should not be disciplined for withdrawing in when any of those situations arises. For example, the lawyer should be permitted to withdraw if the client seeks to pursue an illegal course of conduct or insists that the lawyer do so without regard to any harm caused by the withdrawal;
 - ii. The balancing test is too indefinite to be useful for disciplinary purposes; and
 - iii. The reference to harm to others is inconsistent with the duty of loyalty owed only to the client.
- b. Rule 3-700(C)(1)(a) permits withdrawal if the client insists on presenting a claim or defense that is not warranted under existing law, etc. OCTC suggests that this be moved into (B) as a basis for mandatory withdrawal.

We request the Commission's directions on this point.

- c. Rule 3-700(C)(1)(b), like the MR and the Restatement, permits withdrawal if the client seeks to pursue an illegal course of conduct. The OCTC comment suggests that this be moved in (B) as a mandatory withdrawal. We request the Commission's directions on this point. We think this should be discussed together with the next point, as it might suggest to the Commission that the illegal course of conduct element should remain a basis for permissive withdrawal.
- d. OCTC also suggests that 3-700(C)(1)(b) contain an exception for the representation of criminal defendants, but with the exception conditioned on the lawyer fulfilling generally understood obligations - trying to convince the client to testify honestly or not at all, not being a party to the false testimony, not utilizing the false testimony, and a catch-all obligation to comply with "all applicable law regarding such situations" Neither MR 1.16 nor Restatement §32 contains any provision that corresponds to the OCTC recommendation, and it is not expressly stated in Rule 5-200. We recommend that we attempt to include the OCTC recommendation.
- e. Rule 3-700(C)(1)(c) allows withdrawal if the client insists that the lawyer pursue a course of conduct that is illegal, etc. OCTC suggests that this be moved into (B) as a cause for mandatory withdrawal. We request the Commission's directions on this.
- f. In addition to the discharge issue explained in ¶1.f., above, the OCTC memo recommends including in the mandatory withdrawal section the concept of the lawyer having been hired by someone who was not authorized to do so.
- g. The Ruben Vassio comment (2002-05) wants unspecified changes to Rules 3-600 and 3-700 to allow what he refers to as "loyal disclosure." Mr. Vassio's idea is that the lawyers should be permitted to protect their organizational clients by disclosing the conduct of organizational constituents to authorities when needed to protect the client, and that allowing withdrawal in such situations is not sufficient. We believe that

this issue should be address under 1.13_3-600 and not under 1.16_3-700.

- h. The comment letter from Demetrios Dimitriou (2002-34) says that a careful reading of *Academy of California Optometrists* shows that an attorney is required to deliver to the client those documents “reasonably necessary to the client’s representation” and that any broader suggestion is wrong. As the quoted words are those used in 3-700(D), we don’t see the point of the Dimitriou comment and suggest no change on its account.

RULE 3-700 EXCERPT: STATE BAR OF CALIFORNIA – RULES REVISION COMMISSION
CHART COMPARING MODEL RULES & CALIFORNIA RULES, SORTED BY CALIFORNIA RULE OR STATUTE

CALIFORNIA RULE OR STATUTE	2003 ABA MODEL RULE COUNTERPART	NOTES & COMMENTS
<p>CAL. RULE 3-600, DISCUSSION ¶. 1, provides: “Rule 3-600 is not intended to enmesh members in the intricacies of the entity and aggregate theories of partnership.”</p>	<p>No corresponding Model Rule or Comment</p>	
<p>CAL. RULE 3-600, DISCUSSION ¶. 2, provides: “Rule 3-600 is not intended to prohibit members from representing both an organization and other parties connected with it, as for instance (as simply one example) in establishing employee benefit packages for closely held corporations or professional partnerships.”</p>	<p>MR 1.13, Cmt. 9 states the organization’s lawyer may also represent an officer or major shareholder.</p>	
<p>CAL. RULE 3-600, DISCUSSION ¶. 3, which provides: “Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, nor is it the purpose of the rule to deny the existence or importance of such formal distinctions. In dealing with a close corporation or small association, members commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty. [citations omitted] In resolving such multiple relationships, members must rely on case law.”</p>	<p>MR 1.13, Cmts. 10 and 11 consider derivative actions. Cmt. 11 describes the possible conflicts that can arise in such actions between the lawyer’s duty to the organization and the lawyer’s relationship with the board.”</p>	
<p>CAL. RULE 3-700(A)(1) In General. (1) If permission for termination of</p>	<p>MR 1.16(c) A lawyer must comply with applicable law requiring notice to or</p>	

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<p>employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.</p>	<p>permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.”</p>	
<p>CAL. RULE 3-700(A)(2) In General. * * *</p> <p>(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.</p> <p>CAL. RULE 3-700(D) Papers, Property, and Fees.</p> <p>A member whose employment has terminated shall:</p> <p>(1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. “Client papers and property” includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert’s reports, and other items reasonably necessary to the client’s representation, whether the client has paid for them or not; and</p> <p>(2) Promptly refund any part of a fee paid in advance that has not been earned.</p>	<p>MR 1.16(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.”</p>	

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<p>This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.</p>		
<p>CAL. RULE 3-700(B). TERMINATION OF EMPLOYMENT</p> <p style="text-align: center;">* * *</p> <p>(B) Mandatory Withdrawal.</p> <p>A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:</p> <p>(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or</p> <p>(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or</p> <p>(3) The member’s mental or physical condition renders it unreasonably difficult to carry out the employment effectively.</p>	<p>MR 1.16: Declining or Terminating Representation</p> <p>“(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:</p> <p>(1) the representation will result in violation of the rules of professional conduct or other law;</p> <p>(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or</p> <p>(3) the lawyer is discharged.”</p>	
<p>CAL. RULE 3-700(C) Permissive Withdrawal.</p> <p>If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may</p>	<p>MR 1.16(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:</p> <p>(1) withdrawal can be accomplished without material adverse effect on the</p>	

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<p>not withdraw in other matters, unless such request or such withdrawal is because:</p> <p>(1) The client</p> <p>(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or</p> <p>(b) seeks to pursue an illegal course of conduct, or</p> <p>(c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or</p> <p>(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or</p> <p>(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or</p> <p>(f) breaches an agreement or obligation to the member as to expenses or fees.</p> <p>(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or</p> <p>(3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or</p> <p>(4) The member’s mental or physical</p>	<p>interests of the client;</p> <p>(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;</p> <p>(3) the client has used the lawyer's services to perpetrate a crime or fraud;</p> <p>(4) a the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;</p> <p>(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;</p> <p>(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or</p> <p>(7) other good cause for withdrawal exists.”</p>	

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<p>condition renders it difficult for the member to carry out the employment effectively; or (5) The client knowingly and freely assents to termination of the employment; or (6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.</p>		
<p>CAL. RULE 3-700(C)(1)(F) No corresponding California Rule, but see Cal. Rule 3-700(C)(1)(f), which allows a member to withdraw from representation if the client “breaches an agreement or obligation to the member as to expenses or fees.”</p>	<p>MR 6.2(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or</p>	
<p>CAL. RULE 3-700(D)(1) provides that a member whose employment has terminated shall “(2) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. “Client papers and property” includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert’s reports, and other items reasonably necessary to the client’s representation, whether the client has paid for them or not.”</p>	<p>No corresponding Model Rule or Comment.</p>	
<p>CAL. RULE 3-700(D)(2) requires a member to: “Promptly refund any part of a fee paid in advance that has not been earned,” though it is not required of a “true retainer”. The</p>	<p>MR 1.5 Cmt. 4 2. Cmt. 4 states unearned advance fees must be returned to client. It also notes that lawyer may take fee in property, but</p>	

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<p>Discussion to rule 3-300 states: “Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, <i>unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client.</i> Such an agreement is governed, in part, by rule 4-200.” (emphasis added)</p>	<p>usually such fees will also be subject to MR 1.8(a), the rule concerning business transactions with clients.</p>	
<p>CAL. RULE 3-700, DISCUSSION ¶. 1, provides: “Subparagraph (A)(2) provides that “a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the clients.” What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, “reasonable steps” do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied.”</p>	<p>MR 1.16, Cmts. 7 & 8 address optional withdrawal. Cmt. 7 notes the lawyer’s has an option in certain situations, including “if it can be accomplished without material adverse effect on the client’s interests.” Cmt. 8 notes the lawyer has an option “if the client refuses to abide by the terms of an agreement relating to the representation [e.g., fees].”</p>	
<p>CAL. RULE 3-700, DISCUSSION ¶. 2, provides: “Paragraph (D) makes clear the member’s duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It codifies existing case law. (See <i>Academy of California Optometrists v. Superior Court</i> (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; <i>Weiss v. Marcus</i> (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) Paragraph (D) also requires that the member “promptly” return unearned fees paid in advance. If a client disputes the amount to be returned, the member shall comply with rule 4-100(A)(2).”</p>	<p>No corresponding Model Rule or Comment.</p>	

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<p>CAL. RULE 3-700, DISCUSSION ¶. 3, provides: “Paragraph (D) is not intended to prohibit a member from making, at the member’s own expense, and retaining copies of papers released to the client, nor to prohibit a claim for the recovery of the member’s expense in any subsequent legal proceeding.”</p>	<p>No corresponding Model Rule or Comment.</p>	
<p>CAL. RULE 3-700, CASE LAW</p> <p>FRACASSE V. BRENT (1972) 6 CAL.3D 784, 494 P.2D 9, 100 CAL.RPTR. 385.</p>	<p>MR 1.16, Cmts. 4-6 deal with “discharge” of the lawyer. Cmt. 4 states “[a] client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer’s services.” Cmt. 5 addresses the situation where a client may seek to discharge appointed counsel, and notes the client “should be given” an explanation of the consequences, including that “appointing authority [may decide] that appointment of successor counsel is unjustified.” Cmt. 6 notes a client with “severely diminished capacity ... may lack the legal capacity to discharge the lawyer,” and notes “the lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action.”</p>	
<p>CAL. RULE 4-100(A) PRESERVING IDENTITY OF FUNDS AND PROPERTY OF A CLIENT</p> <p>“(A) All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be</p>	<p>MR 1.15: Safekeeping Property</p> <p>“(a) A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall</p>	