

December 31, 2009 Melchior E-mail to Drafters, cc Sondheim, McCurdy:

Friends: could you give me your responses to this assignment by not later than Wednesday of next week so as to meet the 1/11 deadline? It does not look like a major task from here, at least at first glance. Thanks much, and Happy New Year.

January 2, 2010 Melchior E-mail to Drafters, cc Sondheim, McCurdy:

I have looked at the two comments which object to parts of proposed Rule 8.5 and propose that we resolve them as follows:

1. OCTC claims that the draft conflicts with B&P Code 6049.1. I do not see the conflict: The relevant part of the code section provides that where discipline has been imposed on a California licensed attorney in another jurisdiction, "a certified copy of a final order [from that jurisdiction] . . . shall be conclusive evidence that [a member of the State Bar] is culpable of professional misconduct in this state," subject to stated exceptions.

Thus, 6049.1 provides a directive to discipline a CA lawyer who is found to have been found guilty in disciplinary proceedings elsewhere. In itself, that is in no way inconsistent with 8.5's proposed definition of when a lawyer subject to this rule violates CA law. Rather, it simply adds another basis for a potential CA law violation. But OCTC indirectly suggests two points worthy of consideration: should/can we define a violation of our law, as 8.5 does, where another jurisdiction may also have the right to impose its own law? And do we create an unnecessary conflict of laws if we regulate conduct of CA lawyers outside the state?

My response is that we should stand our ground. The assertion of power over conduct of our licensees, performed outside the state, is not new. Rule 100(D)(1) so provides now, and ABA Rule 8.5 does likewise. And the conflict of laws inherent in two jurisdictions' assertion of power to adjudicate the propriety of particular conduct is inherent in that situation. So the objection does not seem to address the language of our proposal but rather the concept which underlies it. Since this concept is neither new nor modified by the proposed rule, I suggest that we make no change.

How to respond in the response column without all that baggage? I propose: "The Commission has reviewed the Comment but found no inconsistency with the statute and declined to make any change." Leave out the fact that there is nothing new in our language??

2. The U.S. Attorneys' point is more subtle. They claim that in pre-filing investigations which may take place outside California or involve several states, it may not be clear whether the conduct will ultimately result in a California filing or a filing elsewhere (or perhaps no filing at all); and that therefore our rule will create conflicts between this jurisdiction and others as places to which our proposed definition of conduct not to be governed by CA rules, i.e., "specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules" may apply.

I can see that such conflicts may possibly happen; but this should be extremely rare: conduct by a California-licensed federal prosecutor in an investigation outside California which could at the time result in court filings either in this or another state, and where the investigative conduct

would violate our rules but be permitted under the rules of the other jurisdiction. That should be as rare as hen's teeth, and hardly warrants the long discussion we have been provided. Thus, if the case "has no nexus to California" (letter, p. 10), the lawyer should not have to worry under our proposed language about California rules possibly applying to his/her conduct therein.

I think that our language is clearer and more easily interpreted, both by the lawyers seeking to comply and by bar prosecutors, than the ABA language, which simply invites uncertainty: "if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur". If I read the U.S. Attorneys' letter correctly (and though I sympathize with their concern), they argue that more uncertainty is better because it allows a clearer excuse for noncompliance in the identified but extremely rare situation.

That, to me, is not an adequate ground for changing the proposed rule. If the drafting team feels that the described situation warrants a special Comment, we could write such a Comment in response. My own view, subject to that of others, is that the point is too obscure to warrant any modification or even the addition of a Comment.

Responses, please!

January 2, 2010 Melchior E-mail to Drafters, cc Sondheim, McCurdy:

In either event, I think that we need to change the dashboard to "moderately controversial" and to identify the two letter writers as the source of controversy.

January 8, 2010 Peck E-mail to Melchior, cc Chair, Lamport, McCurdy:

Kurt: Sorry for the delay in getting back to you. I agree with your excellent responses to the objectors and agree that you should go forward with these responses. With respect to response to OCTC, I do think that you should state that no change in existing was intended by this change in addition to your proposed statement.

How do you propose that we respond to the Orange County Bar Association's objection to our deletion of the ABA safe harbor? I think the deletion of the safe harbor supports enforcement of B&P Code section

6049.1. Among other reasons we deleted the safe harbor provision was to ensure that section 6049.1 would still be viable. Inclusion of the safe harbor presents the possibility of establishing uncertainty until the conflict with section 6049.1 is resolved, which might take years.

Moreover, misconduct is misconduct. I do not think there should be a pass for a lawyer to commit misconduct just because the lawyer may have been confused about which rules applied.

Would something like this be appropriate?

"The Commission has reconsidered the policy of deleting the safe harbor provision and readopted the deletion. In multijurisdictional

practice, public protection from lawyer misconduct is more important than providing a safe harbor for a lawyer who is confused about which jurisdiction's standards apply."

Feel free to disagree, amend, delete or use the foregoing.

Let me know if I may be of further assistance, Ellen

January 11, 2010 E-mail from Melchior to Chair, Peck & McCurdy:

Since today is the due date and I am preoccupied with client matters, I am sending you two messages: this one which contains my comments in response to your request, and another from Ellen with some further suggestions. I never had any response from Stan.

I will try to coordinate my and Ellen's comments and send them to you in more formal fashion; but just in case you need to get this out before I can do so, I thought that it would be better to send you this than not to respond in time. My apologies.

Rule 8.5 – Public Comment – File List

E-2009-292k OCBA [8.5]

E-2009-293i State Bar OCTC [8.5]

E-2009-308b George S. Cardona [8.5]

E-2009-310h COPRAC [8.5]

E-2009-351k SDCBA [8.5]

E-2009-358j Santa Clara County Bar [8.5]

Hollins, Audrey

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

Dear Ms. Hollins:

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

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

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

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

MEMORANDUM

Date: October 16, 2009

To: Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 8.5 – Disciplinary Authority; Choice of Law**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following comments concerning the subject proposed Rule:

The OCBA endorses the adoption of proposed Rule 8.5, with certain proposed revisions. The proposed Rule makes clear that these Rules apply to all conduct, except if a California lawyer is lawfully practicing in another state where the other state's rules require something different. The ABA Model Rule has a "predominant effect of the conduct test," but proposed Rule 8.5 deletes that because the Commission finds the concept ambiguous. The OCBA agrees with this change. The proposed Rule, however, also deletes a "safe harbor" provision, which provides that a lawyer is not subject to discipline if that lawyer reasonably believes that a different jurisdiction's rule governs. The OCBA questions whether the "safe harbor" should be deleted. Although the "Explanation of Changes to the ABA Model Rule" notes that reasonable belief may be a mitigating factor, the OCBA believes, in some situations, it should and could serve as a complete defense. This would seem more consistent with the Commission's approach, namely, that California's rules govern unless another jurisdiction's rules require otherwise. If a lawyer reasonably believes another jurisdiction's rule governs, and complies with that rule, then subjecting that lawyer to discipline in California seems problematic. The Commission's deletion of the safe harbor provision also affects the language proposed in Comment [3] to the proposed Rule, as well as comment [5] to the ABA Model Rule, which the Commission has deleted. Finally, the OCBA agrees with deleting comment [6] to the Model Rule.



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November 4, 2009

Randall Difuntorum, Director
Office of Professional Competence & Planning
State Bar of California
180 Howard Street
San Francisco, California 94105

re: Comments of the Office of the Chief Trial Counsel to Proposed
Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

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

Rule 1.2 Scope of Representation and Allocation of Authority.

1. The Office of the Chief Trial Counsel (OCTC) is concerned that paragraphs (a) and (b) of proposed Rule 1.2, although in the Model Rules version, are not really rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. OCTC believes that the Rules of Professional Conduct should only address rules that are disciplinable. Otherwise, it can create confusion among the state's lawyers and make enforcement of the rules more difficult. Further, OCTC believes that the concepts in paragraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.
2. OCTC is concerned that, while paragraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. In *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521, an attorney raised the issue of limited scope representation as a defense to charges of incompetence and failing to perform. The court rejected that defense because it found that federal law did not permit limited scope representations in immigration cases and, therefore, the attorney could not defend the charges by asserting a limited scope representation. The court concluded that because the law prohibited limited scope representations the duty to fully and competently represent the client may not be modified by an agreement between the attorney and the client even if the parties expressly noted the limited scope of the representation. That may be what Comment 8 is trying to explain, but, it should be specifically in the rule, not just a comment.

3. OCTC also believes that the consent in paragraph (c) should be in writing. There already are rules requiring that fee agreements and consent to certain fee agreements be in writing. (E.g. Business & Professions Code sections 6147 and 6148 and current Rule 2-200 of the Rules of Professional Conduct.) OCTC recognizes that Business & Professions Code sections 6147 and 6148 are not considered by themselves a basis for discipline (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279-280), but unless the fee agreements are in writing they are voidable and under current rule 4-200 (proposed rule 1.5) a client must be fully informed of the terms of a fee agreement. Moreover, although California has not made Business & Professions Code sections 6147 and 6148 disciplinable offenses on their own, the Model rules and many other jurisdictions have made the lack of a written agreement disciplinable for contingent fees. (See e.g. Model Rule 1.5 (c); *Statewide Grievance Comm. v. Timbers* (Conn App. Ct. 2002) 796 A.2d 565.) Likewise, current rule 2-200 of the Rules of Professional Conduct has made it a disciplinable violation when the attorney does not obtain the client's written consent to the attorney sharing fees with another attorney. Further, making it in writing prevents future arguments between the attorney and client about the scope of the representation and impresses upon the client the importance of the limitation. A similar purpose was among the purposes noted by the Supreme Court in refusing to honor a fee agreement between attorneys without the informed written consent of the client, in violation of current rule 2-200. (See *Chambers v. Kay* (2002) 29 Cal. 4th 142.) Given that limited scope representation is the exception, it would be better policy and more enforceable to require that it be in writing.
4. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, paragraph (d), unlike current rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. While the Commission's Comments make clear that it intends to keep that defense, OCTC believes that it should be in the rule and not in a comment.
5. OCTC is also concerned with Comments 1 and 2's statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. The current law is that a lawyer must advise the client of significant developments and that the client has the authority over significant matters, such as settling a case. However, it has never been that the attorney must consult (or advise) on every step and action, just the significant ones. In fact, it is well established that as a general rule an attorney, not a client, controls the presentation of a case. (See e.g. *People v. Hamilton* (1989) 48 Cal.3d 1142, 1163; *People v. Mattison* (1959) 51 Cal.2d 777, 788.) Proposed rule 1.4 requires reasonable consultation, but the Comments to proposed rule 1.2 could be interpreted to change the law and suggest that every means or action by the lawyers requires this consultation. OCTC thinks these Comments need clarification so that only significant means should require consultation and specific communication; and that nothing is intended to change current law about who controls the presentation of cases.
6. OCTC believes that Comment 8 needs clarification to make clear that limited scope representations are not permitted unless allowed by law. OCTC suggests that the Comment reference *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct.

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

Rule 1.6 Confidentiality of Information.

1. OCTC is concerned that this proposed rule might create confusion and enforcement problems since Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. For example, OCTC is concerned that paragraph (a) of proposed Rule 1.6 uses the term information but not the term confidences or secrets, which is used in Business & Professions Code section 6068(e)(1). If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).
2. OCTC is further concerned that paragraph (b)(1) does not address what happens if any further changes occur to Business & Professions Code section 6068(e). Even if the Supreme Court later changed paragraph (b)(1) to be consistent with any changes in section (e) the delay would be substantial before that occurred. Paragraph (b)(1) currently mirrors the language of Business & Professions Code section 6068(e)(2), but does not specifically refer to Business & Professions Code section 6068(e)(2). To prevent the problems that would occur if the Legislature changed Business & Professions Code section 6068(e)(2) OCTC suggests that, if California is to have a Rule of Professional Conduct to cover the same concerns as already addressed in Business & Professions Code section 6068(e), paragraph (b)(1) of proposed Rule 1.6 simply state that a lawyer may reveal confidential information as permitted under Business & Professions Code section 6068(e). This would prevent conflicting rules, avoid any confusion, and allow for enforcement of this important provision.
3. OCTC agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.
4. OCTC disagrees with the removal from paragraph (b)(4) of the term "other law" and agrees with the Model Rule drafters that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes. OCTC also believes that the term court order should be in this paragraph. Thus, OCTC agrees with the majority view regarding proposed paragraph (b)(4)'s use of the term court order because an attorney should not be disobeying a court order. Such disobedience violates

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

5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).
6. OCTC has some concerns about paragraph (e). It appears paragraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed paragraph (e) is too broad. It covers all of proposed paragraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed paragraph (b)'s language is much broader than current rule 3-100(B). Proposed paragraph (e), as written, unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals have been completed. It seems to OCTC that this paragraph needs clarification and that it should be a violation to disobey a court order or law.
7. OCTC also has some concerns about the Comments. In general, OCTC thinks there are too many and that some are not necessary. Further, OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.
8. Comment 15 is overly narrow and seems to imply that the rule of limited disclosure when disclosing information applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that is contrary to established law. OCTC would strike the Comment or significantly modify it. Comment 19 could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does

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

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

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

Rule 1.9. Duties to Former Clients.

1. OCTC is concerned with paragraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. Thus, it would appear to be a significant change in the law. Moreover, while the term "materially adverse" is in the Model Rules version, the proposed paragraph does not state what that means and why the lawyer, not the client, should decide whether it is material. That should be left to the clients to decide, not the lawyers. Further, it creates uncertainty for the lawyers and makes it more difficult to prosecute for a violation. OCTC also agrees with the Minority of the Commission that paragraph (b) might narrow the duty of confidentiality because it refers to the confidentiality rules in the Rules of Professional Conduct but not Business & Professions Code section 6068(e). OCTC believes that the rule should reference Business & Professions Code section 6068(e) as well.
2. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit . . . or when the information has become generally known" in paragraph (c)(1). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by "information generally known." Business & Professions Code section 6068(e) has traditionally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. It opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not

“generally known.”

3. Further, paragraph (c)(2) references the exception to current clients. Like paragraph (c)(1), paragraph (c)(2) has the issue of whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(1), paragraph (c)(2) does not include the language “or when the information is generally known.” Although this proposed language is also in the Model Rules version, OCTC is not sure when paragraph (c)(1) applies or when paragraph(c)(2) applies. This needs more clarity.
4. OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states or implies that the substantial relationship test applies in disqualification cases, but “might not be necessary” in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney’s former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: “Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)” (Id at 747.)

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

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

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

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

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

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

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

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

Rule 1.10 Imputation of Conflicts.

1. OCTC is concerned that paragraph (b) leaves out a reference to Business & Professions Code section 6068(e). Further, Comment 1 simply states that whether two or more lawyers constitute a firm depends on specific facts. OCTC is concerned that the proposed rule is not a rule subject to discipline and, further, that neither the rule nor Comment 1 provides guidance as to what constitutes a law firm. OCTC believes that either California follow the Model rules version or come up with a more definitive definition, or the Commission should strike the Comment completely. Current rule 1-110 defines a “[l]aw [f]irm” as “two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities.” The Supreme Court discussed the definition of law firm, partnership, etc in *Chambers v. Kay* (2002) 29 Cal.4th 142, although not in a conflict context, and if there is a comment on the definition of law firm the Comment might reference that case and the Supreme Court’s discussion of the meaning of the term “of counsel” in *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135.)
2. OCTC is not sure what the purpose of Comment 3 is. OCTC suggests either it be clarified or stricken. Comment 4 discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people. Comment 9 seems unnecessary and is confusing to OCTC. It needs more clarification or should be stricken.

Rule 1.14 Client with Diminished Capacity.

1. OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the other confidentiality rules. OCTC is concerned that paragraph (b) leaves too much discretion to an attorney’s unqualified personal assessment of a client’s abilities and using that unqualified assessment to permit the attorney to reveal a client’s confidences. Further, it appears to be broadening what Business & Professions Code section 6068(e) allows.
2. Comment 1 is problematic as to when and how to utilize the rule. The problem here is when and who decides when a client is not capable of making decisions - - and how and to whom does the attorney reveal this. If the client is not capable of making the decisions, is the lawyer able to give advice, take direction, or do anything on the client’s behalf as to the matter? Comment 3 attempts to address this, but in such broad terms that it is vague and leaves too much discretion to the attorney. It also states that the attorney

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

3. Comment 4 states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence and decision-making authority, including explaining to the client the need to take such action and requesting the client's permission to do so. However, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult.
4. Comments 5 and 6 states the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interests foremost. Again, the question is to what extent is this consistent with Business & Professions Code section 6068(e) and this Comment may make enforcement of the confidentiality rules much more difficult. Comment 7, which is different than the Model Rules Comment 7, explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline from almost any attorney who claims that he or she revealed the confidences because they believed it was appropriate under this rule. Thus, what safeguards exist for the client?
5. Comment 8 states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (current rule 3-310.) Thus, according to this comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?

Rule 2.1 Advisor.

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

Rule 3.8 Special Responsibilities of a Prosecutor.

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

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

3. Likewise, OCTC is concerned with paragraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6. While in principle laudable, this Comment seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position.
4. OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.
5. OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.
6. OCTC believes that if there are Comments to this rule, the Commission might consider having a Comment to advise prosecutors and former prosecutors and their partners of their duties under Business & Professions Code section 6131. This is an important but often forgotten provision affecting prosecutors and former prosecutors and their partners.

Rule 8.5 Disciplinary Authority: Choice of Law.

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

Letter to Randall Difuntorum @ Office of Professional Competence & Planning
November 4, 2009
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Again, we thank you for the opportunity to present our views. If you have any questions, please feel free to contact us.

Very truly yours,

A handwritten signature in black ink that reads "Russell G. Weiner". The signature is written in a cursive style with a large, sweeping initial "R".

Russell G. Weiner
Interim Chief Trial Counsel

TO: Commission for the Revision of the Rules of Professional Conduct
State Bar of California

FROM: George S. Cardona
Acting United States Attorney
Central District of California

Karen P. Hewitt
United States Attorney
Southern District of California

Joseph P. Russoniello
United States Attorney
Northern District of California

Benjamin B. Wagner
United States Attorney
Eastern District of California

RE: Proposed California Rules of Professional Conduct 3.8(c), (g) and (h) and 8.5(b)

DATE: November 10, 2009

As an initial matter, we want to thank the Commission for all the hard work it has done in arriving at its proposed revisions to the California Rules of Professional Conduct and for its willingness to hear and meaningfully consider views expressed regarding certain of these rules by state, local, and federal prosecutors. We write to provide additional comments on three subsections of Proposed Rule 3.8, Special Responsibilities of a Prosecutor, that we believe could have a substantial negative impact on the work of the prosecutors in our offices, and a subsection of Proposed Rule 8.5, Disciplinary Authority – Choice of Law, that we believe could negatively impact Department Of Justice attorneys, including attorneys in our offices, working on national investigations that only tangentially involve events occurring in California.

A. ~~Proposed Rule 3.8(e)~~

~~The text of Proposed Rule 3.8(e) is substantially the same as ABA Model Rule 3.8(e), with the addition of a clause specifying that its prohibition on soliciting waivers of “important pretrial rights such as the right to a preliminary hearing” from an unrepresented “accused” does not apply where the court has “approved the appearance of the accused *in propria persona*.” ABA Model Rule 3.8(e) contained this same exception to application of the rule in ABA Comment [2], and we have no objection to moving this exception from the comment to the rule itself. We do, however, seek an addition to Proposed Comment [2] to clarify that the rule is not to be interpreted to preclude prosecutors and law enforcement agents from seeking waivers of the time for initial appearance and/or preliminary hearing, an interpretation we believe unwarranted and one that would negatively impact both law enforcement investigations and attempts by arrested~~

~~individuals to improve their own positions through cooperation with law enforcement investigations.~~

~~In the federal system in particular, it is not uncommon for individuals arrested as part of an ongoing investigation, whether on probable cause or on a warrant premised on a criminal complaint, to be offered an opportunity to cooperate in the ongoing investigation. This may occur before the arrested individual has made an initial appearance in court and so before counsel has been retained or appointed. In many circumstances, the ability of such an arrested individual to cooperate and gain the benefits of that cooperation may be time sensitive (for example, if a shipment of drugs is anticipated, the individual may have only a short period of time in which he or she will be able to assist law enforcement agents in recording conversations relating to the shipment of drugs) and may not be available if a public court appearance is made (which would reveal that the individual has been arrested and had contact with law enforcement). Thus, in many instances, law enforcement agents, often in consultation with an Assistant United States Attorney (“AUSA”), may ask arrested individuals to waive their rights (conferred by statute, rule, and/or the Constitution) with respect to the time periods specified for both initial appearance and preliminary hearing.⁺ The waiver does not result in the individual being denied either an initial appearance or a preliminary hearing, but rather, delays those events to enable the individual to cooperate in an ongoing investigation.~~

~~We do not believe that Proposed Rule 3.8(e) should be interpreted as precluding this practice. First, interpreting the proposed rule in this way could in many instances, harm those the Rule is intended to protect by depriving arrested individuals of a beneficial option that might otherwise be available, namely, the option of electing to cooperate in anticipation that benefits might later flow from that cooperation. See Ohio Rules of Professional Conduct, Rule 3.8, Comparison to ABA Model Rules of Professional Conduct (“Division (e) is deleted because of its breadth and potential adverse impact on defendants who seek continuances that would be beneficial to their case or who seek to participate in diversion programs.”). Second, interpreting the proposed rule in this way would run contrary to federal court opinions that have held reasonable delays in presentment to secure a defendant’s cooperation, and waivers taken to accomplish this, to be lawful. See, e.g., *United States v. Torres Rodriguez*, No. 08-cr-30126-JPG, 2009 WL 1372975 at * 8 (S.D. Ill. May 14, 2009) (“the Court believes it is reasonable to delay presentment to a magistrate in order to continue an interview of a cooperating suspect begun within the safe harbor~~

~~⁺ Federal Rule of Criminal Procedure 5(a) specifies that a “defendant” arrested on a federal charge within the United States must be brought “without unnecessary delay before a magistrate judge” for an initial appearance. Federal Rule of Criminal Procedure 5.1(e) specifies that, absent the defendant’s consent and a showing of good cause, or the intervening return of an indictment, a preliminary hearing must be held “no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody.” In the federal system, preliminary hearings are a rarity, as the overwhelming majority of cases are pursued through indictments obtained either prior to arrest or, if post-arrest, within the time specified under Rule 5.1(e) or a time period extended with the consent of the defendant.~~

~~period so long as the interview is not unreasonable in length or conditions.”); United States v. Berkovich, 932 F. Supp. 582, 588 (S.D.N.Y. 1996) (recognizing that a “defendant may waive his right to be presented promptly” and finding that defendant “agreed to waive his right to a speedy presentment in an attempt to obtain the benefits of cooperating with the Government”); United States v. Pham, 815 F. Supp. 1325 (N.D. Cal. 1993) (“A criminal suspect *may* waive his Rule 5(a) right to be brought promptly before a magistrate.”) (emphasis in original). Third, to the extent the concern underlying the proposed rule is that prosecutors will unfairly take advantage of unrepresented individuals to obtain waivers of the time for initial appearance and/or preliminary hearing, that concern is appropriately addressed by a court’s ability to impose a remedy in any subsequently filed criminal case should it find the waiver of time to have been coerced or otherwise invalid and the resulting delay to be unreasonable. See Alaska Rule of Professional Conduct 3.8, Comment (explaining that “Alaska Rule 3.8 does not include paragraph (e) of the model rule” in part because “[i]f a court determines that a prosecutor has taken unfair advantage of an unrepresented suspect or defendant legal remedies are already available”); United States v. Corley, 129 S. Ct. 1558, 1570–71 (2009) (recognizing availability of exclusionary remedy if delay in presenting defendant to magistrate judge is unreasonable); United States v. Pena Ontiveros, 547 F. Supp. 2d 323, 339–40 (S.D.N.Y. 2008) (recognizing that “a defendant may also waive his or her right to be presented promptly” but suppressing confession after finding “insufficient evidence in the record from which to conclude that defendants voluntarily, knowingly, and intelligently waived their rights to speedy presentment in a timely manner”).~~

~~For all these reasons, we ask that the following sentence be added to Proposed Comment [2] to make clear that the proposed rule is not to be interpreted to bar prosecutors or those acting at their direction from obtaining from unrepresented arrestees reasonable waivers of the time for initial appearance and preliminary hearing:~~

~~“Nor does paragraph (e) forbid prosecutors from seeking from an unrepresented arrestee a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the arrestee’s voluntary cooperation in an ongoing law enforcement investigation.”~~

~~B. Proposed Rule 3.8(g), (h)~~

~~As you know, our offices prosecute all federal crimes in California. As prosecutors, we and the United States Department of Justice support the goal of Proposed Rule 3.8(g), (h). We and the Department have always held our attorneys to the highest standard of professional conduct and expect, whenever exculpatory evidence is obtained by our prosecutors, that this evidence will be disclosed as soon as possible. Moreover, neither we nor the Department would countenance the continued incarceration of someone who was convicted but later found to be innocent. When confronted with credible evidence of a defendant’s innocence, therefore, we and the Department expect our attorneys promptly to disclose this information to the defendant and/or the court, whether the information is obtained pre-trial, during trial, or after conviction.~~

~~Though we thus agree with the principle underlying Proposed Rule 3.8(g), (h), we take issue with its text, which is identical to that of ABA Model Rule 3.8(g), (h). The Department previously provided to the ABA, and we previously provided to the Commission, modifications to the text of Model Rule 3.8(g) that we believed would avoid the issue correctly recognized by the minority objectors, namely, the impossibility of a prosecutor in a jurisdiction different from the jurisdiction of conviction meaningfully evaluating whether evidence of which that prosecutor becomes aware is “new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.” (Copies of the letter and draft language we provided to the ABA and the Commission are attached as Exhibit A.) The Commission’s revisions to Proposed Comment [7] attempt to address this issue, and we appreciate this effort, but we do not believe it goes far enough. Accordingly, we feel obligated to object to Proposed Rule 3.8(g), (h) as drafted. The reasons underlying our objection are as follows:~~

~~1. **Few states have followed the ABA’s lead in adopting Model Rule 3.8(g), (h).** Based on the information we have, it appears that since the ABA promulgated Model Rule 3.8(g), (h), only two states have adopted new rules based on it: Wisconsin and Delaware. The New York Court of Appeals recently conclusively rejected a proposal to adopt a rule based on Model Rule 3.8(g), (h). Even more recently, on October 2, 2009, the North Carolina State Bar Ethics Subcommittee voted to recommend to the Ethics Committee that its proposed version of Rule 3.8(g) be rejected entirely. ABA Model Rule 3.8(g), (h) is likely meeting with a lack of acceptance because state bar disciplinary authorities regard it as lacking precision, unnecessary, and addressing a subject matter more appropriately addressed by legislatures and courts handling criminal cases.~~

~~2. **There should not be a special rule for prosecutors that applies in cases to which the prosecutor is a complete stranger.** There is no reason why the rules of professional conduct should treat a prosecutor who is a stranger to a case any differently than any other member of the bar who is similarly a stranger to the case. As the minority objectors have recognized, if a prosecutor learns of evidence tending to show the innocence of a defendant previously convicted in a prosecution by an office in which the prosecutor has never served, then he is in the same position as any other lawyer who learns such information. Like any other lawyer, such a prosecutor will not be aware of the evidence presented to obtain the conviction, the relative credibility of the witnesses who testified, or the issues already raised and addressed by the court, and so will have no more meaningful basis than any other lawyer for assessing whether the evidence is new, credible, material, and creates a reasonable likelihood that a convicted defendant did not commit an offense. Yet, Proposed Rule 3.8(g) would impose the obligation of making this assessment only on such a prosecutor, and not on any other member of the bar.~~

~~3. **Proposed Rule 3.8(g) encourages unnecessary disclosures that may cast unwarranted doubt on the actual guilt of correctly convicted defendants.** Because prosecutors who are strangers to a case will not be in a position to make any meaningful assessment as to whether evidence is new, credible, and material, they will likely err on the side of disclosing all evidence other than that apparently frivolous on its face as a means of avoiding any potential for discipline that might arise from a failure to disclose. This poses two related issues. First, to the extent a chief prosecutor or court receiving such a disclosure recognizes this likelihood, the disclosure~~

~~loses all signaling capacity it might have had the disclosure will be interpreted not as representing a prosecutor's judgment that the particular evidence is significant in any way, but rather as a rote step taken to avoid discipline without any independent assessment of the weight of the evidence. Second, to the extent a chief prosecutor or court receiving such a disclosure fails to recognize this likelihood, the disclosure will inappropriately be interpreted as signaling that a prosecutor has actually passed some judgment that the evidence is in fact credible and material, and puts in doubt the actual guilt of the convicted defendant when in fact this is not the case. The over-breadth of the obligation imposed by Proposed Rule 3.8(g) thus threatens alternatively to under- or over- value the weight to be given a prosecutor's decision to disclose, neither of which accomplishes what should be the goal of the rule, namely, focusing limited resources on those instances in which there is a real and meaningful possibility that a defendant has been wrongfully convicted.~~

~~**4. Proposed Rule 3.8(g) is unclear in many respects which affect the obligations set forth therein.** First, the term "knows" is undefined in the proposed rule. It is defined elsewhere in the California Rules to mean "actual knowledge of the fact in question." California Rule of Professional Conduct 1.0(f). But this is singularly unhelpful in the context of Proposed Rule 3.8(g), (h). Does "knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted" require that the prosecutor know of the possible existence of such evidence or that she know that such evidence actually exist? This is not a meaningless distinction given the most common scenario in which we believe this proposed rule will come into play. Most often, prosecutors become aware of claims that such evidence exists through letters or other communications from incarcerated inmates. Often, these are letters addressed by an inmate convicted in one jurisdiction to a series of prosecutors in other jurisdictions complaining about the unfairness of the proceedings in which the defendant was convicted and asserting that the prosecutor who obtained the conviction engaged in misconduct by concealing from the defendant clear exculpatory evidence of which the defendant has just become aware, for example, through a conversation with another inmate who has told the defendant that yet another inmate has asserted that he told the police that he could corroborate the defendant's asserted alibi for the time of the crime. Does a prosecutor receiving this letter "know" of evidence that could trigger an obligation within the scope of Proposed Rule 3.8(g)? The prosecutor is on notice that if everything the defendant claims is true, another inmate has asserted that there is yet another inmate witness who would provide testimony that would be relevant to defendant's asserted alibi. But without further investigation, the prosecutor simply cannot "know" whether there actually exists either the inmate who purportedly spoke to the defendant or the inmate witness who purportedly would corroborate the defendant's alibi. (And, in furtherance of point 2 above, without even more extensive investigation, a prosecutor outside the jurisdiction of the case of conviction is in no position to evaluate whether if this evidence in fact exists it is new, credible, material, or creates a reasonable likelihood that the defendant did not commit the crime of conviction.)~~

~~Second, we are concerned by the use of the term "material" without a correlating definition. While not defined in ABA Model Rule 3.8 or its comments, the term "material" or "materiality" is used elsewhere in the ABA Model Rules and has been construed broadly to mean important, relevant to establish a claim or defense, or relevant to a fact finder. See, e.g., ABA Model Rules~~

~~1.7(a)(2), 3.3(a)(1), 4.1(a); Cohn v. Commission for Lawyer Discipline, 979 S.W. 2d 694, 698 (Tex. App. 1998) (in reference to lawyer’s duty to correct material false statements made to court, “materiality encompasses matters represented to a tribunal that the judge would attach importance to and would be induced to act in making a ruling. This includes a ruling that might delay or impair the proceeding, or increase the cost of litigation.”). This meaning of “material” is referenced in Proposed Comment [6A], which cross references to Proposed Rule 3.3. In the criminal context, however, the term “material” is most often understood as defined in the Brady/Giglio jurisprudence, the case law incorporated by reference by paragraph (d) of the proposed rule. These cases define evidence as being “material” only “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” United States v. Bagley, 473 U.S. 667, 682 (1985); see also Kyles v. Whitley, 514 U.S. 419, 434 (1995) (favorable evidence “material” if it “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict”). In the context of Rule 3.8(g), that “materiality” should be subject to this latter interpretation is reinforced by the further refinement “creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted[.]” We believe this is the proper interpretation of “material” for purposes of Proposed Rule 3.8(g). Neither the rule nor the comments, however, make this clear. Given that the term “material” is subject to differing interpretations, the use of the term in the proposed rule, without further definition, would leave a prosecutor uncertain about when disclosure would be required.~~

~~Third, we believe the proposed rule’s use of the term “promptly” is problematic because it may subject prosecutors, particularly those who have no previous familiarity with the case of conviction, to being second guessed about the amount of time they take to assess whether particular evidence of which they become aware triggers a disclosure obligation. The problem is compounded by the proposed rule’s ambiguity and lack of direction regarding how much, if any, inquiry or investigation is anticipated before a prosecutor makes the initial determination whether evidence is “new, credible, and material.” Particularly for a prosecutor unfamiliar with a case, the investigation necessary to make this determination could take substantial time. Moreover, for federal prosecutors, certain disclosures may require them to obtain various supervisory approvals within their own offices or from the Department of Justice in Washington, D.C., or may require them to seek a court order. Certain disclosures may also require a prosecutor to take steps related to the security of a witness or informant prior to disclosure. All of these steps can take time, time that may put a prosecutor at risk of being second guessed as to whether his or her disclosure has been made sufficiently “promptly.”~~

~~Fourth, we are concerned with the mandate that a prosecutor “undertake further investigation” or “make reasonable efforts to cause an investigation.” Prosecutors do not have general investigative powers (such as the power to issue subpoenas post trial) nor do they have the staff or monetary resources to investigate thousands of claims of “new, credible and material” evidence. Moreover, in the federal system, prosecuting offices generally do not have access to their own investigators, and would have the ability only to request that a federal investigatory agency (for example, the FBI) undertake an investigation. And, again in the federal system, mandating that prosecutors expend, or request that an investigatory agency expend, available~~

~~resources in this fashion, may violate separation of powers principles by permitting the judicial branch to direct the executive branch on how to allocate and expend resources. Generally, we believe that production to the court and the defendant with notice that a prosecutor in the jurisdiction of conviction has determined that disclosure is required under the standards set forth in this proposed rule should satisfy a prosecutor's obligations, as the defendant and the court are then in position, by appointing counsel and permitting the retention of investigators, to ensure that appropriate investigation, if any, is undertaken.~~

~~**5. Proposed Rule 3.8(h) is also unclear in many respects which affect the obligations set forth therein.** First, similar concerns regarding the use of "knows" in Proposed Rule 3.8(g) apply to Proposed Rule 3.8(h). Though Proposed Rule 3.8(h) applies only to prosecutors in the jurisdiction of the case of conviction, even these prosecutors, when confronted with a claim by a defendant that evidence satisfying the standard set forth in this proposed rule exists, cannot "know" whether that claim is valid without engaging in further investigation, yet run the risk of running afoul of this proposed rule if they, for what they perceive to be valid reasons (which may include factoring the costs of engaging in such investigation), reject the defendant's assertion and elect not to pursue such investigation.~~

~~Second, and perhaps most troubling, is Proposed Rule 3.8(h)'s mandate that a prosecutor "shall seek to remedy the conviction." This phrase is so vague that it utterly fails to give notice of what a prosecutor is required to do to protect his or her license. Proposed Comment 8 (which is taken verbatim from ABA Comment 8) attempts to clarify this mandate but falls short. Proposed Comment 8 states that "[n]ecessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted." The use of the phrase "may include" renders the effort at clarification useless, as it implies that a prosecutor faced with what that prosecutor believes to be clear and convincing evidence of a defendant's innocence will in some circumstances be required to do more, with no guidance as to what this more is. We are particularly troubled because the suggestion that a prosecutor must do more fails to respect the balance struck by existing law regarding post conviction challenges. Both California and federal statutes and rules allocate to the defendant the burden of investigating and raising claims of newly discovered evidence, and to the court the burden of crafting an appropriate remedy for such a claim that is found to have merit. In light of this law, it is unclear to us what more a prosecutor can do to "remedy" a conviction beyond making the required disclosures. For these reasons in particular, we continue to believe that Proposed Rule 3.8(h) is unnecessary if Proposed Rule 3.8(g) is appropriately drafted to require disclosures to the defendant and the court, disclosures that will provide those parties with the information necessary to invoke recognized and existing procedures intended to ensure that any wrongful conviction is promptly corrected.~~

~~**6. Proposed Comment [9]'s undefined "good faith" exception.** We appreciate the inclusion of a good faith exception, and believe that such an exception is appropriate. Proposed Comment [9], however, which purports to protect prosecutors who have acted in "good faith" in deciding not to act under Rule 3.8(g) or (h), leaves it unclear whether this is intended to be a subjective standard based on an analysis of the individual prosecutor's intent, or an objective standard based on what~~

~~a reasonable prosecutor would do in similar circumstances. This is particularly problematic given the ambiguities, discussed above, as to what it means to “know” of evidence triggering obligations under the proposed rule and whether any investigation is required before a prosecutor makes the determination that he or she does or does not “know” of such evidence.~~

~~7. **Potential conflict with other Rules of Professional Conduct and other applicable laws.**~~

~~The duties imposed by Proposed Rule 3.8(g), (h) may conflict with prosecutors’ obligations under other rules and, for federal prosecutors, under other federal laws. For example, Business & Professions Code § 6068(e) and California Rule 1.6 may be implicated in that prosecutors, like all other attorneys, have a client, and are obligated to preserve their client’s confidences. If, as we suspect, the obligations under Proposed Rule 3.8(g), (h) are intended to override this duty, the proposed rule needs to make this clear. Federal prosecutors are also governed by a host of other confidentiality requirements imposed by federal rules and statutes that may limit, or at least require that prosecutors obtain agency approvals or court orders authorizing, disclosures of information required by Proposed Rule 3.8(g), (h). See, e.g., 5 U.S.C. § 552 (Privacy Act); Fed. R. Crim. P. 6(e) (grand jury secrecy); 21 U.S.C. § 6103 (confidentiality of taxpayer information). For example, with respect to records protected by the Privacy Act, 5 U.S.C. § 552a, disclosure could subject an AUSA to criminal penalties, 5 U.S.C. § 552a(i)(1), and the Department of Justice to civil liability, 5 U.S.C. § 552(g)(1). Similarly, Rule 6(e) mandates non-disclosure of grand jury information absent review and approval by a federal court. And, 5 U.S.C. § 301 provides that federal agency records are owned by the agency and cannot be disclosed without agency approval. See *Touhy v. Ragan*, 340 U.S. 462 (1951); *United States v. Williams*, 170 F.3d 431 (4th Cir. 1999) (defendant in state murder prosecution required to comply with Justice Department regulation governing production of information to obtain disclosure of FBI files). Proposed Rule 3.8(g), (h) cannot override these federal laws, and should make clear that the obligations it imposes are subject to a prosecutor’s compliance with the steps required to authorize disclosures under these federal laws, or similar laws that may apply to state and local prosecutors.~~

~~8. **Adopting Proposed Rule 3.8(g), (h) would likely cause a flood of complaints from prisoners with time on their hands and animosity toward prosecutors.**~~

~~Prosecutors and their resources (particularly those in jurisdictions outside the jurisdiction of the case of conviction), will be diverted from prosecuting crime to investigating convicts’ claims of “new” evidence in order to ensure that they do not run afoul of this rule. The Committee needs to understand that within both state and federal prisons, there is a substantial cottage industry devoted to generating all manner of post-conviction claims of innocence in the form of “new” evidence claims, including in particular claims of perjured testimony and claims of ineffective assistance of counsel premised on the discovery of asserted “new” witnesses. Jail house lawyers spend many hours pandering to their fellow inmates with visions of post-conviction assertions of innocence. Only prosecutors, defense attorneys, and judges and their staffs see this cottage industry in action. Despite the good intentions that underlie it, the proposed rule as drafted will hand prisoners and their families and friends a new vehicle with which to take out their frustrations on prosecutors in general. The Committee should carefully consider whether it wants to create such a mechanism for disgruntled prisoners to use the threat of attorney discipline to vent their frustrations and divert prosecutorial resources.~~

C. Proposed Rule 8.5(b)(2).

Proposed Rule 8.5(a) establishes California disciplinary authority over California lawyers, where ever their conduct occurs, and over non-California lawyers if they “provide[] or offer to provide any legal services in California.” As a result, lawyers in our offices, who are virtually all members of the California bar, and any Department of Justice attorney who is admitted in California, will be subject to discipline in California not only for the cases and investigations they work in California but for the investigations and cases they work in other jurisdictions. And, Department of Justice lawyers, or lawyers from other United States Attorney’s Offices, even if not admitted in California, may be subject to discipline in California if even a part of the case or investigation on which they are working requires them to take action in California (for example, by serving a subpoena on or interviewing an employee of an internet service provider based in California) even if that action is only a small part of the overall case or investigation. We understand this broad extension of disciplinary authority, which mirrors the ABA Model Rule, but we believe that it makes sense only if the choice of law rule and safe harbor set forth in ABA Model Rule 8.5(b)(2), or some similar provision, are also adopted as a means of avoiding potential conflicts between differing disciplinary rules that would put lawyers working multi-jurisdictional investigations in the often impossible position of reconciling different disciplinary rules that may apply depending on whether their conduct occurs before or after the investigation coalesces into a case pending before a tribunal. By rejecting ABA Model Rule 8.5(b)(2)’s choice of law rule and safe harbor provision, Proposed Rule 8.5(b)(2) puts our attorneys and DOJ attorneys working multi-jurisdictional investigations in the potentially impossible position of having to comply with two different sets of rules that may, particularly given differences between key California Proposed Rules and the ABA Model Rules, be irreconcilable. We do not believe this is appropriate, and urge the Commission to adopt ABA Model Rule 8.5(b)(2), or some similar provision, as a means of providing uniformity in choice of law rules and ensuring that lawyers working multi-jurisdictional investigations are not whipsawed by potential application of multiple rules.

For conduct in connection with a matter pending before a tribunal, Proposed Rule 8.5(b)(1) follows ABA Model Rule 8.5(b)(1) in providing a clear choice of law rule – the rules of the jurisdiction in which the tribunal sits apply, unless that tribunal’s own rules provide otherwise. Thus, DOJ lawyers working on a case pending before a tribunal (typically, post-investigation) and subject to disciplinary authority in both California and some other jurisdiction, will know that in both disciplinary proceedings the same set of rules will apply, and can comport their conduct to these rules. The same will not be true if these same lawyers are working a multi-jurisdictional investigation that is not yet pending before a tribunal. For such an investigation, the text of Proposed Rule 8.5(b)(2) substantially differs from the ABA Model Rule in rejecting the “predominant effect of the conduct” standard and the “safe harbor” provision. The substitute standard, subjecting lawyers to the California rules except where the lawyer “is specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules” will create confusion and uncertainty for those federal government lawyers admitted in California whose investigations are outside of California or encompass multi jurisdictional practice.

Under Proposed Rule 8.5(b)(2), the California rules are adopted as the choice of law unless a California admitted lawyer, lawfully practicing in another jurisdiction, is required by the rules of that jurisdiction to follow a different set of rules. As stated in Proposed Comment [4], this rule is intended to apply to those cases in which the lawyer’s conduct is in anticipation of a proceeding that is likely to be, but not yet before a tribunal, in other words, during the pre-indictment or pre-litigation phase of a case. This would appear to mean that a DOJ lawyer, who is licensed in California, but based in Washington, D.C., and who is engaged in a pre-indictment or pre-litigation investigation in Pennsylvania, will be subject to the California Rules of Professional Conduct, even though the case has no nexus to California and no California resident’s interests are at stake. However, as soon as the indictment is issued or the lawsuit is filed in Pennsylvania, then the Pennsylvania Rules will apply to that same lawyer’s conduct. Arguably, under this proposed rule, the California admitted federal government lawyer, practicing outside California, will have to tailor his or her investigation, including the supervision of law enforcement officers or investigators, differently than his non-California licensed colleagues in the same case, merely because he is licensed in California. Moreover, if the state in which the lawyer is practicing, in our example, Pennsylvania, has adopted ABA Model Rule 8.5(b)(2), the lawyer may also have to comply with the Pennsylvania rules, which would apply during the investigatory phase under ABA Model Rule 8.5(b)(2) based on application of the “predominant effect” standard. The difficulties posed may be particularly significant in those instances where California’s Proposed Rules of Professional Conduct and related rules governing the conduct of lawyers in California differ significantly from the rules of the jurisdiction in which the case is likely filed. For example, the permissible exceptions to non-disclosure of client confidences under California’s Proposed Rule 1.6 (interpreted to be consistent with California Business and Professions Code § 6068) are substantially narrower than those exceptions recognized in Pennsylvania, which has adopted Model Rule 1.6 (b)(2) (“to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another”) and 1.6(b)(3) (“to prevent, mitigate or rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services are being or had been used”) or where an issue concerning the lawyer’s implied authority for disclosure is at issue, a concept that has also been rejected in California’s Proposed Rule 1.6. It would also not appear to be in the interests of either California or its residents to subject federal lawyers overseeing investigations to different rules of professional conduct in the same case, where the protection of California’s interests are not at issue.

For these reasons, we request that Proposed Rule 8.5(b)(2) and Proposed Comment [4] not be adopted as presently drafted and that either ABA Model Rule Rule 8.5(b)(2) and its accompanying comments be adopted or, alternatively, that Proposed Rule 8.5(b)(2) be modified to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California, in which case the rules of the anticipated tribunal should apply.

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Conclusion

For the foregoing reasons, we request that additional language be added to Comment [2] to Proposed Rule 3.8(c) to make clear that the rule does not preclude prosecutors or those acting at their direction from obtaining from unrepresented arrestees reasonable waivers of the time for initial appearance and preliminary hearing as a means of enabling the arrestees voluntary to cooperate in an ongoing investigation. We also oppose the proposed incorporation of the text of ABA Model Rule 3.8(g), (h) into the California Rules of Professional Conduct. If the Committee ultimately concludes that adoption of some variation of these provisions is warranted, we believe that these provisions should be substantially redrafted along the lines we previously proposed. Finally, we oppose the adoption of Proposed Rule 8.5(b)(2) and Proposed Comment [4], and request that the Commission either adopt ABA Model Rule 8.5(b)(2) and its accompanying comments or modify Proposed Rule 8.5(b)(2) to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California.

Thank you for this opportunity to comment.

Exhibit A

Department of Justice
Proposal to Amend ABA Model Rule 3.8(g) and (h)

DRAFT July 16, 2008

- (g) upon receipt of evidence that purportedly shows a defendant did not commit an offense of which the defendant was convicted:
- (1) if the prosecutor prosecuted defendant for the offense, is still employed in the prosecuting jurisdiction, and knows that the evidence is new and credible and creates a reasonable probability that a defendant did not commit an offense of which the defendant was convicted:
- (i) the prosecutor shall disclose that evidence to the defendant and an appropriate court or other authority, or
- (ii) undertake further investigation or review, or make reasonable efforts to cause an investigation to occur. If the prosecutor determines, after investigation or review, that the evidence is not new, not credible, or does not create a reasonable probability that the defendant did not commit an offense of which the defendant was convicted, the prosecutor has no further duties under this Rule. However, if the prosecutor determines that the evidence is new and credible and creates a reasonable probability that the defendant did not commit an offense for which the defendant was convicted, the prosecutor shall undertake the notifications set forth in subpart (g)(1)(i).
- (2) if the prosecutor did not prosecute the defendant for the offense or prosecuted the defendant but is no longer employed in the prosecuting jurisdiction, the prosecutor shall disclose the evidence to the chief prosecutor for the jurisdiction where the conviction occurred. Any chief prosecutor who receives the evidence shall undertake, or ensure that a subordinate prosecutor undertakes, the steps set forth above in subpart (g)(1).

* * * *

Comments

* * * *

[7] When a prosecutor who prosecuted a case and is still employed by the prosecuting jurisdiction receives evidence the prosecutor knows is new and credible and creates a reasonable probability that a person the prosecutor

prosecuted was convicted of a crime he did not commit, paragraph (g)(1)(i) requires disclosure to the defendant and the appropriate court. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel if the defendant is represented. If the defendant is no longer represented, disclosure may be made directly to defendant and may be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. In the first instance, the prosecutor may elect to undertake further investigation or review in lieu of disclosure under paragraph (g)(1)(ii). However, if the prosecutor determines or confirms after that further investigation or review that the evidence is indeed new and credible and creates a reasonable probability that the defendant did not commit a crime for which the defendant was convicted, the prosecutor must undertake the notifications set forth in paragraph (g)(1)(i). If the prosecutor concludes after the investigation or review that the evidence either is not new, not credible or does not create a reasonable probability that the defendant did not commit a crime for which the defendant was convicted, no further action is required under this Rule.

[8] If a prosecutor receives evidence that is purported to show that a defendant was convicted of a crime the defendant did not commit, and the prosecutor did not prosecute the defendant or prosecuted the defendant but is no longer employed by the prosecuting jurisdiction, the prosecutor must disclose the evidence to the chief prosecutor of the jurisdiction where the conviction occurred if the jurisdiction is known or readily ascertainable. The chief prosecutor must undertake the steps set forth in paragraph (g)(1).

[9] A prosecutor's independent judgment about whether evidence is new, credible and creates a reasonable probability that defendant did not commit a crime for which defendant was convicted shall be reviewed based upon the prosecutor's subjective knowledge and intent, including all the information known to the prosecutor at the time the judgment is made. A prosecutor shall not be deemed to have violated this Rule in the absence of a showing that the violation was willful and intentional.



U.S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

February 7, 2008

Laurel G. Bellows
Chair, House of Delegates
American Bar Association
321 North Clark Street
Chicago, Illinois 60610

Dear Ms. Bellows:

This letter is sent to comment on the proposal by the Criminal Justice Section of the American Bar Association (ABA) to add two provisions to Rule 3.8 of the Model Rules of Professional Conduct. These two new provisions, Model Rule 3.8(g) and (h), would impose additional duties on prosecutors who receive information post-conviction that suggests that a convicted person did not commit a crime of which he or she was convicted. The Department is very supportive of the goals behind this proposed Rule. It has always held its attorneys to the highest standards of professional conduct and expects that when exculpatory evidence is obtained by its prosecutors, that information is disclosed as soon as possible. We take to heart Justice Sutherland's admonition in Berger v. United States:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Indeed, recent revisions to the United States Attorneys' Manual in connection with our disclosure obligations make that abundantly clear. The Department of Justice would not countenance the continued incarceration of someone who was convicted and later found to be innocent of the crime of which he or she was convicted. When confronted with credible evidence of a defendant's innocence, the Department expects its attorneys to disclose this information to the defendant or the court whenever the information is obtained -- pre-trial, during trial, or after conviction. However, while we embrace the spirit of the rule, the Department has some concerns, as set forth below, regarding application of the rule as written, and would urge the House of Delegates to delay adoption while those final details are worked out.

In the first instance, the Rule would require a prosecutor to take action when he knows¹ “new, credible and material” exculpatory evidence. It is unclear how a prosecutor who receives information about a case he or she did not prosecute can determine whether the information is “new, credible and material.” Yet, the proposed Rule seems to require a prosecutor to make this determination even if the prosecutor is not aware of the evidence presented in the case, the legal issues that had been raised or the credibility of the witnesses who testified at trial. Perhaps, in some instances, the newness, credibility, or materiality of the information would be easier to ascertain. For example, perhaps the new evidence would consist of DNA test results reached by using methods that did not exist at the time of the conviction. However, it would be even more difficult for a prosecutor who did not prosecute a case to determine whether non-DNA evidence is “new, credible and material.” We would expect a prosecutor to engage in her best efforts in determining materiality, but there must be recognition that such an analysis, perhaps years after the fact, is difficult. For that reason, we would prefer language, as we note below, clarifying that a prosecutor’s subjective intent should be used in determining adherence to this rule.

“Material”

Secondly, we are concerned with the use of the term “material” in the rule. . Neither the proposed Rule nor the Comments defines the term “material.” In a criminal context, the term “material” is usually defined in the Brady/Giglio jurisprudence. These cases define evidence as material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” United States v. Bagley, 473 U.S. 667, 682 (1985). In the context of this Rule, that interpretation is reinforced by the further refinement “creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.”

However, the term “material” or “materially” is used elsewhere in the Model Rules and has not been given the same construction. See, e.g., ABA Model Rules of Prof’l Conduct R. 1.7(a)(2) (2007) (prohibiting a lawyer from representing a client if there is a significant risk that the representation may be “materially limited” by the lawyer’s own interests or the interests of a third person); ABA Model Rules of Prof’l Conduct 3.3(a)(1) (2007) (imposing upon a lawyer a duty to correct “material” false statements made to a court); ABA Model Rules of Prof’l Conduct R. 4.1(a) (2007) (prohibiting a lawyer from knowingly making a “material” false statement of law or fact to a third person). Often, in professional responsibility jurisprudence, the term “material” may be construed to mean important, relevant to establish a claim or defense, or relevant to a fact finder. See, e.g., Cohn v. Comm’n for Lawyer Discipline, 979 S.W.2d 694, 698 (Tex. App. 1998) (stating in reference to a lawyer’s duty to correct material false statements made to a court, “materiality encompasses matters represented to a tribunal that the judge would

¹ The term “know” is defined in the Model Rules to mean “actual knowledge of the fact in question[,]” Model Rule 1.0(f), and, as a result, we read the proposed Rule change would to apply only when a prosecutor actually knows of exculpatory evidence, and actually knows that the evidence is new, credible, and material.

attach importance to and would be induced to act on in making a ruling. This includes a ruling that might delay or impair the proceeding, or increase the costs of litigation.”).

We would believe that this confusion could be remedied by making clear that the term “material” is used in the Brady sense of the term.

“Promptly”

If the evidence establishes a reasonable likelihood that the defendant did not commit a crime for which he was convicted, the prosecutor must “promptly” disclose the evidence to an appropriate court or authority and, if the conviction was obtained in the prosecutor’s jurisdiction, the prosecutor must “promptly” disclose the evidence to the defendant and undertake further investigation. Although the term “promptly” is not defined in the Model Rules, it does appear in several rules. See, e.g., ABA Model Rules of Prof’l Conduct R. 1.4(a) (2007) (requiring a lawyer to “promptly” consult with clients about certain matters and “promptly” comply with a client’s reasonable request for information); ABA Model Rules of Prof’l Conduct R. 1.11(b)(2) (2007) (requiring the law firm of a former government attorney to “promptly” notify the government agency if the firm intends to represent a client in a matter in which the former government lawyer participated personally and substantially); ABA Model Rules of Prof’l Conduct R. 4.4(b) (2007) (requiring a lawyer who receives privileged information of an opponent that was sent inadvertently to “promptly” notify the sender). Based upon the construction of the term “promptly” when it is used in other Model Rules, we believe that a court would construe the term to mean with some dispatch. Cf. Cobb Publ’g, Inc. v. Hearst Corp., 907 F. Supp. 1038, (E.D. Mich. 1995) (where court held that private firm failed to institute screening of lawyer hired from opposing counsel’s firm “promptly”; the attorney was not screened until ten days after he started working at the new firm; court discounted firm’s description of administrative delays in light of the fact that the firm knew prior to the attorney’s arrival that he was working as opposing counsel on the case).

When the term “promptly” is used elsewhere in the Model Rules, it imposes a duty upon a lawyer to act with dispatch when the lawyer already knows the information that triggers the duty. Under proposed Model Rule 3.8(g), however, it is exceedingly unlikely that a prosecutor would know immediately upon receipt of the alleged exculpatory information that it is “new, credible and material,” particularly if the prosecutor had not handled the case.

It would not be fair for a court or bar authority to sanction a prosecutor for taking the time to review the record of the conviction before acting on the information received. Accordingly, it would be more appropriate if the term “promptly” was removed from the proposed Rule or the Comment is amended to explain that the duty to take action is not triggered until the lawyer has had a reasonable amount of time to make an appropriate inquiry into the facts of the conviction so as to be able to determine and “know” that the evidence is “new, credible and material.”

“Seek to remedy the conviction”

Under proposed Model Rule 3.8(h), if the prosecutor concludes that there is clear and convincing exculpatory evidence, the prosecutor “shall seek to remedy the conviction.” Proposed Comment [8] states,

Necessary steps [to remedy the conviction] *may* include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

(Emphasis added.) Thus, the Comment suggests that the duty to “seek to remedy the conviction” may be met by disclosure, notice and, at most, a motion to the court for appointment of counsel for an indigent defendant. Thus, the unworkably vague instruction in subsection (h), is appropriately modified by the commentary. However, reliance on this Comment raises several concerns.

As an initial matter, some states that may consider adopting proposed Model Rule 3.8(g) and (h) do not have comments that accompany their rules of professional conduct or may choose to develop their own comments. *See, e.g.*, Alaska Rules of Prof'l Conduct R. 3.8 (2007) (adopting its own comments rather than the ABA comments); N.Y. Lawyer's Code of Prof'l Responsibility DR 7-103 (2007) (adopting its own ethical cannons rather than the ABA comments);¹ Ill. Rules of Prof'l Conduct R. 3.8 (2007) (no comments adopted); La. Rules of Prof'l Conduct R. 3.8 (2006) (same); Nev. Rules of Prof'l Conduct R. 3.8 (2006) (same); Or. Rules of Prof'l Conduct R. 3.8 (2005) (same); R.I. Rules of Prof'l Conduct R. 3.8 (2007) (same); W. Va. Rules of Prof'l Conduct R. 3.8 (2005) (same). In those jurisdictions, a court or bar authority may or may not choose to construe the rule based upon the comments to the Model Rule.

Even in jurisdictions where the court decides to adopt Comment [8], it is not clear that notice, disclosure and a motion for appointment of counsel is all that is required to “remedy” a conviction. Indeed, in its report accompanying the recommendation to amend Model Rule 3.8, even the Criminal Justice Section acknowledges that the list in Comment [8] is not exhaustive.

Although the proposed Comments identify steps that might be taken when necessary to remedy a wrongful conviction, the list is not exclusive. Sometimes disclosure to the defendant or the court, or making or joining in an application to the court, will suffice, whereas in jurisdictions where courts lack jurisdiction to release an innocent individual, the appropriate steps may be to make, or join in, an application for executive clemency.

¹Proposed New York Rule 3.8 would include comments. However, the comments in the draft pending before the Court of Appeals do not include a comment similar to Comment [8].

Criminal Justice Section, Report to the House of Delegates, at 5 n.10. See Report appended hereto as Attachment 1. Thus, even in jurisdictions that adopt Comment [8], a defendant or bar counsel may argue that a prosecutor faced with clear and convincing evidence of a defendant's innocence is ethically required to do more.

Finally, if the proposed revision could be construed to require prosecutors to do more than disclose, notify and move the court for appointment of counsel, this could be problematic because federal prosecutors do not have a legal or procedural mechanism to “remedy” a conviction. Rather, that responsibility lies with the defendant. See, e.g., Fed. Rule Crim. P. 33(a) (“Upon a defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.”).

“Good faith” of the prosecutor

The proposed Comment [9] to the Model Rule 3.8 states that a prosecutor will not run afoul of the Rule if he determines in “good faith” that the new evidence does not trigger the duty to notify and disclose under proposed subparts (g) and (h). Usually, the term “good faith” is used to describe a “state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one’s duty or obligation.” Efron v. Kalmanovitz, 57 Cal. Rptr. 248 (Cal. Ct. App. 1967). We read the Comment to require that a bar authority or a court determine whether a prosecutor has run afoul of the rule by examining the prosecutor’s subjective intent. We believe that is the appropriate standard to use.

However, the term “good faith” is used elsewhere in the Model Rules and is not always interpreted in this way. For example, ABA Model Rules of Prof’l Conduct R. 3.1 (2007) provides, “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.” Under Model Rule, courts have analyzed an attorney’s behavior using an objective standard – a standard dependent on what a reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances. In re Disciplinary Action Against Graham, 453 N.W.2d 313, 322 (Minn. 1990).

We believe that the subjective standard of intent should be explicitly stated in the rules.

“Remedy the conviction”

Proposed Model Rule 3.8(h) requires a prosecutor to “seek to remedy the conviction” if there is clear and convincing evidence that a defendant in the prosecutor’s jurisdiction did not commit a crime for which he was convicted. As discussed above, one could argue that, under proposed Comment [8], the phrase “remedy the conviction” should be construed as requiring no more than notice, disclosure, and a motion to the court seeking appointment of counsel for indigent defendants. But, the phrase “remedy the conviction” on its face is very broad, not all jurisdictions that might adopt the proposed Rule would also adopt the proposed comments, and even the Criminal Justice Section concedes the list in the proposed Comment is not exhaustive. Accordingly, a prosecutor could be required to do more to “remedy the conviction.”

A federal prosecutor is limited in what he may do in the face of after-acquired exculpatory evidence. As a matter of substantive law, when a federal prosecutor receives information that exculpates a convicted defendant, there are no specific statutory or procedural mechanisms for the prosecutor to seek relief. Rather, Congress and the courts have placed the responsibility to remedy a conviction on the defendant. Under Fed. R. Crim. P. 33 (a) (2007), a defendant may move to vacate a judgment and for the grant of a new trial “if the interests of justice so require.” There are time limits on such a motion. A defendant basing his motion for a new trial on the ground of newly discovered evidence only has three years from the date of the verdict to file the motion. Any motion for a new trial based upon anything other than newly discovered evidence must be filed within seven days of the verdict. Fed. R. Crim. P. 33(b) (2007). Under 28 U.S.C. § 2255 (Supp. 2007), a defendant may challenge a conviction on constitutional or other legal grounds, but must do so within one year of the judgment of conviction, the occurrence of the constitutional violation, the establishment of the constitutional right or the date that new facts would be discoverable.² Thus, even if a court or bar authority were to construe proposed Model Rule 3.8(h) to require a federal prosecutor to do more than the disclosure, notice, and investigation he has undertaken under proposed Model Rule 3.8(g), there would be no rule of criminal procedure and no statutory basis by which a prosecutor could move the court to take any action to “remedy” a conviction.

The legitimate desire by the courts and congress for finality of judgment have led them to adopt mechanisms like Section 2255 and Rule 33 in order to strike an appropriate balance between the principle of finality of judgment and the desire to have assurance that the innocent are not convicted of crimes they did not commit. To be sure, ensuring that the innocent are not convicted is a fundamental goal of our criminal justice system and the principle underlying many of the constitutional, statutory, and procedural protections presently in place. However, it is also certain that the government and the people’s desire for finality of criminal convictions is an equally compelling interest to be served. “[T]he principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.” Teague v. Lane, 489 U.S. 288, 309 (1989). Moreover, as aptly stated by Justice Harlan, “No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.” Mackey v. United States, 401 U.S. 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part).

A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process. While men

²Congress has created a procedure to permit convicted defendants to seek to compel post-conviction DNA testing in extremely limited circumstances. See 18 U.S.C. § 3600 (Supp. 2007). If, however, such testing is ordered and if the test results exclude the applicant as the source of the DNA evidence, he may then file a new trial motion “[n]otwithstanding any law that would bar a motion under this paragraph as untimely.” 18 U.S.C. § 3600(g)(1) (Supp. 2007).

linguish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final. . . . This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.

Id. (citations omitted).

By developing Section 2255 and Rule 33, Congress and the courts have, after considered review, reflection and debate, struck the balance they deem to be appropriate between finality and innocence. The Criminal Justice Section's proposed revision to Model Rule 3.8 may be construed to alter this balance without being subject the rigors or accountability of a formal legislative process or judicial rule making. Such process would attempt to balance the costs and benefits to the government, society and the individual. However, it does not appear from the text of the proposed revisions or the Section Report that the Section gave sufficient weight to the costs to the government or society that may arise if the proposed revisions are adopted. Bar rules of professional conduct should not try to address matters of substantive or procedural law. Indeed, the regulations interpreting 28 U.S.C. 530B, the statute that makes state rules of professional conduct applicable to federal government attorneys, clearly state that the statute "should not be construed in any way to alter federal substantive, procedural or evidentiary law." 28 C.F.R. § 77.1(b) (2007). Accord Stern v. United States District Court for the District of Mass., 214 F.3d 4, 20 (1st Cir. 2000).

Application to all counsel

We would also suggest that the provisions be applied to all attorneys. While the prosecutor, by nature of his position has a unique role and special obligations, the intent of the proposed revisions is to rectify the conviction of the innocent. As such, a duty to disclose exculpatory evidence acquired post-conviction should apply to all attorneys, not only to prosecutors. . Although there could be various constitutional or client confidentiality concerns that may weigh in the balance of whether a private attorney should disclose such information, the Criminal Justice Section undermines its goal of rectifying the conviction of the innocent by failing to impose a duty to disclose exculpatory information on all attorneys.

For all of the foregoing reasons, we believe the passage of Rule 3.8 is premature and we would welcome the opportunity for further discussion.

Sincerely,

A handwritten signature in black ink, appearing to read "David Margolis", with a long horizontal flourish extending to the right.

David Margolis
Associate Deputy Attorney General



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

November 9, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 8.5

Dear Mr. Sondheim:

The State Bar Standing Committee on Professional Responsibility and Conduct (“COPRAC”) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (“RAD”) for public comment.

COPRAC has reviewed the provisions of proposed Rule 8.5 and offers the following comments.

COPRAC has considered proposed Rule 8.5, and supports the rule as drafted. COPRAC agrees with the deletion of the ABA Model Rule test involving the determination of where the lawyer’s conduct has a predominant effect. That concept is ambiguous and subject to misapplication. COPRAC favors the bright line test proposed by the Commission.

COPRAC thanks the Commission for its consideration of COPRAC’s comments.

Very truly yours,

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



**SAN DIEGO COUNTY
BAR ASSOCIATION**

November 11, 2009

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

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit
the attached comments to Batch 5 of the Proposed Amendments to the Rules of
Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics
Committee, and have been approved by our Board of Directors.

Sincerely,

Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

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

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

- Rule 1.2 Scope of Representation [N/A]
APPROVE

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

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

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

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

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

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

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

- Rule 2.1 Advisor [N/A]
APPROVE

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

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

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

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: CRPC 1-100(D) Geographic Scope of Rules

Proposed New Rule No./ Title: Rule 8.5 Disciplinary Authority; Choice of Law

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

(1) Is the **policy** behind the new rule correct? If “yes,” please proceed to the next question. If “no,” please elaborate, and proceed to Question #4.

Yes [X] No []

(2) Is the new rule **practical** for attorneys to follow? If “yes,” please proceed to the next question. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [X] No []

(3) Is the new rule **worded correctly and clearly**? If “yes, please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [X] No []

(4) Is the policy behind the existing rule correct? If “yes,” please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [X] No []

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

The essence of the Commission’s proposal is to retain the California rule, and yet modify it to fit the Model Rule format, minimizing disruption in modification. Succinctly stated, the California Rules apply to all lawyers licensed to practice in California, without regard to the situs of conduct, and can only be preempted where a lawyer is specifically required by a foreign jurisdiction to follow a different rule.

This differs from the Model Rule, which determines applicable rules by the jurisdiction of “predominant effect” of the lawyer’s conduct. As a safe harbor, it allows the lawyer to apply “the rules of the jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.” The “predominant effect” was removed as ambiguous and unnecessary.

CONCLUSIONS (pick one):

We approve the new rule in its entirety.

We approve the new rule with modifications.*

We disapprove the new rule and support keeping the old rule.

We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on *one* Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization

- Yes
 No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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

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

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule
 DISAGREE with this proposed Rule
 AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

NOTE: The following materials are the assignment materials. The Dashboard, Introduction, Comparison Chart, etc. are the same as the public comment materials. They have not been revised.

**Rule 8.5 Choice of Law.
[Sorted by Commenter]**

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

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Orange County Bar Association	M			<p>The proposed Rule deletes a “safe harbor” provision, which provides that a lawyer is not subject to discipline if that reasonably believes that a different jurisdiction’s rule governs. The OCBA questions whether the “safe harbor” should be deleted. The OCBA believes that, in some situation, a reasonable belief should and could serve as a complete defense. This would seem more consistent with the Commission’s approach, namely, that California’s rules govern unless another jurisdiction’s rules require otherwise.</p> <p>The Commission’s deletion of the safe harbor provision also affects the language proposed in Comment [3] to the proposed Rule, as well as comment [5] to the ABA Model Rule, which the Commission has deleted.</p> <p>The OCBA agrees with deleting comment [6] to the Model Rule.</p>	
2	COPRAC	A			COPRAC has considered proposed Rule 8.5 and supports the Rule as drafted.	
3	San Diego County Bar Association Legal Ethics Committee	A			We approve the new rule in its entirety.	

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

**Rule 8.5 Choice of Law.
[Sorted by Commenter]**

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

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	Santa Clara County Bar Association	A			No comment.	
5	Office of the Chief Trial Counsel	M			<p>OCTC agrees with the policy behind this rule, but has concerns that the rule as written is in conflict with B&P Code section 6049.1. B7P Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed.</p> <p>Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is proposed rule 8.5 changing B&P Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.</p>	
6	George S. Cardona, Acting U.S. Attorney – Central District of California	D			We request that Proposed Rule 8.5(b)(2) and Proposed Comment [4] not be adopted as presently drafted and that either ABA Model Rule 8.5(b)(2) and its accompanying	

**Rule 8.5 Choice of Law.
[Sorted by Commenter]**

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

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					comments be adopted or, alternatively, that Proposed Rule 8.5(b)(2) be modified to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California, in which case the rules of the anticipated tribunal should apply.	

Proposed Rule 8.5 [RPC 1-100(D)] “Disciplinary Authority; Choice of Law” (Draft #3, 8/31/09)

Summary: This amended rule states the territorial and extra-territorial reach of the California Rules of Professional Conduct. It also addresses conflicts of law with regard to professional conduct rules by setting a choice of law standard.

Comparison with ABA Counterpart

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

Primary Factors Considered

- Existing California Law

Rule

RPC 1-100(D); Rules 9.40 - 9.48 of the California Rules of Court

Statute

Case law

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

- Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by Consensus

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

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included on Model Rule Comparison Chart: Yes No

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

See the introduction and the explanation of paragraph (b) of the proposed rule in the Model Rule comparison chart.

Not Controversial – Explanation:

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.5* Disciplinary Authority; Choice of Law

August 2009

(Draft rule to be considered for public comment.)

INTRODUCTION:

Proposed rule 8.5 is based upon Model Rule 8.5, except that proposed 8.5(b)(2) adopts the California rules as a choice of law unless an admitted lawyer, lawfully practicing in another jurisdiction, is required by the rules of another jurisdiction to engage in different conduct. The Model Rule concepts of the “predominant effect of the conduct is in a different jurisdiction” and the “safe harbor” provision (providing no discipline to a lawyer believing that the predominant effect of the rules of another jurisdiction applied) have been deleted in the interests of protecting the residents of California and in creating a brighter line for application by practicing lawyers, disciplinary prosecutors and disciplinary adjudicators.

Most of the Model Rule 8.5 comments have been retained and used as a basis for the comments to the proposed rules, except where the comments have been inconsistent with the proposed black letter rules or California law.

* Proposed Rule 8.5, Draft 3 (8-31-09).

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 8.5 Disciplinary Authority; Choice Of Law</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 8.5 Disciplinary Authority; Choice Of Law</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.</p>	<p>(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdictionCalifornia is subject to the disciplinary authority of this jurisdictionCalifornia, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdictionCalifornia is also subject to the disciplinary authority of this jurisdictionCalifornia if the lawyer provides or offers to provide any legal services in this jurisdictionCalifornia. A lawyer may be subject to the disciplinary authority of both this jurisdictionCalifornia and another jurisdiction for the same conduct.</p>	<p>Paragraph (a) is identical to Model Rule 8.5(a), except that the word "California" has been substituted for "this jurisdiction." The intent of the Model Rules drafters and the practice of many states, when this rule is adopted by a particular jurisdiction, is to substitute the name of the jurisdiction for "this jurisdiction."</p>
<p>(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:</p>	<p>(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdictionCalifornia, the rules of professional conduct to be applied shall be as follows:</p>	<p>Paragraph (b) is identical to Model Rule 8.5(b) except that the word "California" has been substituted for "this jurisdiction." The intent of the Model Rules drafters and the practice of many states, when this rule is adopted by a particular jurisdiction, is to substitute the name of the jurisdiction for "this jurisdiction."</p>
<p>(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and</p>	<p>(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits <u>applies</u>, unless the rules of the tribunal provide otherwise; and</p>	<p>A minor addition has been made to Paragraph (b)(1) to improve clarity. There is no substantive change.</p>

* Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 8.5 Disciplinary Authority; Choice Of Law</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.</p>	<p>(2) these rules apply to for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur in and outside this state, except where a lawyer admitted to practice in California and who is lawfully practicing in another jurisdiction, is specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.</p>	<p>Proposed 8.5(b)(2) deletes most of Model Rule 8.5(b)(2) and substitutes language derived from current rule 1-100(D)(1) as a model to create a brighter line and to provide that these rules remain the standards of professional conduct for all conduct over which California has disciplinary jurisdiction except where an admitted lawyer is lawfully practicing in another jurisdiction which specifically requires a different standard of conduct.</p> <p>This rule deletes the MR concept of "predominant effect" because the concept is ambiguous, over broad and undefineable for the lawyers seeking to comply with the rules and for application by disciplinary prosecutors and adjudicators.</p> <p>The rule also deletes the "safe harbor" provision (providing that a lawyer is not subject to any discipline if the lawyer reasonably believes that he or she was bound by a different set of disciplinary rules) on public protection grounds, since a violation of these rules is generally a "wilful" standard, without any intent requirement. The reasonable belief of the lawyer may properly be considered as a mitigating factor rather than a complete defense.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Disciplinary Authority</p> <p>[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.</p>	<p>Disciplinary Authority</p> <p>[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdictionCalifornia is subject to the disciplinary authority of this jurisdictionCalifornia. Extension of the disciplinary authority of this jurisdictionCalifornia to other lawyers who provide or offer to provide legal services in this jurisdictionCalifornia is for the protection of the citizens of this jurisdictionCalifornia. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters. A lawyer disciplined by a disciplinary authority in another jurisdiction, may be subject to discipline for the same conduct in California. (See e.g., Bus. & Prof. C., §6049.1.)</p>	<p>Comment [1] is based on Model Rule 8.5, cmt. [1] but makes three changes to conform the comment to California law.</p> <p>First, it substitutes "California" for "this jurisdiction." See explanation to proposed (a) above and cites to the court rules for multijurisdictional practice, which also contain the inherent authority of the California Supreme Court over the practice of law in California.</p> <p>Second, it deletes the language regarding reciprocal discipline since California has not adopted these provisions.</p> <p>Third, it adds references to California's statutory provisions for discipline of lawyers who are disciplined in another jurisdiction.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Choice of Law</p> <p>[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.</p>	<p>Choice of Law</p> <p>[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.</p>	<p>Comment [2] is identical to Model Rule 8.5 comment [2].</p>
<p>[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.</p>	<p>[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct; <u>and</u> (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions; and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.</p>	<p>Comment [3] is based on Model Rule 8.5, cmt. [3] except that it deletes the third provision referring to the black letter "safe harbor" to conform to proposed 8.5(b)(2). See explanation above.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.</p>	<p>[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to these rules, <u>unless a lawyer admitted in California is lawfully practicing in another jurisdiction, and may be specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.</u>¹ of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, <u>these rules apply, unless the tribunal is in a jurisdiction in which the lawyer is lawfully practicing and that jurisdiction requires different conduct.</u> the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.</p>	<p>Comment [4] is based on Model Rule 8.5, cmt. [4] but deletes language to conform the comment to proposed rule 8.5(b)(2).</p> <p>Sentence two clarifies that these rules apply to a lawyer's conduct, including prior to the initiation of a proceeding before a tribunal [after which the rules of the tribunal would generally apply under 8.5(b)(1)], unless the lawyer is lawfully practicing in another jurisdiction that requires a different standard of conduct.</p> <p>In sentence three, the same conformance to proposed rule 8.5(b)(2) has been made.</p> <p>The deleted language does not provide a bright line for lawyers engaged in multijurisdictional practice; whereas the proposed rule provides greater clarity.</p>

¹ Drafter's note: This part of the comment has been changed to conform to the black letter rule (8.5(b)(2). See fn. 5 above.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 8.5 Disciplinary Authority; Choice Of Law Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 8.5 Disciplinary Authority; Choice Of Law Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.</p>	<p>[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.</p>	<p>Model Rule 8.5 comment [5] has been deleted because it refers exclusively to the safe harbor language which was deleted from proposed rule 8.5(b)(2). See explanation above.</p>
<p>[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.</p>	<p>[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.</p>	<p>This entire comment has been deleted because it is improper to discuss what another disciplinary jurisdiction should or should not do or to recommend that the California Supreme Court should limit its inherent power with this comment. Moreover, the statement is inconsistent with the operation of Bus. & Prof. C., §6049.1 [discipline of a California lawyer who has been disciplined by another jurisdiction].</p>
<p>[7] The choice of law provision applies to lawyers engaged in transactional practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.</p>	<p>[7]<u>[5]</u> The choice of law provision applies to lawyers engaged in transactional practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise <u>preempt these rules</u>.</p>	<p>Comment [5] is identical to Model Rule 8.5 Comment [7] except that the words "provide otherwise" have been deleted and the words "preempt these rules" have been added. This conforms the comment to the black letter rule 8.5(b)(2) that the California rules will be the default standards, unless the rules of a jurisdiction in which the lawyer is lawfully practicing require different conduct. Accordingly, only preemption by treaty, etc. would "require other conduct."</p>

Rule 8.5 Disciplinary Authority; Choice Of Law

(Commission's Proposed Rule – Clean Version)

- (a) **Disciplinary Authority.** A lawyer admitted to practice in California is subject to the disciplinary authority of California, regardless of where the lawyer's conduct occurs. A lawyer not admitted in California is also subject to the disciplinary authority of California if the lawyer provides or offers to provide any legal services in California. A lawyer may be subject to the disciplinary authority of both California and another jurisdiction for the same conduct.
- (b) **Choice of Law.** In any exercise of the disciplinary authority of California, the rules of professional conduct to be applied shall be as follows:
- (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits apply, unless the rules of the tribunal provide otherwise; and
 - (2) these rules apply to any other conduct, in and outside this state, except where a lawyer admitted to practice in California and who is lawfully practicing in another jurisdiction, is specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.

Comment

Disciplinary Authority

- [1] It is longstanding law that the conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. Extension of the disciplinary authority of California to other lawyers

who provide or offer to provide legal services in California is for the protection of the citizens of California. A lawyer disciplined by a disciplinary authority in another jurisdiction, may be subject to discipline for the same conduct in California. (See e.g., Bus. & Prof. C., §6049.1.)

Choice of Law

- [2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.
- [3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.
- [4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only

to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to these rules, unless a lawyer admitted in California is lawfully practicing in another jurisdiction, and may be specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, these rules apply, unless the tribunal is in a jurisdiction in which the lawyer is lawfully practicing and that jurisdiction requires different conduct.

- [5] The choice of law provision applies to lawyers engaged in transactional practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions preempt these rules.

Rule 8.5: Disciplinary Authority; Choice of Law

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.)

California: Rule 1-100(D), headed “Geographic Scope of Rules,” provides as follows:

(1) As to members: These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.

(2) As to lawyers from other jurisdictions who are not members: These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.

In addition, in 2004 California Supreme Court adopted Rules 964 and 965, which permit “Registered Legal Services Attorneys” and “Registered In-House Counsel” to practice law in California without being members of the California Bar. Each requires that qualifying attorneys “[a]bide by all of the laws and rules that govern members of the State Bar of California, including the Minimum Continuing Legal Education

(MCLE) requirements.” Rules 966 and 967, respectively entitled “Attorneys Practicing Law Temporarily in California as Part of Litigation” and “Non-Litigating Attorneys Temporarily in California to Provide Legal Services,” each contain the following language:

[Conditions] By practicing law in California pursuant to this rule, an attorney agrees that he or she is providing legal services in California subject to:

(1) The jurisdiction of the State Bar of California;

(2) The jurisdiction of the courts of this state to the same extent as is a member of the State Bar of California; and

(3) The laws of the State of California relating to the practice of law, the State Bar of Professional Conduct, the rules and regulations of the State Bar of California, and these rules.

Substantial excerpts from Rules 964 through 967 are reprinted below in our chapter on California Materials following Rule 1-300 of the California Rules of Professional Conduct.

District of Columbia: Rule 8.5(a) omits the second sentence of ABA Model Rule 8.5(a) (“A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.”) Rule 8.5(b)(2) provides as follows:

(2) For any other conduct,

(i) If the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

(ii) If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Florida: In Supreme Court Rule 3-4.6, Florida has adopted the language of Rule 8.5(b) except for the second sentence of paragraph (b)(2). In addition, Florida Rule 3-4.1 provides as follows:

Every member of The Florida Bar and every attorney of another state or foreign country who provides or offers to provide any legal services in this state is within the jurisdiction and subject to the disciplinary authority of this court and its agencies under this rule and is charged with notice and held to know the provision of this rule and the standards of ethical and professional conduct prescribed by this

court. Jurisdiction over an attorney of another state who is not a member of The Florida Bar shall be limited to conduct as an attorney in relation to the business for which the attorney was permitted to practice in this state and the privilege in the future to practice law in the state of Florida.

When the Florida Supreme Court rejected a proposal to amend this rule in 1999, it said: “Out-of-state lawyers are not lawyers who are subject to the Rules Regulating the Florida Bar; rather, they are 'non lawyers' subject to chapter 10 unlicensed practice of law charges if they . . . engage in improper solicitation or advertising in Florida.” See Amendments to Rules Regulating the Florida Bar Advertising Rules, 762 So.2d 392, 393-395 (Fla. 1999).

Georgia: Rules 8.5(a) and (b) both use the phrase “Domestic and Foreign Lawyer” in place of the phrase “lawyer.” Georgia defines those terms as follows:

“Domestic Lawyer” denotes a person authorized to practice law by the duly constituted and authorized government body of any State or Territory of the United States or the District of Columbia but not authorized by the Supreme Court of Georgia or its rules to practice law in the State of Georgia.

“Foreign Lawyer” denotes a person authorized to practice law by the duly constituted and authorized government body of any foreign nation but not authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia.

In addition, Georgia Rule 9.4 generally tracks Rules 6 and 22 of the ABA Model Rules of Lawyer Disciplinary

Enforcement (reprinted below in the Related Materials for ABA Model Rule 8.5), which govern jurisdiction and reciprocal discipline.

Illinois: Illinois Supreme Court Rules 716 and 717 (summarized above in the Related Materials following ABA Model Rule 5.5) permit in-house and legal services lawyers to engage in limited law practice in Illinois. Rules 716 and 717 both provide that all lawyers licensed under the rules “shall be subject to the jurisdiction of the Court for disciplinary purposes to the same extent as all other lawyers licensed to practice law in this state.”

Maryland: Rule 8.5(a) explicitly extends disciplinary jurisdiction to any lawyer who “holds himself or herself out as practicing law in this State,” or who “has an obligation to supervise or control another lawyer practicing law in this State whose conduct constitutes a violation of these Rules.”

Massachusetts has not adopted Rule 8.5 (b). Comment 2 to Massachusetts Rule 8.5 explains that Rule 8.5(b) has been reserved because “study of ABA Model Rule 8.5(b) has revealed many instances in which its application seems problematic.”

Michigan: The second sentence of Rule 8.5 provides as follows: “A lawyer who is licensed to practice in another jurisdiction and who is admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction.” Michigan has not adopted Rule 8.5(b).

Nevada: Rule 8.5 consists of only one sentence: “A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.” Also relevant is Nevada Rule 7.2(a),

which states as follows: “These Rules shall not apply to any advertisement broadcast or disseminated in another jurisdiction in which the advertising lawyer is admitted if such advertisement complies with the rules governing lawyer advertising in that jurisdiction and the advertisement is not intended primarily for broadcast or dissemination within the State of Nevada.”

New Jersey deletes the last sentence of Rule 8.5(b) (“A lawyer shall not be subject to discipline . . .”).

New York: DR 1-105 provides as follows:

A. A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

B. In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

(1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) For any other conduct:

(i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and

(ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

In addition, the last sentence of New York's EC 2-10 states: "A lawyer who advertises in a state other than New York should comply with the advertising rules or regulations applicable to lawyers in that state." Conversely, DR 2-103(K) provides that DR 2-103 (which governs solicitation) "shall apply to a lawyer or members of a law firm not admitted to practice in this State who solicit retention by residents of this State."

Oregon: Rule 8.6 designates certain entities authorized to issue advisory ethics opinions and provides that in any disciplinary matter, the tribunal "may consider any lawyer's good faith effort to comply with an opinion" in evaluating the lawyer's conduct or in mitigation of sanction.

South Carolina: S.C. Appellate Court Rule 418 requires any "unlicensed lawyer" (defined as "any person who is admitted to practice law in another jurisdiction but who is not admitted to practice law in South Carolina") to comply with South Carolina's lawyer advertising rules (Rules 7.1 through

7.5) if the unlicensed lawyer engages in any of six specified forms of advertising or solicitation.

Texas: Rule 8.05(b) provides as follows:

(b) A lawyer admitted to practice in this state is also subject to the disciplinary authority of this state for:

(1) an advertisement in the public media that does not comply with these rules and that is broadcast or disseminated in another jurisdiction, even if the advertisement complies with the rules governing lawyer advertisements in that jurisdiction, if the broadcast or dissemination of the advertisement is intended to be received by prospective clients in this state and is intended to secure employment to be performed in this state; and

(2) a written solicitation communication that does not comply with these rules and that is mailed in another jurisdiction, even if the communication complies with the rules governing written solicitation communications by lawyers in that jurisdiction, if the communication is mailed to an addressee in this state or is intended to secure employment to be performed in this state.

Virginia retains the version of ABA Model Rule 8.5 as it was amended in 1993.

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E-mails, memos, etc. – Revised (1/19/2010)**

December 14, 2009 McCurdy E-mail to Drafters (Melchior, Lamport & Peck), cc Chair, Vice-Chairs & Staff:

Rule 8.5 Drafting Team (**MELCHIOR**, Lamport, Peck):

This message provides the assignment background materials for Rule 8.5 on the January agenda. **The assignment deadline is Monday, January 11, 2010.**

This message includes the following draft documents:

1. public comment compilation (full text of comment letters received)
2. public commenter chart (a staff prepared chart with the synopsis of comments in draft form and open third column for the codrafters recommended response to the comments)
3. dashboard (staff prepared template)
4. introduction (text of public comment version of the introduction – this should be updated if there are any recommended amendments to the rule)
5. Model Rule comparison chart (version of chart as issued for public comment)
6. clean rule text (public comment version – use this clean version to make any changes to the rule, do not edit the rule in the Model Rule comparison chart)
7. state variations excerpt (this does not require any work)

The codrafters are assigned to review any written comments received and to prepare a revised draft rule and comment, if any changes are recommended. The “RRC Response” column on the public commenter chart should be filled in with the drafting team’s recommended action in response to the public comment. In addition, we need the drafting team to prepare a completed dashboard, and to update, as needed, the Introduction, and the Explanations in the third column of the Model Rule comparison chart based on the revised rule. Please do not edit the redline-middle column of the Model Rule comparison chart. Staff is available to generate a new redline of the post public comment rule to the Model Rule and will assist in completing the middle column of the Model Rule comparison chart.

We are looking for submissions that are as close to final form as possible. As noted above, please feel free to send us your revised clean version of the proposed rule and we will generate a redline comparison to the Model Rule for the comparison chart. Of course, you will still need to complete the Explanation column of the Model Rule Comparison Chart. Lastly, if among the drafters there is a minority view, please consider including the minority view in your draft Introduction.

Attached:

RRC - 1-100 [8-5] - Dashboard - ADOPT - DFT1.1 (09-01-09).doc
RRC - 1-100 [8-5] - Compare - Introduction - DFT3.1 (08-31-09).doc
RRC - 1-100 [8-5] - Compare - Rule & Comment Explanation - DFT 3.1 (08-31-09)2.doc
RRC - 1-100 [8-5] - Rule - DFT1 (09-02-09)2 - CLEAN LAND.doc
RRC - 1-100 [8-5] - Public Comments Complete (12-14-09).pdf
RRC - 1-100 [8-5] - Public Comment Chart - By Commenter - DFT1 (12-14-09)AT.doc
RRC - 1-100 [8-5] - State Variations (2009).pdf

December 31, 2009 Melchior E-mail to Drafters, cc Sondheim, McCurdy:

Friends: could you give me your responses to this assignment by not later than Wednesday of next week so as to meet the 1/11 deadline? It does not look like a major task from here, at least at first glance. Thanks much, and Happy New Year.

January 2, 2010 Melchior E-mail to Drafters, cc Sondheim, McCurdy:

I have looked at the two comments which object to parts of proposed Rule 8.5 and propose that we resolve them as follows:

1. OCTC claims that the draft conflicts with B&P Code 6049.1. I do not see the conflict: The relevant part of the code section provides that where discipline has been imposed on a California licensed attorney in another jurisdiction, “a certified copy of a final order [from that jurisdiction] . . . shall be conclusive evidence that [a member of the State Bar] is culpable of professional misconduct in this state,” subject to stated exceptions.

Thus, 6049.1 provides a directive to discipline a CA lawyer who is found to have been found guilty in disciplinary proceedings elsewhere. In itself, that is in no way inconsistent with 8.5's proposed definition of when a lawyer subject to this rule violates CA law, Rather, it simply adds another basis for a potential CA law violation. But OCTC indirectly suggests two points worthy of consideration: should/can we define a violation of our law, as 8.5 does, where another jurisdiction may also have the right to impose its own law? And do we create an unnecessary conflict of laws if we regulate conduct of CA lawyers outside the state?

My response is that we should stand our ground. The assertion of power over conduct of our licensees, performed outside the state, is not new. Rule 100(D)(1) so provides now, and ABA Rule 8.5 does likewise. And the conflict of laws inherent in two jurisdictions' assertion of power to adjudicate the propriety of particular conduct is inherent in that situation. So the objection does not seem to address the language of our proposal but rather the concept which underlies it. Since this concept is neither new nor modified by the proposed rule, I suggest that we make no change.

How to respond in the response column without all that baggage? I propose: “The Commission has reviewed the Comment but found no inconsistency with the statute and declined to make any change.” Leave out the fact that there is nothing new in our language??

2. The U.S. Attorneys' point is more subtle. They claim that in pre-filing investigations which may take place outside California or involve several states, it may not be clear whether the conduct will ultimately result in a California filing or a filing elsewhere (or perhaps no filing at all); and that therefore our rule will create conflicts between this jurisdiction and others as places to which our proposed definition of conduct not to be governed by CA rules, i.e., “specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules” may apply.

I can see that such conflicts may possibly happen; but this should be extremely rare: conduct by a California-licensed federal prosecutor in an investigation outside California which could at the time result in court filings either in this or another state, and where the investigative conduct would violate our rules but be permitted under the rules of the other jurisdiction. That should be as rare as hen's teeth, and hardly warrants the long discussion we have been provided. Thus, if the case “has no nexus to California” (letter, p. 10), the lawyer should not have to worry under our proposed language about California rules possibly applying to his/her conduct therein.

I think that our language is clearer and more easily interpreted, both by the lawyers seeking to comply and by bar prosecutors, than the ABA language, which simply invites uncertainty: "if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur". If I read the U.S. Attorneys' letter correctly (and though I sympathize with their concern), they argue that more uncertainty is better because it allows a clearer excuse for noncompliance in the identified but extremely rare situation.

That, to me, is not an adequate ground for changing the proposed rule. If the drafting team feels that the described situation warrants a special Comment, we could write such a Comment in response. My own view, subject to that of others, is that the point is too obscure to warrant any modification or even the addition of a Comment.

Responses, please!

January 2, 2010 Melchior E-mail to Drafters, cc Sondheim, McCurdy:

In either event, I think that we need to change the dashboard to "moderately controversial" and to identify the two letter writers as the source of controversy.

January 6, 2010 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

Rule 8.5 Drafting Team (MELCHIOR, Lamport, Peck):

This message provides an updated commenter chart adding the previously omitted comment of the US Attorney's Office (George Cardona, et al.). The comment was included in the full text comment compilation provided in the earlier assignment materials, but didn't make it into the chart. If you have already completed work on the commenter chart, please copy the column for the George Cardona comment (final entry on the attached chart) into your chart and add your recommended response.

Attached:

RRC - 1-100 [8-5] - Public Comment Chart - By Commenter - DFT2 (01-06-10)AT.doc

January 8, 2010 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

Please note that, in addition to those comments mentioned in my message below, the OCTC's comment was also omitted from the earlier chart. Please write an explanation for that comment as well. I've reattached the revised chart circulated below for ease of reference.

Attached:

RRC - 1-100 [8-5] - Public Comment Chart - By Commenter - DFT2 (01-06-10)AT.doc

January 8, 2010 Peck E-mail to Melchior, cc Chair, Lamport, McCurdy:

Kurt: Sorry for the delay in getting back to you. I agree with your excellent responses to the objectors and agree that you should go forward with these responses. With respect to response to OCTC, I do

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think that you should state that no change in existing was intended by this change in addition to your proposed statement.

How do you propose that we respond to the Orange County Bar Association's objection to our deletion of the ABA safe harbor? I think the deletion of the safe harbor supports enforcement of B&P Code section

6049.1. Among other reasons we deleted the safe harbor provision was to ensure that section 6049.1 would still be viable. Inclusion of the safe harbor presents the possibility of establishing uncertainty until the conflict with section 6049.1 is resolved, which might take years.

Moreover, misconduct is misconduct. I do not think there should be a pass for a lawyer to commit misconduct just because the lawyer may have been confused about which rules applied.

Would something like this be appropriate?

“The Commission has reconsidered the policy of deleting the safe harbor provision and readopted the deletion. In multijurisdictional practice, public protection from lawyer misconduct is more important than providing a safe harbor for a lawyer who is confused about which jurisdiction's standards apply.”

Feel free to disagree, amend, delete or use the foregoing.

Let me know if I may be of further assistance, Ellen

January 11, 2010 E-mail from Melchior to Chair, Peck & McCurdy:

Since today is the due date and I am preoccupied with client matters, I am sending you two messages: this one which contains my comments in response to your request, and another from Ellen with some further suggestions. I never had any response from Stan.

I will try to coordinate my and Ellen's comments and send them to you in more formal fashion; but just in case you need to get this out before I can do so, I thought that it would be better to send you this than not to respond in time. My apologies.

January 17, 2010 Vapnek E-mail to RRC:

My comments on this Rule follow:

1. I agree with Kurt that OCTC is misreading the rule with respect to purported conflict with B & P Code Section 6049.1 I do not see any conflict, and I believe there is none. Our current rules also permit discipline of a California lawyer for acts that also may subject that lawyer to discipline in another jurisdiction. So pointing out that this may occur is not making any change in the rules. More typically, in my experience, if another jurisdiction commences proceedings against a California lawyer for acts in that other jurisdiction, OCTC will await the decision in the other jurisdiction and then use a certified copy of the decision as conclusive proof of culpability for violation of the California rule. Makes their job infinitely easier.

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2. With respect to George Cardona's critique of proposed Rule 8.5(b)(2), I believe he is misapplying the Rule as his example is covered by the current rule, and there has been no problem with prosecution of DOJ people under our current rules. His example is on p. 10 of his letter, p. 683 of the agenda package. He postulates that a a DOJ lawyer who is licensed in California but based in Washington, D.C. and engaged in pre-indictment activity in Pennsylvania would be subject to the California rules under our proposed rule 8.5. But the same activity now would have the same effect under Rule 1-100 (D)(1). No change in the proposed rule or Comments 2 and 3 is required.

3. I agree with deletion of the safe harbor provision. I find it hard to conceive of a situation that might confront a prosecutor that would lead to confusion as to which set of rules applies to a particular scenario. Current discipline of prosecutors is occurring long after the acts in question, typically as result of the granting of a habeas corpus petition or a reversal of a conviction for prosecutorial misconduct. The acts of the prosecutors in the recent cases have been clearly violative of the rules in any jurisdiction, including California.

4. One minor language change would be appropriate in Comment 1. I would change the word order in that last sentence of Comment 1 to read as follows: "A lawyer disciplined by a disciplinary authority in another jurisdiction, may be subject to discipline in California for the same conduct." The sentence as I propose it has less ambiguity, the original can be read as requiring the same conduct to be performed in California in order to be subject to California discipline.

January 18, 2010 Sondheim E-mail to RRC:

Since there is no Commenters Chart for this item, I suggest we postpone its consideration until our February meeting. Those of you who want to provide the drafting team with input, can do so by e-mail as Paul has done.

January 18, 2010 Kehr E-mail to RRC:

Here are my comments on these materials:

1. In rereading paragraph (b)(2) as a result of George Cardona's letter (agenda p. 682-84), it occurs to me that there is a potential gap in our proposed language. That language, and current rule 1-100(D)(1), focus on the situation in which a lawyer practicing elsewhere is required by the local rules to act in a way that would violate the California rules. However, it also is possible that a lawyer practicing elsewhere would be permitted (but not required) to do something that the lawyer would not be permitted to do in California. As an obvious example, there are a number of situations in which a lawyer practicing outside California properly may act without obtaining a client's informed written consent, as would be required in California. If one's reaction is that no one reasonably could think that a California lawyer would be required to meet this California standard while practicing elsewhere, then isn't that tantamount to saying that the MR "predominate effect" standard is read into the California rule? And if that is true, why not say so in the rule? I ask that the Commission reconsider the MR language in light of George's letter. George suggests (in the second paragraph on agenda p. 683) as an alternative a special rule for cases investigated in anticipation of litigation in which the likely site of the tribunal

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would be outside California. I don't support a special rule, nor am I certain that his suggestion draws the line appropriately. The general problem he raises applies outside of the DOJ context to which he refers, for example, with a corporate house counsel who is a member of the California Bar but is resident in another jurisdiction. Returning to George's alternative suggestion, it might be possible to expand paragraph (b)(1) so that it applies pre-filing as well as post-filing. To take George's example, there would be a higher degree of certainty if it were clear that (b)(1) applies to a member of the California Bar, who resides in Washington, and is representing a client with regard a planned filing in Pennsylvania. This also would eliminate the oddity that, as George pointed out, a lawyer might be subject to one set of rules for pre-filing work and another when the court proceeding has commenced.

2. I support Paul's suggested revision to the last sentence of Comment [1].