

Proposed Rule 1.16 [3-700] “Declining or Terminating Representation”

(Draft # 6.1, 9/29/08)

Summary: Proposed Rule 1.16 and the Model Rule 1.16 generally cover the same four topics: situations in which a lawyer must terminate a representation, situations in which a lawyer may do so, the requirement of court authorization when the court’s rules so require, and the lawyer’s conduct when a representation is terminated. The proposed Rule, however, involves several substantive changes to the Model Rule. See Introduction.

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

Primary Factors Considered

Existing California Law

Rules

RPC 3-700.

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

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

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

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by consensus

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

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

A representative from the Alameda Public Defender's Office expressed a concern that the Rule's requirement that a lawyer return the client's file have an exception for materials a criminal defense lawyer is prohibited by statute from providing a client. See Explanation of Changes for paragraph (e)(1).

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.16* Declining Or Terminating Representation

September 2009

(Draft rule following consideration of public comment)

INTRODUCTION: This proposed Rule and the Model Rule generally cover the same four topics: situations in which a lawyer must terminate a representation, situations in which a lawyer may do so, the requirement of court authorization when the court's rules so require, and the lawyer's conduct in terminating a representation. However, the Commission's recommendation includes a number of substantive and drafting changes in the Model Rule. These generally can be summarized as designed to enhance client protection either by narrowing the situations in which a lawyer is permitted to withdraw or by making Rule language clearer and more detailed.

The most fundamental of these changes is the removal of Model Rule 1.16(b)(1), a provision that permits a lawyer to withdraw from a representation whenever this can be accomplished "with material adverse effect on the interest of the client". The Commission views this as nearly *carte blanche*, permitting a lawyer to abandon a client whenever it is profitable or convenient for a lawyer to do so, limited only by the indefinite, unexplained, and undefinable standard of "material adverse effect" on the client. As more fully explained in the accompanying comparison chart, the Commission believes that, because of the heavy reliance that clients properly place on their lawyers, —a lawyer's acceptance of a representation involves a serious commitment to the client, that this commitment should not be made lightly or only for so long as it might suit the lawyer's ~~temporary benefit convenience,~~ ~~because of the heavy reliance that clients properly place on their lawyers,~~ and that a lawyer should withdraw from a representation only as permitted under one of the express provisions of this Rule.

* Proposed Rule 1.16, Draft 6.1 (9/29/08).

INTRODUCTION (Continued):

Variations in other jurisdictions: There are a number of local variations in this Rule. These include the following: North Carolina includes in its paragraph (b) counterparts to our recommended paragraphs (b)(1) [client insists on taking a legally unsupported legal position] and (b)(6) [termination of a representation by client consent]. Ohio and New York also have provisions similar to the Commission's recommended (b)(6). North Dakota has added "reasonably believes" in paragraph (a)(1), like the Commission's recommendation. Virginia omits paragraph MR (b)(1), as does the Commission's recommendation. D.C. and New York have the equivalent of the Commission's recommended (b)(10) [the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal]. N.Y. in its (c)(7) has an equivalent to our recommended (b)(4) [the client renders it unreasonably difficult for the lawyer to provide effective legal services], in its (c)(8) an equivalent to our recommended (b)(7) [the difficulty of working with co-counsel makes it in the best interests of the client for the lawyer to withdraw], and in its (c)(9) an equivalent to our (b)(8) [the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively].

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.16 Declining Or Terminating Representation</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.16 Declining Or Terminating Representation</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:</p> <p>(1) the representation will result in violation of the rules of professional conduct or other law;</p>	<p>(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:</p> <p>(1) <u>the lawyer knows or reasonably should know¹ that</u> the representation will result in violation of the rules of professional conduct<u>these Rules</u> or other law<u>of the State Bar Act</u>;</p>	<p>Paragraph (a) is substantially the same as the Model Rule but makes two changes. First, the Model Rule requires a lawyer to withdraw from a representation if the representation “will” result in a violation by the lawyer. That standard appears to require withdrawal only when the lawyer can predict with certainty that a violation will occur. The Commission proposes to change broaden this duty by requiring the lawyer to withdraw if the lawyer “knows or reasonably should know”. Second, the Model Rule phrase “of the rules of professional conduct” is changed to “of these Rules or the State Bar Act” in order to include the related statutory provisions and conform to our style.</p>
<p>(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or</p>	<p>(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client <u>competently</u>; or</p>	<p>Model Rule paragraph (a) implies but does not state that a lawyer must withdraw from a representation when the lawyer’s physical or mental condition impairs the lawyer’s ability to represent the client competently, but it omits the word “competently”. The Commission proposes to add that word for clarity.</p>
<p>(3) the lawyer is discharged.</p>	<p>(3) the <u>client discharges the</u> lawyer is discharged.</p>	<p>Paragraph (c) is substantively the same as the Model Rule but has been restated in the active voice to conform to the Guidelines for Drafting and Editing Court Rules.</p>

- Redline/strikeout showing changes to the ABA Model Rule

¹ The Commission adopted this Rule with the phrase “should know”. The applicable defined term is “reasonably should know”, and we have inserted the extra word. It is not believed this change alters the expression of the Commission’s intent.

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<p>(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:</p> <p>(1) withdrawal can be accomplished without material adverse effect on the interests of the client;</p>	<p>(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:</p> <p>(1) withdrawal can be accomplished without material adverse effect on the interests of the client;</p>	<p>Paragraph (b) lists a number of situations in which a lawyer may, but is not required to, withdraw from a representation. The first of these is that a lawyer may terminate a representation whenever doing so will have no “material adverse effect on the interests of the client”, thus permitting withdrawal when it is in the lawyer’s interests but not the client’s. The Commission has rejected this broad authorization, primarily for client protection reasons but also because of the role of lawyers in the legal system. The Commission believes that lawyers generally should accept a representation only with the intent of seeing it through to completion, and that a lawyer’s termination of a representation for the lawyer’s benefit: (i) would be contrary to client expectations and would damage the reputation of lawyers generally and of the legal system; (ii) would allow lawyers to place their own convenience above the protection of the interests of their clients; and (iii) would give to lawyers the unacceptably broad discretion to terminate under the vague standard of a “material adverse effect” on the client (how much financial or other injury to the client would trigger the Model Rule standard?). In summary, a lawyer should not be permitted to terminate a representation for personal convenience, such as in order to accept another, more profitable or prestigious engagement.</p>
	<p>(1) <u>the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;</u></p>	<p>In place of Model Rule paragraph (a)(1), the Commission proposes to add this paragraph (a)(1), which in substance adds a reference to Rule 3.1 (titled “Meritorious Claims and Contentions”).</p>

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<p>(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;</p>	<p>(2) the client persists in <u>either seeks to pursue a criminal or fraudulent course of action involving</u> conduct or has used the lawyer's services <u>to advance a course of conduct</u> that the lawyer reasonably believes is criminal <u>was a crime or fraudulent</u> fraud;</p>	<p>Proposed paragraph (b)(2) combines the topics of Model Rule paragraph (b)(2) and (3) in a single paragraph, but with a broadening of Model Rule (b)(3). The Model Rule paragraph (b)(3) permits a lawyer to terminate a representation if the "client has used" the lawyer's services to perpetrate a crime or fraud, a phrasing that would seem to require the lawyer's to be certain. This proposal expands the Model Rule to permit termination when the lawyer "reasonably believes" the client has acted in that way. In addition, the drafting of the Model Rule incorrectly has "criminal or fraudulent" modify "the lawyer's services", which is not intended and is eliminated by this revision.</p>
<p>(3) the client has used the lawyer's services to perpetrate a crime or fraud;</p>	<p>(3) the client has used <u>insists that</u> the lawyer's services to perpetrate <u>lawyer pursue a crime</u> course of conduct that is criminal or fraud <u>fraudulent</u>;</p>	<p>In place of Model Rule paragraph (b)(3), which now is part of paragraph (b)(2), this proposal adds the situation in which a client insists that the lawyer pursue a course of conduct that itself would be criminal or fraudulent. This supplements proposed paragraph (b)(2), which addresses the situation in which the lawyer's actions might be perfectly legal, such as simply forming a corporation for a client, but the client's actions are not proper.</p>
<p>(4) a the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;</p>	<p>(4) a the client insists upon taking action that <u>by other conduct renders it unreasonably difficult for</u> the lawyer considers repugnant or with which <u>to carry out</u> the lawyer has a fundamental disagreement <u>employment effectively</u>;</p>	<p>The Commission has rejected Model Rule paragraph (b)(4). The concept that a client's conduct is "repugnant" to a lawyer is divorced from the proper concern, which is the ability of the lawyer to competently and loyally represent the client and would give the lawyer a broad subjective basis for terminating representations. In its place, proposed paragraph (b)(4) identifies as a basis for permissive withdrawal conduct of the client that materials interferes with the lawyer's ability to act competently. The Commission's rejection was informed by the requirement of Bus. & Prof. C. § 6068(h).</p>

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<p>(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;</p>	<p>(5) the client fails—substantially—to fulfill<u>breaches a material term of an agreement with or</u> obligation to the lawyer regarding<u>relating to</u> the lawyer's services<u>representation,</u> and <u>the lawyer</u> has been given <u>the client a</u> reasonable warning <u>after the breach</u> that the lawyer will withdraw unless the <u>client fulfills the agreement or performs the</u> obligation is fulfilled;</p>	<p>Proposed paragraph (b)(5) narrows the Model Rule counterpart in order to advance the goal of better client protection. First, the lawyer's right to withdraw is limited to the client's breach of a <i>material</i> term of an agreement with the lawyer. Second, the lawyer's obligation to warn the client of possible termination must come after the client's breach so that, for example, it cannot be buried in a much earlier fee agreement.</p>
	<p>(6) <u>the client knowingly and freely assents to termination of the representation;</u></p>	<p>The Model Rule and the Commission's proposal include as a mandatory withdrawal the situation in which the client discharges the lawyer. However, the Model Rule overlooks the possibility that a lawyer and client will agree to terminate a representation. Because Rule 1.16 is the exclusive statement of when a lawyer may terminate a representation, the Commission has included this alternative.</p>
	<p>(7) <u>the lawyer believes in good faith that the inability to work with co-counsel makes it in the best interests of the client to withdraw from the representation;</u></p>	<p>The Model Rule recognizes certain situations in which the lawyer's ability to represent the client might have been materially affected by the client's conduct. However, it overlooks the possibility that a lawyer will not be able to perform in the best interest of a client because of the conduct of co-counsel. As stated above, because Rule 1.16 is the exclusive statement of when a lawyer may terminate a representation, the Commission has included this alternative.</p>

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	<p>(8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively;</p>	<p>The Model Rule also overlooks the possibility that a lawyers own condition might interfere materially with the lawyer's ability to advance the interests of a client. As explained above, because Rule 1.16 is the exclusive statement of when a lawyer may terminate a representation, the Commission has included this alternative.</p>
<p>(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or</p>	<p>(69) a continuation of the representation will likely to result in an unreasonable financial burden on the lawyer a violation of these Rules or has been rendered unreasonably difficult by the client State Bar Act; or</p>	<p>The Commission rejected Model Rule paragraph (b)(6). As written, it appears to be broad enough to permit a lawyer to terminate a representation simply because of more profitable representation is available. See the explanation above for the Commission's rejection of Model Rule paragraph (b)(1). The lawyer's financial situation would come into play only when so grave that it would affect the lawyer's ability to fulfill the duty of competence.</p>
<p>(7) other good cause for withdrawal exists.</p>	<p>(7) other good cause for withdrawal exists.</p>	<p>Model Rule paragraph (b)(7) grants to the lawyer the unilateral authority to determine when it is ok to terminate a representation. The Commission has rejected that broad authority for the same reason that it rejected Model Rule paragraph (b)(1), as explained above.</p>
	<p>(10) the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.</p>	<p>Proposed paragraph (b)(10) is a narrow substitute for Model Rule paragraph (b)(7). This broadly allows a lawyer to seek court permission to withdraw, leaving the court to control its proceedings.</p>

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<p>(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.</p>	<p>(c) A lawyer must comply with applicable law requiring notice to or permission <u>for termination</u> of a tribunal when terminating a representation. When ordered to do so is <u>required by the rules of</u> a tribunal, a lawyer shall continue <u>not terminate a</u> representation notwithstanding good cause for terminating the representation before that tribunal without its permission.</p>	<p>Proposed paragraph (c) is substantively the same as the Model Rule. However, it eliminates what appears to be a Model Rule assumption that there always is applicable law governing termination of a representation and clarifies that, when there is applicable law, that law takes precedence even if there is no court order directing the lawyer to continue a representation.</p>
<p>(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.</p>	<p>(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.</p>	<p>The Commission believes that a lawyer's conduct upon termination of a lawyer-client relationship involves client-protection issues of the highest importance. It therefore has rejected the generalized, unspecific language of Model Rule paragraph (d) in favor of the considerably more detailed requirements of proposed paragraphs (d) and (e). The Commission believes that the definition of a lawyer's duties in this situation should be robust so that lawyers will not be left in doubt as to their obligations and in order to facilitate discipline of lawyers who do not fulfill their obligations. The proposed replacement provisions also make substantive changes, as explained below.</p>

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	<p>(d) <u>A lawyer shall not terminate a representation until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).</u></p>	<p>Model Rule paragraph (d) requires a lawyer to take certain protective step upon termination of a representation. The Commission has rejected the timing of this obligation as coming too late. This proposed paragraph obligates the lawyer to take protective steps before terminating a representation.</p>
	<p>(e) <u>Upon the termination of a representation for any reason:</u></p> <p>(1) <u>Subject to any applicable protective order, non-disclosure agreement or statutory limitation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and</u></p>	<p>Proposed paragraph (e) contains a detailed elaboration of a lawyer's duties to a former client upon the termination of a representation. It is substantively consistent with Model Rule paragraph (d). In adding a reference to limitations imposed by applicable protective order, non-disclosure agreements or statutes, this recognizes, for example, the Proposition 15 limitations on the materials to which a criminal defendant is entitled. See proposed Comment [9], below.</p>

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	<p>(2) The lawyer promptly shall refund any part of a fee paid in advance that the lawyer has not earned. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.</p>	<p>Model Ruled paragraph (d) requires the lawyer to refund any advance payment of fee or expense that has not been earned or incurred. This proposal requires that the lawyer <i>promptly</i> refund. Also, this adds a reminder about true retainers because they have caused considerable confusion among lawyers.²</p>

² There appears to be a drafting error in paragraph (e)(2) because it omits the Model Rule's requirement that the lawyer refund an advance payment for expenses that has not yet been incurred. I cannot locate any explanation for this.

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<p>[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].</p>	<p>[1] A lawyer should not accept a representation unless the lawyer reasonably believes the lawyer can complete the representation in a matter unless it can be performed competently, promptly compliance with these Rules and the State Bar Act. A lawyer has the obligation or option to withdraw only in the circumstances and only in the manner described in this Rule. This requirement applies, without improper conflict of interest and limitation, to completion any sale under Rules 1.17.1 and 1.17.2. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. (See Rules [1.2(c)] and [6.5].) A lawyer can be subject to discipline for improperly threatening to terminate a representation. See also Rule 1.3 Matter of Shalant, Comment [4] Cal. State Bar Ct. Rptr. 829 (2005).</p>	<p>This proposed Comment restates the Model Rule Comment as a declarative sentence in line with the Guidelines for Drafting and editing Court Rules. It adds the important substantive reminder that Rule 1.16 provides the exclusive statement of when and how a lawyer may terminate a lawyer-client relationship. Also, it adds references to the State Bar Act and California case law, uses the phrase “these Rules”</p>

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<p>Mandatory Withdrawal</p> <p>[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.</p>	<p>Mandatory Withdrawal</p> <p>[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates<u>would violate</u> the Rules of Professional Conduct or other law<u>the State Bar Act</u>. <u>The references to these Rules and to the State Bar Act in paragraphs (a)(1) and (b)(3) reflect the primacy of the lawyer's duties, for example, under Business and Professions Code sections 6067, 6068, 6103, and 6106.</u> The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may<u>might</u> make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. <u>Depending on the circumstances, when the client's conduct permits the lawyer to withdraw, or to seek permission to withdraw where that is required, the lawyer might consider counseling the client regarding the client's conduct, limiting the scope of the representation, or aiding the client in rectifying the client's prior conduct. (See Rules 1.2(c) and 1.4.)</u></p>	<p>This proposed Comment is substantively the same as the Model Rule Comment but tracks the Rule changes explained above and adds several references to pertinent California statutes.</p>

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<p>[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.</p>	<p>[3] <u>[When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. (See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.]]</u></p>	<p>The Commission has rejected the last four sentences of the Model Rule Comment because it discusses topics covered by court rules and because it presumes to tell courts what standard of proof they should accept without regard to other facts and circumstances the court might be aware of. This Comment is bracketed because Rule 6.2 is not finalized.</p>
	<p><u>[4] A lawyer is not subject to discipline for withdrawing under paragraph (a)(1) or (2) if the lawyer has acted reasonably under the facts and circumstances known to the lawyer, even if that belief later is shown to have been wrong.</u></p>	<p>Proposed Comment [4] has no Model Rule counterpart. It is based on Restatement § 32, Comment <i>f</i>.</p>

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<p>Discharge</p> <p>[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.</p>	<p>Discharge</p> <p>[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.</p>	<p>The Commission has rejected Model Rule Comments [4] – [6]. The purpose of a Comment is to explain the Rule to which it is attached, and Model Rule Comments [4] – [6] do not do so. Instead, Comment [4] is a practice pointer together with a statement of other law. As a statement of other law, it is not entirely correct because it overlooks the wrongful discharge rights of house counsel under the <i>General Dynamics v. Superior Court</i> line of cases.</p>
<p>[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.</p>	<p>[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.</p>	<p>See the explanation of the rejection of Model Rule Comment [4], above.</p>
<p>[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.</p>	<p>[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.</p>	<p>See the explanation of Model Rule Comment [4], above. Also, because of the extreme sensitivity of the Rule 1.14 treatment of a lawyer's relationship to a client with diminished capacity, the Commission believes the entire discussion of that subject should be in a single place where the drafters' and the readers' attention can be focused.</p>

<p style="text-align: center;"><u>ABA Model Rule</u></p> <p style="text-align: center;">Rule 1.16 Declining Or Terminating Representation Comment</p>	<p style="text-align: center;"><u>Commission's Proposed Rule</u></p> <p style="text-align: center;">Rule 1.16 Declining Or Terminating Representation Comment</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Optional Withdrawal</p> <p>[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on a taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.</p>	<p>Optional Withdrawal</p> <p>[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified <u>from a representation even</u> if the client persists <u>lawyer is not asked to participate</u> in or further a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if. <u>Even when a withdrawal is in these circumstances,</u> the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on a taking action that the lawyer considers repugnant or <u>must comply</u> with which the lawyer has a fundamental disagreement this or her <u>duties under Business and Professions Code, section 6068(e)(1) and [Rule 1.6].</u>⁴</p>	<p>This proposed Comment substantially revises Model Rule Comment [7] because of the Commission's rejection of Model Rule paragraph (b)(1). Instead, this provision is directed only to proposed paragraph (b)(2), which as explained above is a combination of Model Rule paragraphs (b)(2) and (b)(3).</p>

³ The adopted version of this Comment states that paragraph (b)(2) is intended to allow a lawyer to withdraw. I have revised this to follow our current style of making only the declarative statement.

⁴ In the adopted version of this Comment, the Commission referred to Rule 3-100. I have substituted the Model Rule number.

<p align="center"><u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.16 Declining Or Terminating Representation Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.</p>	<p>[86] A Paragraph (b)(5) allows⁵ a lawyer may to withdraw <u>from a representation</u> if the client refuses to abide by the terms <u>a material term</u> of an agreement relating to the representation, such as an agreement concerning fees or court costs <u>or other expenses</u>, or an agreement limiting the objectives of the representation.</p>	<p>This paragraph is substantially the same as the corresponding Model Rule Comment but tracks the two substantive changes in the Commission's proposed Rule: (i) the lawyer may terminate a representation under paragraph (b)(5) only if the client has breached a <i>material</i> term of an agreement with the lawyer; and (ii) the Commission's proposed paragraph (b)(5) specifies that an agreement regarding <i>expenses</i> is within the scope of the provision.</p>
	<p><u>Permission to Withdraw</u></p> <p>[7] <u>Lawyers must comply with their obligations to their clients under [Rule 1.6]⁶ and to the courts under [Rule 3.3] when seeking permission to withdraw under paragraph (c). If a tribunal denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. (See Business and Professions Code sections 6068(b), and 6103.) This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with Rules 3.36 and 5.71 of the California Rules of Court satisfies paragraph (c).</u></p>	<p>Paragraph (c) of both the Model Rule and the Commission's proposed Rule requires that the lawyer comply with any applicable court rules regarding termination of a representation. However, the Model Rule has no explanatory Comment. The Commission has added this paragraph for that purpose and has included references to potentially applicable California statutes and court rules. The references to Rules 1.6 and 3.3 are bracketed because they have not been finalized.</p>

⁵ The adopted version of this Comment states that paragraph (b)(5) is intended to allow a lawyer to withdraw. I have revised this to follow our current style of making only the declarative statement.

⁶ In the adopted version of this Comment, the Commission referred to Rule 3-100. I have substituted the Model Rule number.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.16 Declining Or Terminating Representation Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.16 Declining Or Terminating Representation Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Assisting the Client upon Withdrawal</p> <p>[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.</p>	<p>Assisting the Client upon Withdrawal</p> <p>[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.</p>	<p>Model Rule Comment [9] expresses a general principle with which the Commission agrees, but it instead recommends the adoption of Comments [8] – [10] in order to more fully explain the extremely important topic of what a lawyer is required to do after the termination of a lawyer-client relationship. This elaboration is believed to advance client protection materially.</p>
	<p><u>[8] Paragraph (d) requires the lawyer to take "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client." These steps will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and the lawyer has satisfied paragraph (e). The lawyer must satisfy paragraph (d) even if the lawyer has been unfairly discharged by the client.</u></p>	<p>Proposed Comment [8] is much the same as Model Rule Comment [9], but with two changes. First, this does not include the Model Rule to retaining liens because they are prohibited under California law. Second, this adds the explanation that a lawyer's post-termination duty to a former client normally does not include an obligation to provide additional legal services – a duty that arguably is implied by the Model Rule's language.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.16 Declining Or Terminating Representation Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[9] Paragraph (e) states a lawyer's duties when, after termination of a representation for any reason, new counsel seeks to obtain client files from the lawyer. It applies to client papers and property held by a lawyer in any form or format and codifies existing case law. (See <i>Academy of California Optometrists v. Superior Court</i> (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; <i>Weiss v. Marcus</i> (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) See Penal Code sections 1054.2 and 1054.10 for examples of statutory restrictions on whether a lawyer may release client papers. Other statutory provisions might require the lawyer to provide client papers to someone other than the client, and in those situations paragraph (e) is intended to apply equally to the duty to provide papers to that other person. (See Penal Code section 1054.2(b).) Paragraph (e) also requires the lawyer to “promptly” return unearned fees paid in advance. If a client disputes the amount to be returned, the lawyer shall comply with [Rule 1.15].</p>	<p>Proposed Comment [9] adds a detailed explanation of the extremely important question of how a lawyer is obligated to handle client files post-termination. It also adds references to important California statutory and case law authority. Finally, it adds a reference to Rule 1.15 with respect to the lawyer's handling of unearned fees when the lawyer and client disagree as to the lawyer's entitlement to additional payment. The reference to Rule 1.15 is bracketed because it has not yet been finalized.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.16 Declining Or Terminating Representation Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[10]A lawyer's duty under paragraph (e)(1) to release "writings" to the client includes all writings as defined in Evidence Code section 250. A lawyer must comply with paragraph (e)(1) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. Paragraph (e)(1) is not intended to prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding. Paragraph (e)(1) also does not affirmatively grant to the lawyer a right to retain copies of client papers or to recover the cost of copying them; these are issues that might be determined by contract, court order, or rule of law.</p>	<p>Proposed Comment [10] further elaborates on the lawyer's post-termination duties with respect to the former client's file. It: (i) further explains what is included in the client's file by referring to the Evidence Code definition of "writing"; (ii) clarifies that the lawyer's duty to make the file available to the former client does not mean that the lawyer is not permitted to copy the file at the lawyer's own expense; and (iii) explains that, although the Rule does not grant the lawyer the right to copy the file, there might be contractual, court order, or other reasons why the lawyer does not have the right to copy.</p>

**Rule 1.16 Declining or Terminating Representation.
[Sorted by Commenter]**

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

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	Agree, only if modified			<p>1.16(e)(1) needs clarification: does “client papers and property” include electronic data? Does it include an attorney’s uncommunicated work product?</p> <p>Comment [1] statement that “a lawyer has the obligation or the option to withdraw only in the circumstances and only in the manner described in this Rule” appears inconsistent with <i>Ramirez v. Superior Court</i>, 21 Cal. App. 4th 904, 915, in which the court “saw no basis in the law, or in logic, for a conclusion that an attorney may never withdraw except for cause.” COPRAC objects to the Comment if it attempts to preclude an attorney from withdrawing if the situation does not fall within the provisions of 1.16(a) or (b).</p> <p>Asked the Commission to provide guidance as to whether the obligation to make the client’s file available to the client upon</p>	<p>The Commission agrees with COPRAC’s first comment and as a result added the detailed definition in proposed paragraph (e)(1) that explains that the lawyers obligation includes materials “whether in tangible, electronic or other form”. This now is echoed in proposed Comment [9] with “held by a lawyer in any form or format”, and in Comment [10] through the citation of the Evidence Code definition of “writing”.</p> <p>The Commission does not agree with COPRAC’S citation to the <i>Ramirez</i> case. As explained in the accompanying comparison chart, particular with respect to the Commission’s rejection of Model Rule 1.16(b)(1), the Commission believes that a proper level of client protection requires that lawyer’s only be required or permitted to terminate a representation as stated in Rule d1.16.</p> <p>The Commission considered alternative ways to address this question and decided that the many possible factual variations cannot be addressed within the limited scope of a Rule Comment,</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.16 Declining or Terminating Representation.
[Sorted by Commenter]**

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

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					termination of a representation includes work product.	preferring to allow this area to work itself out over time.
2	Los Angeles County Bar Association (Toby A. Rothschild)	Agree, only if modified			<p>Add a Comment stating that 1.16(a)(1) is not intended to result in duplicative disciplinary charges.</p> <p>Amend 1.16(d) to incorporate ABA Rule language.</p> <p>1.16(e) should clarify whether attorney work product is included in the definition of "client papers and property".</p>	<p>The Commission was aware of no evidence that duplicate disciplinary charges are a problem under the current rule, and it therefore made no change.</p> <p>The Commission believes that the current Rule language directly addresses the concerns expressed in the letter and that no clarification is needed.</p> <p>See the COPRAC's third comment, above.</p>
3	Orange County Bar Association (Trudy Levindofske)	Agree, only If modified			<p>Rule should require cause to withdraw only when there is pending litigation or when doing so will prejudice the client's rights (see Ramirez v. Sturdevant, 21 Cal.App.4th 904).</p> <p>Amend (b)(10) to require only lawyer's good faith belief in existence of good cause for withdrawal as opposed to a good faith belief that a tribunal will find existence of good cause for withdrawal.</p> <p>Amend (b)(10) to include references to paragraphs (c), (d), and (e).</p>	<p>See the COPRAC's second comment, above.</p> <p>We see no basis for OC's concern that the good cause standard of (b)(10) will require lawyers to speculate improperly about what a court will do. Lawyers generally are bound to act with good faith in dealing with a court. Existing law and common sense should be adequate.</p> <p>The Commission disagrees with this suggestion because a lawyer's obligation to comply with (c), (d), and (e) applies no matter how a representation ends.</p>

**Rule 1.16 Declining or Terminating Representation.
[Sorted by Commenter]**

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

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Amend (b)(5) to include breaches other than fee agreements. Expressed concern about who threaten to withdraw.	O.C. correctly identified a discrepancy between (b)(5) and Comment [6]. The Commission has broadened (b)(5) to eliminate that difference. The Commission agrees with this concern and as a result added the following to Comment [1]: "A lawyer can be subject to discipline for improperly threatening to terminate a representation. See <i>Matter of Shalant</i> , Cal. State Bar Ct. Rptr. 829 (2005)."
4	San Diego County Bar Association (Heather L. Rosing)	agree			Clearer than existing rule	
5	Steve Lewis	Agree, only if modified			Phrase "papers and property" is outdated in electronic data age (Op. 2007-174).	Commission agrees. See COPRAC's first comment, above.

Rule 1.16: Declining or Terminating Representation

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.)

Arizona: Rule 1.16(d) adds that “upon the client’s request, the lawyer shall provide the client with all of the client’s documents, and all documents reflecting work performed for the client. The lawyer may retain documents reflecting work performed for the client to the extent permitted by other law only if retaining them would not prejudice the client’s rights.”

California: Rule 3-700 allows a lawyer to withdraw if a client “by other conduct renders it unreasonably difficult for the member to carry out the employment effectively” or if the client “breaches an agreement or obligation to the member as to expenses or fees.” A lawyer may also withdraw if the “inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.”

Connecticut: Connecticut adds the following sentence at the end of Rule 1.16(d): “If the representation of the client is terminated either by the lawyer withdrawing from representation or by the client discharging the lawyer, the lawyer shall confirm the termination in writing to the client before or within a reasonable time after the termination of the representation.”

Florida: In Rule 1.16(a), Florida also requires withdrawal if:

(4) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent, unless the client agrees to disclose and rectify the crime or fraud; or

(5) the client has used the lawyer’s services to perpetrate a crime or fraud, unless the client agrees to disclose and rectify the crime or fraud.

Florida Rule 1.16(b)(2) permits withdrawal if the client insists upon taking action that the lawyer considers repugnant, “imprudent,” or with which the lawyer has a fundamental disagreement. Rule 1.16(d) provides that, upon termination, a lawyer may retain papers “and other property relating to or belonging to the client” to the extent permitted by law.

Illinois: Rule 1.16 is substantially the same as DR 2-110 in the old ABA Model Code of Professional Responsibility.

Louisiana: Rule 1.16(d) adds the following:

Upon written request by the client, the lawyer shall promptly release to the client or the client’s new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or

for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding.

Maryland: Rule 1.16(b)(4) permits withdrawal if the client insists upon taking action “or inaction” that the lawyer considers repugnant.

Massachusetts: Rule 1.16(e) provides as follows:

A lawyer must make available to a former client, within a reasonable time following the client’s request for his or her file, the following:

1. all papers, documents, and other materials the client supplied to the lawyer. The lawyer may at his or her own expense retain copies of any such materials.
2. all pleadings and other papers filed with or by the court or served by or upon any party. The client may be required to pay any copying charge consistent with the lawyer’s actual cost for these materials, unless the client has already paid for such materials.
3. all investigatory or discovery documents for which the client has paid the lawyers out-of-pocket costs, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence. The lawyer may at his or her own expense retain copies of any such materials.
4. if the lawyer and the client have not entered into a contingent fee agreement, the client is entitled only to that portion of the lawyer’s work product (as

defined in subparagraph (6) below) for which the client has paid.

5. if the lawyer and the client have entered into a contingent fee agreement, the lawyer must provide copies of the lawyer’s work product (as defined in sub-paragraph (6) below). The client may be required to pay any copying charge consistent with the lawyer’s actual cost for the copying of these materials.

6. for purposes of this paragraph (e), work product shall consist of documents and tangible things prepared in the course of the representation of the client by the lawyer or at the lawyer’s direction by his or her employee, agent, or consultant, and not described in paragraphs (2) or (3) above. Examples of work product include without limitation legal research, records of witness interviews, reports of negotiations, and correspondence.

7. notwithstanding anything in this paragraph (e) to the contrary, a lawyer may not refuse, on grounds of nonpayment, to make available materials in the client’s file when retention would prejudice the client unfairly.

Minnesota deletes the last sentence of Rule 1.16(d) (“The lawyer may retain papers relating to the client to the extent permitted by other law”) and adds a detailed set of rules regarding a client’s right to documents.

Missouri: In the rules effective July 1, 2008, 1.16(c) provides that, when a lawyer has filed a limited appearance pursuant to Missouri’s version of Rule 1.2(c), the lawyer is not subject to the usual rule regarding termination of representation. Rule 1.16(c) provides as follows:

A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation unless the lawyer has filed a notice of termination of limited appearance. Except when such notice is filed, a lawyer shall continue representation when ordered to do so by a tribunal notwithstanding good cause for terminating the representation.

New Hampshire: New Hampshire makes the protective steps in Rule 1.16(d) a “condition” to terminating a representation.

New York: DR 2-110 tracks DR 2-110 of the ABA Model Code.

North Carolina: Rule 1.16(b)(4) retains the word “imprudent” and permits withdrawal if the client insists upon taking action “contrary to the advice and judgment of the lawyer....” North Carolina also adds Rule 1.16(b)(8), which permits withdrawal if “the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.”

Texas: Rule 1.15(d) permits a lawyer to retain papers relating to the client to the extent permitted by other law “only if such retention will not prejudice the client in the subject matter of the representation.”

Virginia: Rule 1.16(b)(1) replaces “criminal or fraudulent” with “illegal or unjust.” Rule 1.16(e) specifies in detail the papers to which a client is entitled after a lawyer withdraws and whether the client or the lawyer must bear the cost of duplication. The client’s entitlement does not depend upon “whether or not the client has paid the fees and costs owed a lawyer.”

**RRC – Rule 3-700 [1.16]
E-mails, etc. – Revised (10/13/2009)**

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August 27, 2009 McCurdy E-mail to Kehr, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

No lead drafter assignments.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

1. **III.AA. Rule 8.3 Reporting Misconduct [1-500(B)]** (Dec. 2008 Comparison Chart)
Codrafters: Peck, Tuft, Vapnek
Assignment: (1) a chart comparing proposed Rule 8.3 to MR 8.3; (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

2. **III.II. Rule 1.7 Conflicts of Interests: Current Clients [3-310]**
(Post Public Comment Draft #12.1 dated 10/21/08)
Codrafters: Melchior, Mohr, Snyder
Assignment: (1) a chart comparing proposed Rule 1.7 to MR 1.7; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

3. **III.LL. Rule 1.16 Terminating Representation [3-700]** (Post Public Comment Draft #6.1 dated 9/29/08)
Codrafters: Foy, Melchior
Assignment: (1) a chart comparing proposed Rule 1.16 to MR 1.16; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

4. **III.MM. Rule 1.17 Purchase & Sale of a Geographic Area or Substantive Field of a Law Practice [2-300]** (Post Public Comment Merged Rule Draft #1.1 dated 1/6/09 to be revised following the July 2009 meeting)
Codrafters: SAPIRO (co-lead), Martinez, Melchior
Assignment: (1) a chart comparing proposed Rule 1.17 to MR 1.17; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

No lead drafter assignments.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

September 18, 2009 McCurdy E-mail to Drafters (Kehr, Foy & Melchior), cc RRC:

Bob & Codrafters (Linda & Kurt):

This message provides the assignment background materials for Rule 1.16 on the October agenda. **The assignment deadline is Wednesday, September 30, 2009.**

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

Attachments:

- Dashboard, Draft Template (9/18/09)
- Introduction, Template (9/18/09)
- Rule & Comment Chart, Template (9/18/09)
- Public Comment Chart, Draft 1 (9/18/09)

September 19, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:

I have another question for you. We appear to have adopted in Rule 1.16(a) a standard of "know of should know", but "should know" is not a defined term. I think we should have used "know or reasonably should know", both of which are defined terms.

Do you have any thoughts or suggestions on this? Unless you have an explanation, I would suggest that we make this change before sending the Rule to the Board.

September 19, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

I agree that we should make the change to Rule 1.16 as you suggested: "know or reasonably should know." I don't think we are changing the will of the Commission by doing so. Had we already adopted the definition at the time we were drafting Rule 1.16, we would have used the defined term, "know or reasonably should know".

Harry: Is that OK by you?

There may be other Rules with the same problem, e.g., proposed Rule 1.13. I will check before we send them on.

Bob: I've attached a clean version of Draft 7 (9/19/09) with the change. When you circulate the Comparison Charts, please make a note of it and we'll make the necessary change to the Rule comparison chart.

September 19, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:

That was my thinking, and I already have included the extra word and footnote, and my column three explanation assumes we will include “reasonably”.

September 19, 2009 Sondheim E-mail to Drafters, cc Staff:

It is fine by me, but in the e-mail accompanying this rule which is on the Oct. agenda, the change should be noted.

September 20, 2009 Kehr E-mail #1 to Drafters, cc Chair & Staff:

Linda and Kurt: I have attached my initial drafts of our materials on this Rule for the October meeting. Please look particularly at the footnotes in the comparison chart. I caught what appear to be some errors. I have not included the dashboard b/c I couldn't figure out how to place an X in the boxes.

These drafts follow the custom of bracketing the references to other Rules, but I'm not certain that makes sense in this advanced stage of the Commission's work.

I will be out of town from September 22 through the 26th. Please don't think I'm ignoring you if you don't hear from me.

Attachments:

- Introduction, Draft 1 (9/19/09)RLK
- Rule & Comment Chart, Draft 1 (9/19/09)RLK
- Public Comment Chart, Draft 1 (9/19/09)RLK

September 20, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

1. I'd defer to Harry and Randy on this but I'd recommend that we not bracket any rule that the Commission has at least approved for public comment. I don't think it would make much sense to explain that we've bracketed a rule reference because there is no final decision on a rule we're submitting to BOG for adoption or have submitted for public comment. But see my point #4, below.

a. I would recommend, however, that we bracket the Batch 6 rules for which no decision has yet been made on whether to adopt or even pursue.

2. To date, the only Model Rules the Commission has voted not to at least circulate for public comment are 1.3 (diligence), 2.3 (Evaluation), 3.2 (expediting litigation), 5.7 (law-related services), and 7.6 (pay-for-play) [though this latter rule is still hanging on by a thread].

3. I'm not sure there will be others not adopted, but among the Batch 6 rules, 6.1 (pro bono) might be rejected in favor of keeping the BOG Resolution, which covers the same territory. I'm also not sure whether there will be a groundswell for MR 3.9 (Advocate in non-adjudicative proceedings). I think we will probably adopt some form of 4.1 (truthfulness in statements to others) and 4.4 (respect for rights of third persons, including the issue of inadvertent disclosure that is covered in 4.4(b)). I also think we will probably adopt some form of MR 6.2 (accepting appointments).

4. The more difficult issue is a cross-reference to a specific paragraph or comment of a rule, which would have to await the final draft of that rule before we can accurately cross-reference (especially the comment cross-references). If it's a specific reference, then I'd bracket it for now.

September 20, 2009 Kehr E-mail #2 to Drafters, cc Chair & Staff:

Linda and Kurt: my last e-mail overlooked the comparison to other states. My incomplete survey suggests that most states have adopted what by and large in the M.R., but there are a number of particular changes. These include:

- Florida omits MR paragraph (b)(2) and (b)(3)
- North Carolina includes in its paragraph (b) counterparts to our recommended paragraphs (b)(1) and (6)
- North Dakota has added “reasonably believes” in paragraph (a)(1) much the same as we have recommended.
- Ohio includes a counterpart to our recommended paragraph (b)(6) [client consent]
- Virginia omits paragraph MR (b)(1).
- D.C. has as its (b)(5) the equivalent of our recommended (b)(10)
- N.Y. in its (c)(7) has an equivalent to our recommended (b)(4), in its (c)(8) an equivalent to our recommended (b)(7), in its (c)(9) an equivalent to our (b)(8), in its (c)(10) the equivalent of our (b)(6), in its (c)(12) the equivalent of our (b)(10). One might say that, although N.Y. has retained MR (b)(1), like California it has spelled out in greater detail than does the MR the situations in which a lawyer is permitted to withdraw.

September 20, 2009 Kehr E-mail to Rule 1.0.1 Drafters, cc Chair & Staff re 1.16:

JoElla, Raul, and Tony: You might remember that the public comment we received on Rule 1.16 included concerns that the references to the client materials a lawyer is obligated to make available to a client upon the termination of a representation is not broad enough to cover virtual materials. These concerns presumably were triggered by the COPRAC opinion about a lawyer's duties with respect to materials held by a lawyer in electronic form. We discussed alternatives to the Model Rule phrase, which is “papers and property” and settled on “materials and property”. We also included a more elaborate explanation in 1.16(e)(1).

In reading Kevin's meeting notes while preparing the Rule 1.16 materials for the October meeting, I've come across a note that we should consider including “materials and property” in the global definition section. When the October materials arrive, please look at 1.16(e)(1) and the related Comment paragraphs. My view is that they are sufficient and that nothing needs to be added to 1.0.1. Also, I don't think the phrase is used in any other Rule. My recommendation is to not include “materials and property” in 1.0.1. We should discuss this in preparation for the November meeting.

September 20, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:

That all makes sense to me. It will require some final editing of the October materials before they are sent to the Board.

September 20, 2009 Sondheim E-mail to KEM, cc Drafters, Chair & Staff:

See my response below in caps.

* * *

1. I'd defer to Harry and Randy on this but I'd recommend that we not bracket any rule that the Commission has at least approved for public comment. I don't think it would make much sense to explain that we've bracketed a rule reference because there is no final decision on a rule we're submitting to BOG for adoption or have submitted for public comment. **I AGREE WITH KEVIN.** But see my point #4, below.

a. I would recommend, however, that we bracket the Batch 6 rules for which no decision has yet been made on whether to adopt or even pursue. **AGAIN, I AGREE.**

2. To date, the only Model Rules the Commission has voted not to at least circulate for public comment are 1.3 (diligence), 2.3 (Evaluation), 3.2 (expediting litigation), 5.7 (law-related services), and 7.6 (pay-for-play) [though this latter rule is still hanging on by a thread]. **AT SOME POINT, PERHAPS AS PART OF BATCH 6, DON'T WE HAVE TO TELL THE PUBLIC THAT WE HAVE REJECTED CERTAIN ABA RULES SO AS TO GIVE THE PUBLIC AN OPPORTUNITY TO PERSUADE THE COMMISSION THAT IT SHOULD ADOPT THE REJECTED RULES?**

3. I'm not sure there will be others not adopted, but among the Batch 6 rules, 6.1 (pro bono) might be rejected in favor of keeping the BOG Resolution, which covers the same territory. I'm also not sure whether there will be a groundswell for MR 3.9 (Advocate in non-adjudicative proceedings). I think we will probably adopt some form of 4.1 (truthfulness in statements to others) and 4.4 (respect for rights of third persons, including the issue of inadvertent disclosure that is covered in 4.4(b)). I also think we will probably adopt some form of MR 6.2 (accepting appointments).

4. The more difficult issue is a cross-reference to a specific paragraph or comment of a rule, which would have to await the final draft of that rule before we can accurately cross-reference (especially the comment cross-references). If it's a specific reference, then I'd bracket it for now. **I AGREE.**

September 28, 2009 Kehr E-mail to Drafters, cc Chair & Staff:

Linda and Kurt: I have attached a revised version of the Introduction. The only change is the addition of the paragraph on adoptions in other jurisdictions.

Attachment:

Introduction, Draft 2.1 (9/28/09)RLK

October 1, 2009 McCurdy E-mail to KEM:

I didn't receive a dashboard for rule 1.16. Have you been working with Bob Kehr on that. He only submitted a revised intro. and said that we should have the other items.

I'm assuming that the other materials have already been finalized and are being included as last circulated with the assignment materials.

Please advise.

October 1, 2009 KEM E-mail to McCurdy:

I didn't have a dashboard but I threw one together and have also attached the other materials, which Bob had circulated to the Drafters on 9/19/09. The most recent introduction is attached (9/28/09). Please let me know if you have any questions. Thanks,

Attachments:

Dashboard, Draft 1 (10/1/09)KEM
Introduction, Draft 2.1 (9/28/09)RLK
Rule & Comment Chart, Draft 1 (9/19/09)RLK
Public Comment Chart, Draft 1 (9/19/09)RLK

KEM NOTE: In the materials I sent, I did not send the most recent Public Comment Chart. The correct chart to include in the BOG submission is Draft 2 (9/29/09)RLK-KEM.

October 9, 2009 Sondheim E-mail to RRC:

In the Introduction, 2d paragraph, second line the word "with" should be "without." (Page 305) Also in the same paragraph, there is a hyphen before the word "a" in the fifth line and I believe there should be a hyphen after the word "client" in the sixth line. Furthermore, in the sixth the word "that" should be deleted because there is a "that" in the fifth line.

In the Commentator Chart, on page 325, 2d paragraph, RRC response:

1. In the third line should the word "particular" be particularly?
2. In the sixth line the word "lawyer's" should be lawyers.
- 3 In the last line there is a letter "d" which should be deleted.

On page 326, I suggest we check with Mary to be certain that we are correct.

On page 327, Comment, 2d paragraph: This sentence is missing something.

October 11, 2009 Sapiro E-mail to RRC List:

I offer some minor suggestions regarding this rule. If we have to vote “no” to be able to discuss the issues below, I reluctantly vote “no.” I would prefer to send this out, however.

1. In the Introduction, second paragraph, Section 1, the word “with” should be “without.”
2. At page 3 of 7 of the agenda materials, explanation of changes column for paragraph (a)(1), sixth line, the word “change” should be deleted.
3. In the explanation of changes column for paragraph (b)(1), last line, I would change “reference to” to “tracks proposed.” The rule does not refer to Rule 3.1.
4. I agree with the recommendation in footnote 1.
5. In the explanation of changes column for paragraph (b)(2), third line, I would delete the word “The.”
6. In the explanation of changes column for paragraph (b)(8), I would insert the apostrophe in “lawyer’s.”
7. In the explanation of changes column for paragraph (d), I would change the word “step” to “steps.”
8. I agree with the observation in footnote 2. An advancement payment of expenses that have not been occurred should be refunded.
9. In Comment [1], I would change the reference to Rule 1.17. We have decided not to adopt to two rules regarding sale of the practice.
10. In the explanation of changes column for Comment [1], next to last line, I would delete the comma after the word “law” and insert the word “and” at that point.
11. In Comment [2], middle column, I would change “the Rules of Professional Conduct” to “these Rules.”
12. I agree with the changes reflected in footnotes 3 through 6.
13. In proposed Comment [10], we fall back into using the phrase “is not intended to.” I recommend that we change that to “does not.” Again, if it takes a “no” vote to bring this back for us and make that change, I reluctantly vote “no.”

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

Rule 1.16: p. 305, 2d paragraph, line 2: 1 spelling error (“representation”) and 1 not: should be “without material . . .”

October 12, 2009 Kehr E-mail to RRC List:

Jerry and all: As I did yesterday with your comments to Rule 1.7, I've numbered your paragraphs and will provide my comments. To try to simplify by placing everything on a single sheet, I've pasted Harry's comments from his e-mail and will provide my responses to those comments following my replies to yours. This is a consent item.

1. This refers to my quotation from the MR. While I rather enjoy my Freudian error, you of course are right.
2. Agreed.
3. Ok.
4. I'm not certain if I've said this to the Commission as opposed to Kevin in an e-mail, but I also agree with fn. 1.
5. Ok.
6. Agreed.
7. Agreed.
8. Jerry, thank you for reminding me of this footnote. Being somewhat lost in the paper avalanche, I can't recall if I suggested a drafting solution. I would add the bold font words to the first sentence of paragraph (e)(2): "The lawyer promptly shall refund any part of a fee paid in advance that the lawyer has not earned **and of an expense paid in advance that the lawyer has not incurred.**"
9. Agreed.
10. Agreed.
11. Agreed.
12. No response needed.
13. Agreed.

Now for Harry's comments:

1. The "with" v. "without" is handled above.
2. What appears to be a stray hyphen is a Word marking b/c a space was added. It will disappear when the changes are accepted. This will leave the parenthetical set off by commas (the first I right in front of the apparent hyphen and the closing commas is after "client" in the next line – but see the next item.
3. Harry's comment about the extra "that" convinces me that the sentence is longer and more convoluted than it should be. I suggest breaking it up into two sentences as

follows: “As more fully explained in the accompanying comparison chart, the Commission believes that, because clients properly place heavy reliance on their lawyers, a lawyer’s acceptance of a representation involves a serious commitment to the client. As a result, a lawyer should not make this commitment lightly or only for so long as it might suit the lawyer’s convenience, and a lawyer should withdraw from a representation only as permitted by one of the express provisions of this rule.”

4. Yes, “particular” should be “particularly”.
5. Yes, "lawyer's" should be “lawyers”.
6. Yes, the "d" which should be deleted.
7. Harry, on p. 326, are you referring to the first L.A. comment?
8. Harry, if you are referring to the S.D. comment, I would insert in the third column: “No response needed.”

In summary, I accept all of Jerry’s and of Harry’s comments, and they provide no reason to take this off the consent calendar except perhaps to discuss (a) my suggested fn. 2 drafting change; and (b) Harry’s request that we check with Mary, I think about our response to the first L.A. comment.