

-----Original Message-----

From: Kevin Mohr [mailto:kemohr@comcast.net]

Sent: Thursday, May 27, 2004 10:19 AM

To: Peck, Ellen; Raul L. Martinez; Kurt Melchior

Cc: Harry Sondheim; Difuntorum, Randall; McCurdy, Lauren; Kevin Mohr; Kevin Mohr; Kevin Mohr

Subject: RRC - 1-300 - POL Rules - Draft 5

Greetings drafters:

Based on the comments at the 5/8/04 meeting, I've taken a shot at a redraft of rule the POL-related Rules (MR 5.3 to 5.5, and 1-600) that is now on the agenda as Item III.B. for the 7/9/04 meeting. I've attached the following:

1. 1. Clean Draft 5 of the rules, in WP.
2. Red-line, comparing DFT5 to DFT4 (11/28/03), in WP and PDF.
3. Re-typed excerpt of the Kutak Commission's 8/24-26/79 meeting minutes, & 8/10/79 draft of proposed rule 7.4 [now Model Rule 5.3, re supervising non-lawyers], in WP and PDF.
4. My 5/8/2004 meeting notes for the POL-related rules, in WP and PDF.

As requested, to give the rules a less-cluttered look, I removed most of the underlinings and boldings from the previous draft, and also converted the footnotes to endnotes. I also sank the caselaw annotations in the comments to rule 5.5 into endnotes for this round, again to give the rules a less cluttered look.

Some comments.

1. **Please review certain endnotes.** For the most part, I kept the same footnotes and simply memorialized the RRC's action at the 5/8/04 meeting. However, there were some drafting choices I made that I would like you to review before we send them out to the RRC as a whole. Therefore, please review the following endnotes and accompanying rule or comment text to see if you agree:

- a. Endnote 2. This endnote includes a discussion of the outsourcing issue, in light of the inconclusive comments in the Kutak meeting minutes. Ultimately, I came down on the same side as Tony (leave this up to malpractice).
- b. Endnote 6. Again, I made a drafting choice on an issue that was raised at the 5/8/04 meeting concerning the different language used in MR 5.1 and 5.3. I suggest we are best off keeping the different language as in the Model Rules.

c. Endnote 23. Should we be raising the MJP issue at this time? Or is it better left to be discussed with 1-310X? Note that 1-310X is not on the agenda for the 7/9/04 meeting.

2. Other than reviewing the foregoing endnotes to see if you agree with my choices, the rule is pretty much as was presented at the last meeting. I think items 1.a. and 1.b. might be the main subjects for discussion, but if we can agree before the meeting on them, and if there are no comments before the meeting, perhaps we can move on.

3. Finally, please note that although the RRC voted in favor of a slight revision to 1-311, we have not yet posted it on the web, in part because we are awaiting a decision as to whether to fold present 1-311 into proposed rule 5.3 [rule 1-311 is now found at paras. (d) to (i) of proposed rule 5.3]. Perhaps this is an issue we should flag for the RRC for the next meeting, i.e., should Model Rule 5.3 be adopted as modified, with rule 1-311 as part of it?

Thanks,

Kevin

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**CalBar – RRC – 1-300 (“Practice of Law”)
Minutes of Kutak Commission
August 24-26, 1979**

Excerpt of 8/24-26/79 Minutes of Kutak Commission:¹

The group turned its attention to a new section: “Responsibilities of a Supervisory Lawyer” (7.2). As a preliminary comment, it was noted that there is an emphasis on “supervision.” That is, the rule stated is not an automatic application of *respondeat superior* reasoning, but aims at the actual lawyer directing and controlling a subordinate’s conduct. The lawyer whom this section addresses has specific, effective responsibility or real control over the professional conduct of another lawyer in a given situation. Authority and responsibility, it was noted, are often matters of proximity and degree. The rule requires analysis of these factors in its application.

The rule is similar to that in Section 7.4 [current 5.3, the subject rule being addressed in the Practice of Law rules], dealing with supervision of nonlawyer assistants. While the hope was expressed that the locution of the two rules might be more harmonized, it was suggested that the two rules might have to be distinguished along somewhat different axes. Specifically discussed was a general duty of education and training, a “systems” duty falling on all requiring that the environment of practice be conducive to compliance with the Rules of Professional Conduct. Adding the element of real and effective control over professional conduct, however, may invoke or require a more severely-put rule.

In any event, it was suggested that in practice the rule might not be often involved in bringing to book supposed offenders. Rather, the value of the rule was thought to lie in the internal activity it would generate, bringing about, in time, the desired result of heightened ethical sensibilities up and down the profession’s many chains-of-command.

This rule of supervisory responsibility is _____ [this language obscured in faxed document] rule of responsibility for the supervised or, in the drafts words, “subordinate” lawyer. [KEM: current rule 5.2, then denominated rule 7.3] The rule answers the Nuremberg question by clearly imposing responsibility on subordinate lawyers for their own conduct, despite any pressures of authority directing that conduct.

A problem raised by the rule, however, is the necessity of protecting a lawyer who attempts to comply. The best approach to that problem, it was suggested, may lie in the preceding rule dealing with the responsibilities of supervisors. The comment there should perhaps specify that

¹ On 5/20/04, Sue Campbell of ABA’s Center for Professional Responsibility replied to KEM’s 5/12/04 E-mail re difference in language used in MR 5.1 (“conform[s] to the Rules of Professional Conduct”) and MR 5.3 (“is compatible with the professional obligations of the lawyer”), referred to the minutes, and faxed them on 5/21/04.

firms must have an effective nonpunitive mechanism for reporting ethical impositions on subordinates.

A similar clarification was sought for the next rule under this Section 7 – that dealing with supervisory responsibilities over nonlawyer assistants (Rule 74.). Most of the comments on 7.4, however, centered on the desirability of imposing a so-called “forbidden fruit” rule on the use of lawyers of material obtained by nonlawyers through methods which, if undertaken by attorneys, would be improper.

This suggestion was met with general disfavor on a number grounds. Several saw the door being opened to a new tactic in litigation, contributing to delay, cost and the whole panoply of undesirables the Commission has sought to avoid in formulating other rules. Others detected some professional arrogance in extending lawyerly concepts of candor and openness to such activities as investigation, where deception may be a standard of practice in its own right. Furthermore, the attempt to invade the law of evidence through the Rules of Professional Conduct was largely disapproved.

On the other side of the question, however, it was thought by some that at least attorneys should be dissuaded from associating with persons or entities known to systematically employ methods offensive to the Rules.

Text of rule 7.4 [currently rule 5.3] dated 8/10/1979:

7.4 SUPERVISION OF NON-LAWYER ASSISTANTS

A lawyer shall use reasonable care to prevent non-lawyers employed or retained by the lawyer from engaging in conduct in the course of their work that would *violate the Rules of Professional Conduct if done by a lawyer*. [Emphasis added].

Comment:

Lawyers generally employ assistants in their practice, including secretaries, investigators, and para-professionals. Such assistance, whether employees or independent contractors, act for the lawyer in rendition of the lawyer’s professional services. The lawyer should use reasonable efforts to see that such persons observe the professional obligations of the lawyer, for example the duties to preserve client confidences, to be candid with the court, and to deal fairly with other parties.

**Calbar--RRC--1-300 ("Practice of Law")
5/7 & 5/8/2004 KEM Meeting Notes**

*Peck,
Martinez,
Melchior,
Mohr

B. Consideration of a "Practice of Law" Definition

[anticipated 2-hour discussion]

(Matter carried over from December 12, 2003 and February 20, 2004 meetings. **NOTE:** Refer to pages 13 - 80 circulated with the February 20, 2004 meeting agenda.)

1. KEM: Goes over what has happened with the rule and how drafters have already incorporated most of Jerry's comments received re rule draft prepared for the 10/24 & 10/25 meeting.
 - a. Notes non-response to HSB's 4/15/04 e-mail re Jerry's 2/19/04 e-mail, but that he and ERP have discussed, and will address Jerry's comments as they arise in considering the footnotes one by one.

2. <u>Footnote 2.</u> Issue re "OUTSOURCING"

- a. Mark: Many law firms outsource a lot of functions that previously were covered in-house.
 - (1) Need to impose supervisory responsibility.
- b. Ellen: Patent firm that outsources patent applications to East.
 - (1) Now, as to supervisory role of law firm.

- | |
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| <ol style="list-style-type: none">c. <u>VOTE:</u> Should drafting team work on a Discussion comment re outsourcing (KEM: need to pay particular attention here to the extent to which there is a duty to supervise). |
|--|

<p style="text-align: center;"><u>NOTE:</u> Vote never taken re this.</p>

(1) Mark: Under traditional law practice format, L had control. But where you have outsourced responsibilities to someone else (e.g., accounting). What are your professional responsibilities when use those services.

(2) Kurt: Outsourcing of substantive work abroad – e.g., document production. There has to be responsibility by the lawyer in the firm that did the outsourcing.

(a) Needs to be considered and thought through.

d. Ellen: The comments so far have been helpful.

(1) Gives us some idea of where you would draw the line?

(2) E.g., Level 1: Has the firm retained the person to whom work is outsourced?

(3) E.g., Level 2: retention of an expert witness where the lawyer does not have expertise. For what acts of the person retained should you be responsible.

(4) Mark: Outsource services that enable the lawyer to provide the services that the lawyer has been retained to provide.

e. Joella: Doesn't want to help lawyers dodge bullets.

(1) You have to be responsible for that person.

(2) Even if you are not an expert in the field, you should still retain supervisory responsibility. It is not just being responsible for the initial research that lead to the retention of the expert.

f. Jerry: Tries to explain the biologist discussion in footnote 2.

- (1) Where biologist has killed an endangered species for which the client is now liable, that is a different issue; should not be a matter of a disciplinary rule.

g. Linda: Talking about contracting with lawyer is too narrow.

(1) With respect to a ... retained by, **or supervised by** ~~or associated with~~ a lawyer.”

(2) This rule is narrower than dealing with experts.

h. Stan: L may be negligent in hiring expert, but that should not subject the lawyer to discipline.

a. “regular assistance roles in the provision of my services as a lawyer ...”

b. Outsourcing must relate to my duties under the rules of professional conduct.

i. Tony: Let’s forget about outsourcing.

a. Malpractice can cover this.

j. KEM: Perhaps Tony is right about this. We can’t be everything to everybody.

a. **KEM can check** exactly what E2K did re this. Can’t imagine they were not confronted with the issue.

k. Harry: Seems to be agreeing with what Tony said.

a. Another issue is the lawyer from India whom the lawyer hires to do patent work, etc.

- I. Ira: “compatible with the professional obligations of the lawyer”

3. **Footnote 4.** “Comparable” – KEEP (RRC Consensus)

4. **Footnote 5** (Related issue to note 4: Paragraph 2a.) — NO!!!! (RRC consensus)

5. “Assurance” in paragraph 2 (p. 21 of materials). No strict liability.

- a. KEM: Should we keep the language?

b. Mark: “These rules are rules of reason.” Kurt: Put this statement in the 1-100.

- c. Ellen: For would be uniformity.

d. VOTE: Keep assurance.

AIN: 0 FOR: 9 AGAINST: 0 ABST

6. **Footnote 6.** Drafters agreed with Jerry to take out language “and are not subject to professional discipline”

- a. However, to keep uniformity with MR’s here, drafters didn’t want to add footnote language to the Discussion
- b. Instead put it in the drafter’s comments.

c.

VOTE: Put language of note 6 in drafter's comments but not in a separate Discussion ¶. to the rule.

FOR: 8 AGAINST: 1 ABST
AIN:0

7. **Footnote 7.** Drafters thought we should stick with the ABA comment.

- a. Stan: If I'm a solo practitioner w/o written policy but instruct secretary in a way that reasonably assures compliance, do I need policies?
- b. Paul: Disagrees with Jerry that terminology requires *written* policies.
- c. Mark: L's cannot delegate or be excused from professional obligations because of non-lawyers.

d. Kurt: Agrees with Mark. Footnote 7 should state that internal policies do not mean written policies.

- e. Joella & Ellen: Pass.
- f. Linda: Pass.
- g. Stan: Prefers the revision.
- h. Rob: L should reasonably assure rather than make an effort to establish a policy that will reasonably assure.
- i. Ira: We do have policies and procedures in our firm. We've put an effort into doing it.
- j. Harry: Makes sense not to follow the ABA here.
 - a. Agrees with Rob that the message you want to get across is that you reasonably assure.

g. Tony: Leave it the way it is and have Stan define “professional obligations” in 1-100.

h. Harry: There’s something wrong here. Lawyers must conform to the RPC’s, but when supervising non-lawyers, must reasonably assure that the non-L’s conform with the “professional obligations of the lawyer.”

(1) KEM: Check with ABA re this.

i. Ellen: Addresses Harry’s concern.

j. **Motion:** Add RPC’s and State Bar Act in (A) and (B) of MR 5.3 in place of “Professional obligations of the lawyer.”

FOR: 4 AGAINST: 6 ABST
AIN:

KEM 5/9/2004 Note: Vote may be revisited if KEM learns from ABA that this is a problem or that the ABA never considered the issue.

10. **Footnote 9.** “Practice law” has been added and should remain in the rule draft.

11. **Para. [5] on page 22.** Should we add reference to Cal. Bar Rule 964-967 in this rule.

a. KEM: Add those references.

b. Also, perhaps use Jerry’s language (see 2/19/04 Sapiro E-mail to RRC List: “This rule does not limit to preclude ...”)

12.

Footnotes 11 to 14. Refer the suggestions in these footnotes to Mark for possible inclusion in 1-310X.

13.

Mark: Move to have a draft of MR 5.5 without the additional items in ABA 5.5 (2002/MJP), with a Discussion section that refers to Rules of Court 964-967. However, consider post-2002, without (c) and (d), to see if it works. Also whether X-refs should be included in para. [5] of MR 5.5.

FOR: 7 AGAINST: 1 ABSTAIN:1

14.

Jerry: This is not just “practice of law.”

a.

Better title? [**KEM 5/9/2004 Note**: Drafters to work on a better title for the rule]

***[THE ENDNOTES FOR BOTH THE CLEAN AND REDLINE DRAFT APPEAR AT THE
END OF REDLINE DRAFT]***

ALTERNATIVE 1:¹

***AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT
FORMAT***

Rules containing the term “practice of law” or “practice law”

[Proposed] Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with² a lawyer:

- (a) a partner, and a lawyer³ who individually or together with other lawyers possesses **comparable**⁴ managerial authority in a law **firm**⁵ shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;⁶

- (b) a **lawyer** having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the **lawyer**; and

- (c) a **lawyer** shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a **lawyer** if:
 - (1) the **lawyer** orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the **lawyer** is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

DRAFTERS' NOTE: *Paragraph (d), below, is California RPC 1-311, conformed to ABA Model Rule Format. The underlined sentence in paragraph (f) was approved by the RRC at its 5/2/2003 meeting. See 06/03/2003 Voogd Memo re Rule 1-311.*

(d) A member shall not employ, associate professionally with, or aid a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the member's client:

- (1) Render legal consultation or advice to the client;
- (2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;
- (3) Appear as a representative of the client at a deposition or other discovery matter;
- (4) Negotiate or transact any matter for or on behalf of the client with third parties;
- (5) Receive, disburse or otherwise handle the client's funds; or
- (6) Engage in activities which constitute the **practice of law**.

(e) A member may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to:

- (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;
- (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or
- (3) Accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active member who will appear as the representative of the client.

(f) Prior to or at the time of employing a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the member shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (d) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The information contained in such notices shall be available to the public.⁷ The member shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The member shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the member's employment with the client.

(g) A member may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.

(h) Upon termination of the employment of a disbarred, suspended, resigned, or involuntarily inactive member, the member shall promptly serve upon the State Bar written notice of the termination.

(i) For the purposes of subparagraphs (d)-(g), ~~For purposes of this rule:~~

(1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;

(2) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code sections 6007, 6203~~(e)~~(**d**)(**1**),⁸ or California Rule of Court 958(d); and

(3) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.]

COMMENT

[1] **Lawyers** generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the **lawyer** in rendition of the **lawyer's** professional services. A **lawyer** must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in instructing and supervising nonlawyers should take account of the fact that they do not have legal training.⁹

[2] Paragraph (a) requires **lawyers** with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance¹⁰ that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct.¹¹ See Comment [1] to Rule 5.1.¹² Paragraph (b) applies to **lawyers** who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a **lawyer** is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a **lawyer**.

[2a]¹³

[3] _____ Concerning the meaning of “the practice of law” or “practice law”¹⁴ see rule 5.5, Comment.

DRAFTERS’ NOTE: *The following discussion paragraphs are from rule 1-311, as approved by the Commission at its 05/02/2003 Meeting. Note that at that meeting, there was no change to the Discussion from the version of rule 1-311 now in effect. See 06/03/2003 Voogd Memo to Commission re rule 1-311.*

For discussion of the activities that constitute the practice of law, see *Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford v. State Bar* (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants Protective Corporation* (1922) 189 Cal. 531, 535 [209 P. 363]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].¹⁵

[4] **Sub-Paragraph (Df)** is not intended to prevent or discourage a member from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a member's client is an organization, then the written notice required by paragraph (Df) shall be served upon the highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule 3-600 [Organization as Client].)

[5] Nothing in rule 5.3¹⁶ ~~4-311~~ shall be deemed to limit or preclude any activity engaged in pursuant to rules 983, 983.1, 983.2, and 988 of the California Rules of Court, or any local rule of a federal district court concerning admission pro hac vice.

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
 - (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
 - (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
 - (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
 - (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

DRAFTERS' NOTE: *Sub-paragraph (a)(5), below, is California RPC 1-320(A)(4), conformed to ABA Model Rule Format.*

- (5) a member may pay a prescribed registration, referral, or participation fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California.

- _____ (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.¹⁸
- (d) A lawyer shall not practice with or in the form of a professional corporation or association¹⁹ authorized to practice law for a profit, if:
 - (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;²⁰

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation ; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

COMMENT

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 3-310(F) (member may accept compensation from a third party as long as there is no interference with the member's independence of professional judgment, **information protected under Business & Professions Code, section 6068(e)(1) is protected**, and the client gives informed **written** consent).

[3] Concerning the meaning of “the practice of law” or “practice law,” see rule 5.5, **Comments [2]-[4]**²¹

[Proposed] **Rule 5.5 UNAUTHORIZED PRACTICE OF LAW [Incorporating the substance of “CRPC 1-300. Unauthorized Practice of Law.]**

PRE-AUGUST 2002 MODEL RULE:

A member ~~lawyer~~ shall not:

- (a) ~~*A member shall not aid any person or entity in the unauthorized practice of law.*~~ practice law in a jurisdiction where doing so [where to do so] violates the regulation of the legal profession in that jurisdiction; or

- (b) ~~*A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.*~~ assist a person who is not a member, ~~of the bar or~~ **assist an entity** in the performance of activity that constitutes the unauthorized practice of law [aid any person or entity in the unauthorized practice of law]²²

POST-AUGUST 2002 MODEL RULE (Adopted per ABA’s MJP Report):²³

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

- (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
 - (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

 - (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

COMMENT

[1] **[Pre-2002 Model Rule Version]** The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against the rendition of legal services by unqualified **[The purpose of prohibiting the unauthorized practice of law is to protect the public and the administration of justice from the rendition of legal services by unqualified persons or entities.]** Paragraph (b), **except as otherwise prohibited in rule [1-311]**, does not prohibit a lawyer from employing the services of para-professionals or other assistants and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law, including claims adjusters, employees of financial or commercial institutions or entities, social workers, accountants, low cost legal service programs, and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[2] In California, the phrase “practice of law” is defined by legislation and published decisions. California published appellate decisions and other

authorities have determined that the following conduct or activities may constitute the “practice of law”:

- (a) Holding oneself out as an attorney or a person entitled to practice law. [See Ca Bus & Prof §§ 6126(a); *Bluestein v. State Bar* (1975) 13 Cal.3d 162, 175, 118 Cal.Rptr. 175, 183, fn. 13]²⁴
- (b) Appearing on behalf of another or performing services in a representative capacity before a tribunal in any matter pending therein throughout its various stages. [See *Birbrower, Montalbano, Condon & Frank, P.C. v. Sup.Ct. (ESQ Business Services, Inc.)* (1998) 17 Cal.4th 119, 128, 70 Cal.Rptr.2d 304, 308; *People v. Merchants’ Protective Corp.* (1922) 189 Cal. 531, 535, 209 P 363, 365; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 542, 86 Cal.Rptr. 673, 677]²⁵
- (c) Giving legal advice and counsel to another which involves the application of law or legal principles to the specific facts and circumstances, rights, obligations, liabilities or remedies of that person or entity or of another, whether or not a matter is pending in any court. [See *People v. Merchants’ Protective Corp.* (1922) 189 Cal. 531, 535, 209 P 363, 365]²⁶

[3] With respect to assisting a person who is not a member, or an entity, in the unauthorized practice of law as proscribed in paragraph (b), California published appellate decisions and other authorities have determined that the following kinds of conduct or activities by non-lawyers or **[out-of-state]** lawyers not licensed to practice law in California constitute the unauthorized practice of law. The following cases and other authorities are provided for information and guidance only. They are not all-inclusive. The nature and kinds of activities subject to prohibition under this rule are subject to change by judicial or legislative action. Whether or not an activity constitutes the unauthorized practice of law may vary depending upon the context in which the activity occurs, or who performs the activity, e.g. whether a lawyer or non-lawyer is the actor; whether the lawyer is disbarred, suspended, resigned with disciplinary charges pending, or involuntarily inactive; or whether the lawyer is voluntarily inactive; or whether the lawyer is an out-of-state lawyer.

- (a) Out-of-state lawyer not licensed to practice in California providing legal advice to California residents in California without a member’s supervision. [See Ca Bus & Prof §§ 6126(a); *Bluestein v. State Bar* (1975) 13 Cal.3d 162, 175, 118 Cal.Rptr. 175, 183, fn. 13] **[OUT-OF-STATE LAWYER]**²⁷

- (b) Out-of-state lawyer not licensed to practice law in California appearing before an arbitration tribunal on behalf of another. [See *Birbrower, Montalbano, Condon & Frank, P.C. v. Sup.Ct. (ESQ Business Services, Inc.)* (1998) 17 Cal.4th 119, 128, 70 Cal.Rptr.2d 304, 308. **[OUT-OF-STATE LAWYER]**²⁸
- (c) Corporation entering into contracts for the provision of legal services, and providing those legal services through attorney agents. *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535, 209 P 363, 365. **[CORPORATION]**²⁹
- (d) Corporation appearing in a court of law, except in small claims courts, where the person appearing on behalf of the corporation is not licensed to practice law in California. [*Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284, 111 Cal.Rptr.2d 439, 444, fn. 5; *Merco Const. Engineers, Inc. v. Mun.Ct.* (1978) 21 Cal.3d 724, 733, 147 Cal.Rptr. 631, 636; see also *In re Las Colinas Develop. Corp.* (1st Cir. 1978) 585 F.2d 7, 13] **[CORPORATION]**³⁰
- (e) Non-lawyer appearing in a court of law under a general power of attorney permitting the person to act as a representative for another. [*People ex rel. Dept. of Pub. Works v. Malone* (1965) 232 Cal.App.2d 531, 537, 42 Cal.Rptr. 888, 892 (non-lawyer condemnee, given special power of attorney to make decisions and act on behalf of second condemnee owner, could not appear before tribunal on behalf of second condemnee); *Drake v. Sup.Ct. (Clements)* (1994) 21 Cal.App.4th 1826, 1829-1830, 26 Cal.Rptr.2d 829, 831 (Uniform Statutory Power of Attorney Act does not authorize non-lawyer attorney-in-fact to appear in a court of law on behalf of principal).] **[NON-LAWYER]**³¹
- (f) Non-lawyer appearing in a court of law and serving in a representative capacity, including as a trustee, guardian, guardian ad litem, parent, executor, administrator, personal representative of estate, conservator or class representative in class action. [*J.W. v. Sup.Ct.* (1993) 17 Cal.App.4th 958, 969, 22 Cal.Rptr.2d 527, 533 (guardian ad litem); *Johns v. County of San Diego* (9th Cir. 1997) 114 F.3d 874, 877 (guardian & parent); *Mossanen v. Monfared* (2000) 77 Cal.App.4th 1402, 1409-1410, 92 Cal.Rptr.2d 459, 464 (guardian ad litem); *City of Downey v. Johnson* (1968) 263 Cal.App.2d 775, 779, 69 Cal.Rptr. 830, 833 (conservator & executor); *Cevallos v. City of Los Angeles* (C.D. Cal. 1996) 914 F.Supp. 379, 385 (class action representative); *Ziegler v. Nickel*

(1998) 64 Cal.App.4th 545, 548, 75 Cal.Rptr.2d 312, 315
(trustee).] **[NON-LAWYER]**

- (g) Lawyer not licensed to practice law in California³² appearing at a deposition on behalf of another. [*Ex Parte McCue* (1930) 211 Cal. 57, 68, 293 P 47, 52] **[OUT-OF-STATE LAWYER]**³³
- (h) Lawyer not licensed to practice law in California appearing on behalf of another or performing services in administrative hearings in which a party may not be represented by other than a lawyer. [*Z.A. v. San Bruno Park School Dist.* (9th Cir. 1999) 165 F.3d 1273, 1274-1276] **[OUT-OF-STATE LAWYER]**³⁴
- (i) Lawyer neither licensed to practice law in California nor admitted pro hac vice filing pleadings on behalf of another in court proceedings. [See *Gentis v. Safeguard Business Systems, Inc.* (1998) 60 Cal.App.4th 1294, 1308, 71 Cal.Rptr.2d 122, 130.] **[OUT-OF-STATE LAWYER]**³⁵
- (j) **Non-lawyer or lawyer not licensed to practice law in California** giving advice to a person or entity concerning which document to use, where the choice of document will affect the legal rights, responsibilities, liabilities or obligations of the person, entity or another. [*People v. Sipper* (1943) 61 Cal.App.2d Supp. 844, 846-847, 142 P.2d 960, 962 (overruled on other grounds in *Murguia v. Mun.Ct.* (1975) 15 Cal.3d 286, 301, 124 Cal.Rptr. 204, 214, fn. 11) (non-lawyer providing advice on the kind of legal document to execute to secure loan on real estate.); *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599, 1609, 264 Cal.Rptr. 548, 553 (non-lawyer's eviction assistance not limited to clerical services or the provision of a general manual on the relative law).] **[NON-LAWYER]**³⁶
- (k) Nonlawyer accountant rendering legal advice on purely legal issue. *Agran v. Shapiro* (1954) 127 Cal.App.2d Supp. 807, 818-819, 273 P.2d 619, 626. **[NON-LAWYER]**³⁷
- (l) Non-lawyer preparing legal instruments and contracts on behalf of another by which legal rights may be secured, including the drawing of agreements, the organization of corporations and preparing papers connected therewith, and wills and trusts, whether or not a matter is pending in court. [*People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535, 209 P 363, 365] [*Smallberg v. State Bar* (1931) 212 Cal. 113, 119-120, 297 P 916, 919; see also *Geibel v.*

State Bar (1938) 11 Cal.2d 412, 422-423, 79 P.2d 1073. [**NON-LAWYER**]³⁸

- (m) Suspended lawyer negotiating a stipulation on behalf a party in a divorce action. *Morgan v. State Bar* (1990) 51 Cal.3d 598, 797 P.2d 1186, 274 Cal.Rptr. 8 (“The character of the act, and not the place where it is performed, is the decisive element, and if the application of legal knowledge and technique is required, the activity constitutes the practice of law....”). [**SUSPENDED LAWYER**]³⁹

[4] With respect to assisting a person who is not a member, or an entity, in the unauthorized practice of law as proscribed in paragraph (b), the following kinds of conduct or activities by non-lawyers or out-of-state lawyers not licensed to practice law in California but otherwise in good standing do not constitute the unauthorized practice of law. The following cases and other authorities are provided for information and guidance, but they are not all-inclusive. The kinds of activity allowed pursuant to the authorities below are subject to change by judicial or legislative action. Whether or not an activity constitutes the unauthorized practice of law may vary depending upon the context in which the activity occurs, or who performs the activity, e.g., whether a lawyer or non-lawyer is the actor; whether the lawyer is disbarred, suspended, resigned with disciplinary charges pending, or involuntarily inactive; or whether the lawyer is voluntarily inactive; or whether the lawyer is an out-of-state lawyer not licensed in this state.

- (a) A natural person appearing or performing services on behalf of himself or herself in a proceeding pending before a court of record, administrative body, or arbitration. (*Abar v. Rogers* (1981) 121 Cal.App.3d 862, 865, 177 Cal.Rptr. 655, 656 (although non-lawyer husband was permitted to represent himself as a plaintiff in a civil action, he could not also represent his wife.) See also 28 USC §1654 (right of self representation in federal civil cases); [**NON-LAWYER**]⁴⁰
- (b) Non-lawyer spouse appearing on behalf of an absent spouse, where both spouses are civil defendants, sued jointly and one spouse “neglects to defend.” (Cal. Code Civ. Pro. § 371.) [**NON-LAWYER**]⁴¹
- (c) Appearing in a California or federal administrative proceeding where permitted by statute or other law. [**NON-LAWYER & OUT-OF-STATE LAWYER**]

Drafters' Note: *The issue was raised at the July 2003 meeting whether the ability to appear at an administrative proceeding applies equally to: (1) Non-lawyers; (2) Out-of-state lawyers not licensed in California but otherwise in good standing; and (3) California lawyers who are disbarred, suspended or involuntarily inactive? It was noted that although non-lawyers and out-of-state lawyers in good standing may be permitted to do so pursuant to each agency's policy, current Cal. RPC 1-311(A)(2) [inserted as rule 5.3(d)(2), above] prohibits California lawyers who are disbarred, etc.*⁴²

- (d) Lawyer licensed and in good standing in a foreign country who holds himself or herself out as a “foreign legal consultant” and provides legal services in compliance with California Rules of Court 988(d). **[FOREIGN LAWYER]**⁴³
- (e) Non-lawyer patent agent [or lawyer not licensed to practice in California but otherwise in good standing] registered to practice before the United States Patent and Trademark Office holding himself or herself out as able to prepare and prosecute, and preparing and prosecuting, patent applications before the United States Patent and Trademark Office. See 35 USCA §§ 31; *Sperry v. State of Fla. ex rel. Florida Bar* (1963) 373 U.S. 379, 385-387, 83 S.Ct. 1322, 1326-1327 (Preparation of patent applications is the “practice of law” under Florida law, but patent office regulations, promulgated pursuant to 35 U.S.C. §§ 31 et seq., expressly permits non-lawyer to practice before the PTO, so Florida cannot enjoin such practice by non-lawyer.) **[NON-LAWYER OR OUT-OF-STATE LAWYER]**
- (f) Non-lawyer giving tax advice or appearing behalf of another before the United States Internal Revenue Service not involving an *interpretation* of general or tax law or uncertainties as to the *application* of law to a particular transaction. *Agran v. Shapiro, supra*, 127 Cal.App.2d Supp. at 819, 273 P.2d at 626 (accountant). **[NON-LAWYER]**
- (g) Non-lawyer offering opinions to a friend or relation, without compensation, which may involve an interpretation or application of the law or legal principles to specific facts and circumstance. [*People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599, 1609, 264 Cal.Rptr. 548, 554] **[NON-LAWYER]**⁴⁴

- (h) Non-lawyer performing clerical services on behalf of another, e.g., filling in blanks on a form selected by a party representing himself or herself. (*People v. Landlords Professional Services*, supra, 215 Cal.App.3d at 1606, 264 Cal.Rptr. at 551-552; *People v. Sipper*(1943) 61 Cal.App.2d Supp. 844, 846-847, dis. on other grounds in *Murguia v. Mun. Ct.* (1975) 15 Cal.3d 286, 301 [**NON-LAWYER**]⁴⁵)
- (i) A liability insurance carrier which negotiates and settles a claim against an insured, authorized by a contract of insurance by the insured to “settle or defend” claims or suits against the insured for damages covered by the policy within the policy limits.[See *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 110 Cal.Rptr. 511] [**NON-LAWYER/ CORPORATION**]
- (j) An insurance company employing its own in-house staff attorneys or creating a captive law firm to defend the company’s insureds against third party claims. [*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1405, 120 Cal.Rptr.2d 392, 403] [**CORPORATION?**]
- (k) Non-lawyer operating a collection agency. [See *Le Doux v. Credit Research Corp.* (1975) 52 Cal.App.3d 451, 454-456, 125 Cal.Rptr. 166, 168-169 (collection agency’s lawyer held to have represented the creditor-assignor of the debt, and not the agency itself)] [**NON-LAWYER/ CORPORATION**]
Drafters’ Note: Note that the collection agency’s lawyer was held to be representing the creditor-assignor of the debt, not the agency itself.
- (l) Non-lawyer accompanying a State Bar member to a deposition to provide assistance, under the direct supervision of the lawyer, who takes no part in the deposition proceedings, including asking questions or interposing objections. [**NON-LAWYER**]
- (m) Non-lawyer publishing and sellign “do-it-yourself” manuals, designed to allow purchasers to represent themselves, provided that the instructions are addressed to the public in general rather than to the specific legal problems of a specific person. [*People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599, 1606, 264 Cal.Rptr. 548, 551] [**NON-LAWYER**]

- (n) Non-lawyer selling legal forms, including blank wills, deeds, trust instruments, or court forms. [*People v. Landlords Professional Services*, supra, 215 Cal.App.3d at 1605-1606, 264 Cal.Rptr. at 551] [**NON-LAWYER**]
- (o) Non-lawyer delivering and filing with the court clerk pleadings on behalf of another. [*People v. Landlords Professional Services*, supra, 215 Cal.App.3d at 1608, 264 Cal.Rptr. at 553; *Drake v. Sup.Ct. (Clements)* (1994) 21 Cal.App.4th 1826, 1832, 26 Cal.Rptr.2d 829, 833, fn. 5] [**NON-LAWYER**]
- (p) Law corporation providing legal services through active members of the State Bar if the corporation is registered with and certified by the State Bar of California and operate under the California Professional Corporation Act. [Ca Corp §§ 13400 et seq.; Ca Bus & Prof §§ 6160 et seq.; State Bar Law Corporation Rules, Rule I et seq.] [**“CORPORATION”**]
- (q) Non-lawyer acting as a “legal document assistant” or “unlawful detainer assistant” in compliance with Bus & Prof §§ 6400 et seq. [Ca Bus & Prof §§ 6400 et seq. ; see Ca Bus & Prof §§ 6402, 6402.1 [**NON-LAWYER**]⁴⁶
- (r) Law student engaging in activities as a certified law students as permitted by and in compliance with the State Bar Rules Governing the Practical Training of Law Students. [Cal. Rule of Court 983.2] [**NON-LAWYER**]
- (s) Lawyer not licensed to practice law in California but otherwise in good standing elsewhere appearing on behalf of another in a commercial arbitration in California involving international commercial disputes in compliance with Code of Civil Procedure §§ 1297.351 et seq. or in an arbitrations under collective bargaining agreements in California in compliance with Code of Civil Procedure §§ 1282.4(g) & (i)(2). [abrogating *Birbrower, Montalbano, Condon & Frank, P.C. v. Sup.Ct. (ESQ Business Services, Inc.)* (1998) 17 Cal.4th 119, 130-131, 70 Cal.Rptr.2d 304, 310] [**OUT-OF-STATE LAWYER**]
- (t) [Non-lawyer/lawyer not licensed to practice law in California but otherwise in good standing ?] appearing on behalf of another in an arbitration in California in compliance with Ca Code Civ. Proc. §1282.4 and CRC 983.4. [**NON-LAWYER OR OUT-OF-STATE LAWYER**]

- (u) Non-lawyer providing legal information as a Family Law Facilitator or under the direction of a Family Law Facilitator.[Cal. Family Code §10000 et seq.] **[NON-LAWYER]**

CRPC 1-600:

There is no equivalent ABA MRPC for CRPC 1-600.⁴⁷ The same comment as set forth with proposed MRPC 5.3 and 5.4 would be appropriate to add to the comment of any such rule.

Rule 1-600. Legal Service Programs

(A) A member shall not participate in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services, which allows any third person or organization to interfere with the member's independence of professional judgment, or with the client-lawyer relationship, or allows unlicensed persons to practice law, or allows any third person or organization to receive directly or indirectly any part of the consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules.

(B) The Board of Governors of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on members.

Discussion:

[1] The participation of a member in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of these rules.

[2] Rule 1-600 is not intended to override any contractual agreement or relationship between insurers and insureds regarding the provision of legal services.

[3] Rule 1-600 is not intended to apply to the activities of a public agency responsible for providing legal services to a government or to the public.

[4] For purposes of paragraph (A), "a nongovernmental program, activity, or organization" includes, but is not limited to group, prepaid, and voluntary legal service programs, activities, or organizations.

[5] **Concerning the meaning of "the practice of law" or "practice law" see rule 1-300, Discussion section.**

CALBAR – RRC
Practice of Law Related Rules – ANNOTATED
Model Rule Format
Draft 45
November 28, 2003
For Consideration at July 9, 2004 Meeting
Ellen R. Peck (KEM, ed.)

ALTERNATIVE 1:⁴⁸

***AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT
FORMAT***

Rules containing the term “practice of law” or “practice law”

[Proposed] Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated² with⁴⁹ a lawyer:

- (a) a partner, and a lawyer⁵⁰ who individually or together with other lawyers possesses **comparable**⁵¹ managerial authority in a law **firm**⁵² shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;⁵³

- (b) a **lawyer** having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the **lawyer**; and

(c) a **lawyer** shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a **lawyer** if:

(1) the **lawyer** orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the **lawyer** is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

DRAFTERS' NOTE: *Paragraph (d), below, is California RPC 1-311, conformed to ABA Model Rule Format. The underlined sentence in paragraph (f) was approved by the RRC at its 5/2/2003 meeting. See 06/03/2003 Voogd Memo re Rule 1-311.*

(d) A member shall not employ, associate professionally with, or aid a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the member's client:

(1) Render legal consultation or advice to the client;

(2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) Appear as a representative of the client at a deposition or other discovery matter;

(4) Negotiate or transact any matter for or on behalf of the client with third parties;

(5) Receive, disburse or otherwise handle the client's funds; or

(6) Engage in activities which constitute the **practice of law**.

(e) A member may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to:

(1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or

(3) Accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active member who will appear as the representative of the client.

(f) Prior to or at the time of employing a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the member shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (d) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The information contained in such notices shall be available to the public.⁵⁴ The member shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The member shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the member's employment with the client.

(g) A member may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.

(h) Upon termination of the employment of a disbarred, suspended, resigned, or involuntarily inactive member, the member shall promptly serve upon the State Bar written notice of the termination.

(i) For the purposes of subparagraphs (d)-(g), ~~For purposes of this rule:~~

(1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;

(2) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code sections 6007, 6203(e)(d)(1),⁵⁵ or California Rule of Court 958(d); and

(3) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.]

COMMENT

[1] **Lawyers** generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the **lawyer** in rendition of the **lawyer's** professional services. A **lawyer** must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in instructing and supervising nonlawyers should take account of the fact that they do not have legal training.⁵⁶

[2] Paragraph (a) requires **lawyers** with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance⁵⁷ that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct.⁵⁸ See Comment [1] to Rule 5.1.⁵⁹ Paragraph (b) applies to **lawyers** who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a **lawyer** is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a **lawyer**.

[2a] ~~In the event that no lawyer in the firm has been designated as managing partner, then every partner in the firm is deemed to have comparable managerial authority and responsibilities within the meaning of this rule.~~⁶⁰

[3] Concerning the meaning of "the practice of law" or "practice law"⁶¹ see rule 5.5, Comment.

Discussion:

DRAFTERS' NOTE: The following discussion paragraphs are from rule 1-311, as approved by the Commission at its 05/02/2003 Meeting. Note that at that meeting, there was no change to the Discussion from the version of rule 1-311 now in effect. See 06/03/2003 Voogd Memo to Commission re rule 1-311.

For discussion of the activities that constitute the practice of law, see *Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford*

v. State Bar (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants Protective Corporation* (1922) 189 Cal. 531, 535 [209 P. 363]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].)

[4] **Sub-Paragraph (f)** is not intended to prevent or discourage a member from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a member's client is an organization, then the written notice required by paragraph (f) shall be served upon the highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule 3-600 **[Organization as Client]**.)

[5] Nothing in ~~this~~ rule 5.3⁶³ ~~1-311~~ shall be deemed to limit or preclude any activity engaged in pursuant to rules 983, 983.1, 983.2, and 988 of the California Rules of Court, or any local rule of a federal district court concerning admission pro hac vice.

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
 - (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
 - (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
 - (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
 - (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

DRAFTERS' NOTE: *Sub-paragraph (a)(5), below, is California RPC 1-320(A)(4), conformed to ABA Model Rule Format.*

- (5) a member may pay a prescribed registration, referral, or participation fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California.

- _____ (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.⁶⁵
- (d) A lawyer shall not practice with or in the form of a professional corporation or association⁶⁶ authorized to practice law for a profit, if:
 - (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;⁶⁷

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation ; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

COMMENT

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 3-310(F) (member may accept compensation from a third party as long as there is no interference with the member's independence of professional judgment, **information protected under Business & Professions Code, section 6068(e)(1) is protected**, and the client gives informed **written** consent).

[3] Concerning the meaning of “the practice of law” or “practice law,” see rule 5.5, **Comments [2]-[4]**⁶⁸

[Proposed] **Rule 5.5 UNAUTHORIZED PRACTICE OF LAW [Incorporating the substance of “CRPC 1-300. Unauthorized Practice of Law.]**

PRE-AUGUST 2002 MODEL RULE:

A member ~~lawyer~~ shall not:

- (a) ~~*A member shall not aid any person or entity in the unauthorized practice of law.*~~ practice law in a jurisdiction where doing so [where to do so] violates the regulation of the legal profession in that jurisdiction; or

- (b) ~~*A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.*~~ assist a person who is not a member, ~~of the bar~~ or **assist an entity** in the performance of activity that constitutes the unauthorized practice of law [aid any person or entity in the unauthorized practice of law]⁶⁹

POST-AUGUST 2002 MODEL RULE (Adopted per ABA’s MJP Report):⁷⁰

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

- (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
 - (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
 - (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

COMMENT

[1] **[Pre-2002 Model Rule Version]** The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against the rendition of legal services by unqualified **[The purpose of prohibiting the unauthorized practice of law is to protect the public and the administration of justice from the rendition of legal services by unqualified persons or entities.]** Paragraph (b), **except as otherwise prohibited in rule [1-311]**, does not prohibit a lawyer from employing the services of para-professionals or other assistants and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law, including claims adjusters, employees of financial or commercial institutions or entities, social workers, accountants, low cost legal service programs, and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[2] In California, the phrase “practice of law” is defined by legislation and published decisions. California published appellate decisions and other

authorities have determined that the following conduct or activities may constitute the “practice of law”:

- (a) Holding oneself out as an attorney or a person entitled to practice law. [See Ca Bus & Prof §§ 6126(a); *Bluestein v. State Bar* (1975) 13 Cal.3d 162, 175, 118 Cal.Rptr. 175, 183, fn. 13]

~~**Bluestein v. State Bar – out-of-state lawyer**~~

~~[Westlaw] Actions which include introducing unlicensed person to clients at law office, informing clients that the unlicensed person is an attorney in another state and has practiced law in Europe, and subsequently allowing the unlicensed person to consult with clients without any supervision by a licensed attorney would constitute aiding and abetting the unlicensed person to practice law whether or not the unlicensed person in fact does advise client in California regarding foreign law and notwithstanding contention that unlicensed person would be doing nothing but assisting clients in obtaining counsel in a foreign country and that such referral of clients to foreign counsel is constitutionally protected speech.~~

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- (b) Appearing on behalf of another or performing services in a representative capacity before a tribunal in any matter pending therein throughout its various stages. [See *Birbrower, Montalbano, Condon & Frank, P.C. v. Sup.Ct. (ESQ Business Services, Inc.)* (1998) 17 Cal.4th 119, 128, 70 Cal.Rptr.2d 304, 308; *People v. Merchants’ Protective Corp.* (1922) 189 Cal. 531, 535, 209 P 363, 365; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 542, 86 Cal.Rptr. 673, 677]

~~**Birbrower – out-of-state lawyers**~~

~~[Westlaw - Birbrower] Term “practice law,” as used in statute restricting practice to persons who are members of state bar, means doing and performing services in court of justice in any matter depending therein throughout its various stages and in conformity with adopted rules of procedure, and includes legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in course of litigation~~

~~[Westlaw - Birbrower] Term “practice law in California,” as used in statute restricting practice to persons who are members of state bar, entails sufficient contact with California client to render nature of legal service a clear legal representation, and primary inquiry is~~

whether unlicensed lawyer engaged in sufficient activities in state, or created continuing relationship with California client that included legal duties and obligations.

People v. Merchants' Protective Corp. — Corporation practicing law/offering legal services

[Westlaw] Where a corporation charged a yearly membership fee for dispensing legal advice and services of the sort usually furnished by attorneys to their clients, and part of this membership fee was paid to attorneys for rendering services as agents and representatives of the corporation, the corporation was engaged in the practice of law, in view of Const. art. 6, § 22, and Code Civ.Proc. § 171, § 281 (repealed. See Business and Professions Code, § 6127), and § 1209, subd. 13.

[Citing *Eley v. Miller*, 7 Ind. App. 529, 34 N. E. 836] “As the term is generally understood, the practice of the law is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court.”

Baron v. City of Los Angeles — In-state non-lawyers “practicing law”/lobbying

[Westlaw] Where city ordinance requiring registration of local lobbyists defined “municipal legislation” so broadly that ordinance applied to virtually all activities of attorneys representing clients before any local administrative agencies, including activities unrelated to lobbying as traditionally defined, ordinance was invalid insofar as conflicting with provisions of State Bar Act regulating “practice of law,” i. e., performing services in representative capacity in manner which would constitute unauthorized practice of law if performed by layman.

State Bar Act preempts field of regulation of attorneys only insofar as they are “practicing law” under the Act, i. e., performing services in representative capacity in manner which would constitute unauthorized practice of law if performed by layman.

- (c) Giving legal advice and counsel to another which involves the application of law or legal principles to the specific facts and circumstances, rights, obligations, liabilities or remedies of that person or entity or of another, whether or not a matter is pending in any court. [See *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535, 209 P 363, 365]

~~**People v. Merchants' Protective Corp. Corporation practicing law/offering legal services**~~

~~Note that case involved a corporation, other than a law corporation, providing legal services to third parties. [Citing *Eley v. Miller*, 7 Ind. App. 529, 34 N. E. 836.]⁷³~~

- [3] With respect to assisting a person who is not a member, or an entity, in the unauthorized practice of law as proscribed in paragraph (b), California published appellate decisions and other authorities have determined that the following kinds of conduct or activities by non-lawyers or **[out-of-state]** lawyers not licensed to practice law in California constitute the unauthorized practice of law. The following cases and other authorities are provided for information and guidance only. They are not all-inclusive. The nature and kinds of activities subject to prohibition under this rule are subject to change by judicial or legislative action. Whether or not an activity constitutes the unauthorized practice of law may vary depending upon the context in which the activity occurs, or who performs the activity, e.g. whether a lawyer or non-lawyer is the actor; whether the lawyer is disbarred, suspended, resigned with disciplinary charges pending, or involuntarily inactive; or whether the lawyer is voluntarily inactive; or whether the lawyer is an out-of-state lawyer.

- (a) Out-of-state lawyer not licensed to practice in California providing legal advice to California residents in California without a member's supervision. [See Ca Bus & Prof §§ 6126(a); *Bluestein v. State Bar* (1975) 13 Cal.3d 162, 175, 118 Cal.Rptr. 175, 183, fn. 13] **[OUT-OF-STATE LAWYER]**

~~**Bluestein v. State Bar out-of-state lawyer**~~

~~[Westlaw] Actions which include introducing unlicensed person to clients at law office, informing clients that the unlicensed person is an attorney in another state and has practiced law in Europe, and subsequently allowing the unlicensed person to consult with clients without any supervision by a licensed attorney would constitute~~

~~aiding and abetting the unlicensed person to practice law whether or not the unlicensed person in fact does advise client in California regarding foreign law and notwithstanding contention that unlicensed person would be doing nothing but assisting clients in obtaining counsel in a foreign country and that such referral of clients to foreign counsel is constitutionally protected speech.~~

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- (b) Out-of-state lawyer not licensed to practice law in California appearing before an arbitration tribunal on behalf of another. [See *Birbrower, Montalbano, Condon & Frank, P.C. v. Sup.Ct. (ESQ Business Services, Inc.)* (1998) 17 Cal.4th 119, 128, 70 Cal.Rptr.2d 304, 308. **[OUT-OF-STATE LAWYER]**

~~**Birbrower out of state lawyers**~~

~~[Westlaw - Birbrower] Term “practice law,” as used in statute restricting practice to persons who are members of state bar, means doing and performing services in court of justice in any matter depending therein throughout its various stages and in conformity with adopted rules of procedure, and includes legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in course of litigation~~

~~[Westlaw - Birbrower] Term “practice law in California,” as used in statute restricting practice to persons who are members of state bar, entails sufficient contact with California client to render nature of legal service a clear legal representation, and primary inquiry is whether unlicensed lawyer engaged in sufficient activities in state, or created continuing relationship with California client that included legal duties and obligations.~~

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- (c) Corporation entering into contracts for the provision of legal services, and providing those legal services through attorney agents. *People v. Merchants’ Protective Corp.* (1922) 189 Cal. 531, 535, 209 P 363, 365. **[CORPORATION]**

~~**People v. Merchants’ Protective Corp. Corporation practicing law/offering legal services**~~

Note that case involved a corporation, other than a law corporation, providing legal services to third parties. [Citing *Eley v. Miller*, 7 Ind. App. 529, 34 N. E. 836.]

[Westlaw] Where a corporation charged a yearly membership fee for dispensing legal advice and services of the sort usually furnished by attorneys to their clients, and part of this membership fee was paid to attorneys for rendering services as agents and representatives of the corporation, the corporation was engaged in the practice of law, in view of Const. art. 6, § 22, and Code Civ.Proc. § 171, § 281 (repealed. See Business and Professions Code, § 6127), and § 1209, subd. 13.

[Citing *Eley v. Miller*, 7 Ind. App. 529, 34 N. E. 836] ““ As the term is generally understood, the practice of the law is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court.””

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- (d) Corporation appearing in a court of law, except in small claims courts, where the person appearing on behalf of the corporation is not licensed to practice law in California. [*Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284, 111 Cal.Rptr.2d 439, 444, fn. 5; *Merco Const. Engineers, Inc. v. Mun.Ct.* (1978) 21 Cal.3d 724, 733, 147 Cal.Rptr. 631, 636; see also *In re Las Colinas Develop. Corp.* (1st Cir. 1978) 585 F.2d 7, 13] [CORPORATION]

Gamet v. Blanchard — California corporation representing itself

[footnote 5] Until this court advised appellants the corporation’s appeal would be dismissed because it had to appear through an attorney, no one advised the corporation it could not represent itself. In California a corporation may not represent itself, except in a small claims proceeding. This prohibition stems from the notion a corporate representative who would likely appear on behalf of the corporation would be engaged in the unlicensed practice of law. (*Merco Construction Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 147 Cal.Rptr. 631, 581 P.2d 636.) The ban on corporate self-representation does not prevent a court from

~~granting a motion to withdraw as attorney of record, even if it leaves the corporation without representation. Such an order puts pressure on the corporation to obtain new counsel, or risk forfeiting important rights through nonrepresentation. (Ferruzzo v. Superior Court (1980) 104 Cal.App.3d 501, 504, 163 Cal.Rptr. 573.) It is the duty of the trial judge to advise the representative of the corporation of the necessity to be represented by an attorney. (Van Gundy v. Camelot Resorts, Inc. (1983) 152 Cal.App.3d Supp. 29, 31, 199 Cal.Rptr. 771.) Yet every opportunity to so advise was missed by the court in this case. As already mentioned, the rule of court requiring such notice was not followed, the January 23, 1996 order relieving counsel implied the corporation could represent itself, and the letter sent by the judge to Gamet that same day did not mention the corporation.~~

~~**Mereo Const. Engineers, Inc. v. Municipal Court – California corporation representing itself**~~

~~“Practice of law” is doing and performing services in court of justice, in any matter depending therein through its various stages.~~

~~[Westlaw: Separation of Powers Issue!] Code of Civil Procedure section permitting corporations to appear as parties in proceedings in justice courts through directors, officers, or employees, whether or not such natural persons are attorneys constitutes legislative attempt to permit persons judiciary has deemed not qualified for practice of law to engage in limited practice of law, and as such offends separation of powers clause of Constitution and is of no force and effect.~~

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- (e) Non-lawyer appearing in a court of law under a general power of attorney permitting the person to act as a representative for another. [*People ex rel. Dept. of Pub. Works v. Malone* (1965) 232 Cal.App.2d 531, 537, 42 Cal.Rptr. 888, 892 (non-lawyer condemnee, given special power of attorney to make decisions and act on behalf of second condemnee owner, could not appear before tribunal on behalf of second condemnee); *Drake v. Sup.Ct. (Clements)* (1994) 21 Cal.App.4th 1826, 1829-1830, 26 Cal.Rptr.2d 829, 831 (Uniform Statutory Power of Attorney Act does not authorize non-lawyer attorney-in-fact to appear in a court of law on behalf of principal).] **[NON-LAWYER]⁷⁸**

People ex rel. Dept. of Pub. Works v. Malone — Power of Attorney

[Westlaw] Power of attorney does not permit agent to act as attorney at law. One condemnee, not an attorney at law, could not by virtue of special power of attorney executed by second condemnee participate in litigation on behalf of second condemnee and stipulate to judgment, what first condemnee purported to do for the second in place of an attorney was a nullity and judgment entered could not be upheld as to second condemnee

Drake v. Superior Court (Clements) — Power of Attorney Act

[Westlaw] Attorney in fact could not practice law on behalf of proper litigants, despite language in Uniform Statutory Power of Attorney Act authorizing attorney in fact to assert and prosecute before court or administrative agency a claim or cause of action for principals, to bring action to determine adverse claims, intervene in litigation and act as amicus curiae, and to appear for principals in connection with prosecution, settlement or defense of claim or litigation. West's Ann.Cal.Civ.Code § 2494.

[Westlaw] Nothing in Uniform Statutory Power of Attorney Act changes rule that attorney in fact may not act as attorney at law; authority of attorneys in fact under Act is subject to conditions of fact and law that exist outside of Act, and one such law is State Bar Act's prohibition against practice of law by nonlawyers. West's Ann.Cal.Civ.Code § 2494; West's Ann.Cal.Bus. & Prof.Code §§ 6125, 6126.

[Westlaw] Clerical functions such as delivering and filing pleadings with clerk are not included as practice of law for principal that attorney in fact would be precluded from doing. West's Ann.Cal.Civ.Code § 2494; West's Ann.Cal.Bus. & Prof.Code §§ 6125, 6126.

- (f) Non-lawyer appearing in a court of law and serving in a representative capacity, including as a trustee, guardian, guardian ad litem, parent, executor, administrator, personal representative of estate, conservator or class representative in class action. [*J.W. v. Sup.Ct.* (1993) 17 Cal.App.4th 958, 969, 22 Cal.Rptr.2d 527, 533 (guardian ad litem); *Johns v. County of San Diego* (9th Cir. 1997) 114 F.3d 874, 877 (guardian & parent); *Mossanen v. Monfared*

(2000) 77 Cal.App.4th 1402, 1409-1410, 92 Cal.Rptr.2d 459, 464 (guardian ad litem); *City of Downey v. Johnson* (1968) 263 Cal.App.2d 775, 779, 69 Cal.Rptr. 830, 833 (conservator & executor); *Cevallos v. City of Los Angeles* (C.D. Cal. 1996) 914 F.Supp. 379, 385 (class action representative); *Ziegler v. Nickel* (1998) 64 Cal.App.4th 545, 548, 75 Cal.Rptr.2d 312, 315 (trustee.)] [NON-LAWYER]

- (g) Lawyer not licensed to practice law in California⁷⁹ appearing at a deposition on behalf of another. [*Ex Parte McCue* (1930) 211 Cal. 57, 68, 293 P 47, 52] [OUT-OF-STATE LAWYER]

~~**Ex parte McCue — out-of-state lawyer (also licensed in California federal courts):**~~

~~**Court at 68, 293 P. at 52:** “His appearance before the officer before whom a deposition was being taken at the request of the attorney of record is a practice not to be commended. This proceeding, even though held without the court, was in fact a proceeding in court. Applicant was not within his rights in appearing at said hearing, and the fact that he was acting without compensation does not furnish any justification for his actions. He had no consent from the court to appear at said hearing, and he was clearly violating the ethics of his profession as well as the laws of his adopted state by acting as an attorney in said matter without a license. However, we do not consider this conduct on his part as in any way involving his moral character, or that it is sufficient in itself to deprive him of his right to a license to practice law in this state.”~~

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- (h) Lawyer not licensed to practice law in California appearing on behalf of another or performing services in administrative hearings in which a party may not be represented by other than a lawyer. [*Z.A. v. San Bruno Park School Dist.* (9th Cir. 1999) 165 F.3d 1273, 1274-1276] [OUT-OF-STATE LAWYER]

~~**Z.A. v. San Bruno Park School Dist. — Out-of-state lawyer**~~

~~[Westlaw] Under California law, clients of attorney admitted to local federal bar but not California bar could not recover attorney fees under IDEA for prevailing in state administrative proceeding concerning client’s special education placement. Individuals with Disabilities Education Act.~~

- (i) Lawyer neither licensed to practice law in California nor admitted pro hac vice filing pleadings on behalf of another in court proceedings. [See *Gentis v. Safeguard Business Systems, Inc.* (1998) 60 Cal.App.4th 1294, 1308, 71 Cal.Rptr.2d 122, 130.] **[OUT-OF-STATE LAWYER]**

~~**Gentis v. Safeguard Business Systems – Out-of-state lawyer**~~

~~**Court at 1308, 71 Cal.Rptr.2d at 130:** “Defendants’ petition for rehearing or for modification of the opinion is denied. The attorney who filed the petition on defendants’ behalf is not licensed to practice law in this state. Nor did that attorney request permission to appear as counsel pro hac vice in connection with the appeal or this rehearing petition. (Cal. Rules of Court, rule 983.) An attorney who is not an active member of the California State Bar, and who has not been granted permission to appear in a particular matter, may not represent a party in this state’s courts. Bus. & Prof. Code, § 6125; *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 127-135, 70 Cal.Rptr.2d 304.”~~

- (j) Non-lawyer **or lawyer not licensed to practice law in California** giving advice to a person or entity concerning which document to use, where the choice of document will affect the legal rights, responsibilities, liabilities or obligations of the person, entity or another. [*People v. Sipper* (1943) 61 Cal.App.2d Supp. 844, 846-847, 142 P.2d 960, 962 (overruled on other grounds in *Murguia v. Mun.Ct.* (1975) 15 Cal.3d 286, 301, 124 Cal.Rptr. 204, 214, fn. 11) (non-lawyer providing advice on the kind of legal document to execute to secure loan on real estate.); *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599, 1609, 264 Cal.Rptr. 548, 553 (non-lawyer’s eviction assistance not limited to clerical services or the provision of a general manual on the relative law)]. **[NON-LAWYER]**

~~**People v. Sipper (1943) 61 Cal.App.2d Supp. 844, 846-847, 142 P.2d 960, 962 (overruled on other grounds in Murguia v. Mun.Ct. (1975) 15 Cal.3d 286, 301, 124 Cal.Rptr. 204, 214, fn. 11) (Advice re kind of legal document to execute to secure loan on real estate) – Non-lawyer**~~

~~**People v. Landlords Professional Services (1989) 215 Cal.App.3d 1599, 1609, 264 Cal.Rptr. 548, 553 (Eviction**~~

assistance not limited to clerical services or provision of manual) – Non-lawyer

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- (k) Nonlawyer accountant rendering legal advice on purely legal issue. *Agran v. Shapiro* (1954) 127 Cal.App.2d Supp. 807, 818-819, 273 P.2d 619, 626. [NON-LAWYER]

***Agran v. Shapiro* (1954) 127 Cal.App.2d Supp. 807, 818-819, 273 P.2d 619, 626 (Accountant in tax matter) – Non-lawyer**

From the case (at 813-814): “A different and more serious question arises, however, with respect to the services rendered by the plaintiff in preparing the applications for a carry back adjustment and refund of taxes paid for the previous two years, and the preparation of the 1949 return wherein a deduction was claimed for a portion of the Pritchard loss, as well as his subsequent services in resisting the additional assessment proposed by the Treasury Department upon the ground that the Pritchard loss did not constitute a ‘net operating loss’ within the meaning of the ‘carry back’ provisions of the statute. At this stage no question of accounting was involved. Neither the fact that the loss had been sustained nor the manner in which it arose was questioned. The only question was whether, under the admitted facts, the loss was one which could be ‘carried back,’ the answer to which depended upon whether or not it was a loss ‘attributable to the operation of a trade or business regularly carried on by the taxpayer’ within the meaning of that phrase as used in the Internal Revenue Code, section 122(d)(5), 26 U.S.C.A. § 122(d)(5). We see no escape from the conclusion that under the circumstances this question was purely one of law.”

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- (l) Non-lawyer preparing legal instruments and contracts on behalf of another by which legal rights may be secured, including the drawing of agreements, the organization of corporations and preparing papers connected therewith, and wills and trusts, whether or not a matter is pending in court. [*People v. Merchants’ Protective Corp.* (1922) 189 Cal. 531, 535, 209 P 363, 365] [*Smallberg v. State Bar* (1931) 212 Cal. 113, 119-120, 297 P 916, 919; see also *Geibel v. State Bar* (1938) 11 Cal.2d 412, 422-423, 79 P.2d 1073. [NON-LAWYER]

~~People v. Merchants' Protective Corp. (1922) 189 Cal. 531, 535, 209 P 363, 365 – non-lawyer~~

~~Smallberg v. State Bar (1931) 212 Cal. 113, 119-120, 297 P 916, 919 (assisting in the UPL; ambulance chaser; the runner drafted the pleadings without oversight by the lawyer) – non-lawyer~~

~~Geibel v. State Bar (1938) 11 Cal.2d 412, 422-423, 79 P.2d 1073 (assisting in UPL. Apparently, non-lawyers drafted the documents/pleadings at issue) – non-lawyer~~

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- (m) Suspended lawyer negotiating a stipulation on behalf a party in a divorce action. *Morgan v. State Bar* (1990) 51 Cal.3d 598, 797 P.2d 1186, 274 Cal.Rptr. 8 (“The character of the act, and not the place where it is performed, is the decisive element, and if the application of legal knowledge and technique is required, the activity constitutes the practice of law....”). [SUSPENDED LAWYER]

~~**Morgan v. State Bar (1990) 51 Cal.3d 598, 797 P.2d 1186, 274 Cal.Rptr. 8.**⁸⁶~~

~~[Westlaw] Engaging in negotiations with opposing counsel concerning settlement of divorce action, and agreeing that case should be continued until later date, constitutes “practice of law,” for purposes of determining whether attorney has engaged in practice of law while under suspension, even though negotiation takes place in hallway outside of courtroom rather than before judge.~~

~~**KEM:** Note that in *Morgan*, the court applied the above quoted language to conclude that the fact the suspended lawyer was not in court when the stipulation he negotiated was entered did not matter. However, need to distinguish cases from other states that have suggested if lawyer provides legal advice on another state’s law, he or she is not UPL, so long as the advice is rendered within the state in which the lawyer is licensed.~~

[4] With respect to assisting a person who is not a member, or an entity, in the unauthorized practice of law as proscribed in paragraph (b), the following kinds of conduct or activities by non-lawyers or out-of-state lawyers not licensed to practice law in California but otherwise in good standing do not constitute the unauthorized practice of law. The following cases and other authorities are provided for information and guidance, but they are not all-inclusive. The kinds of activity allowed pursuant to the authorities below are subject to change by judicial or legislative action. Whether or not an activity constitutes the unauthorized practice of law may vary depending upon the context in which the activity occurs, or who performs the activity, e.g., whether a lawyer or non-lawyer is the actor; whether the lawyer is disbarred, suspended, resigned with disciplinary charges pending, or involuntarily inactive; or whether the lawyer is voluntarily inactive; or whether the lawyer is an out-of-state lawyer not licensed in this state.

- (a) A natural person appearing or performing services on behalf of himself or herself in a proceeding pending before a court of record, administrative body, or arbitration. (*Abar v. Rogers* (1981) 121 Cal.App.3d 862, 865, 177 Cal.Rptr. 655, 656 (although non-lawyer husband was permitted to represent himself as a plaintiff in a civil action, he could not also represent his wife.) See also 28 USC §1654 (right of self representation in federal civil cases); [NON-LAWYER]

~~**Abar v. Rogers – Husband not allowed to represent wife**~~

~~[Westlaw] Husband, who was not licensed to practice law in state, should not have been permitted to represent his wife as a plaintiff in instant action and, hence, to practice law on her behalf.~~

~~**Court stated, at 865, 177 Cal.Rptr. at 656:** “While any person may represent himself, and his own interests, at law and in legal proceedings: “No person shall practice law (for another) in this State unless he is an active member of the state bar.” (Bus. & Prof.Code, s 6125.) A violation of this statute is a criminal act. (Id., s 6126.) Nor is Abar who is (as is Elizabeth) a plaintiff of the instant action aided by Code of Civil Procedure section 371, which provides: “If a husband and wife are sued together, each may defend for his or her own right, but if one spouse neglects to defend, the other spouse may defend for that spouse’s right also.” Here Abar and Elizabeth are the plaintiff suitors.”~~

- (b) Non-lawyer spouse appearing on behalf of an absent spouse, where both spouses are civil defendants, sued jointly and one spouse “neglects to defend.” (Cal. Code Civ. Pro. § 371.) [NON-LAWYER]

~~“If a husband and wife are sued together, each may defend for his or her own right, but if one spouse neglects to defend, the other spouse may defend for that spouse’s right also.”~~

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- (c) Appearing in a California or federal administrative proceeding where permitted by statute or other law. [NON-LAWYER & OUT-OF-STATE LAWYER]

Drafters’ Note: The issue was raised at the July 2003 meeting whether the ability to appear at an administrative proceeding applies equally to: (1) Non-lawyers; (2) Out-of-state lawyers not licensed in California but otherwise in good standing; and (3) California lawyers who are disbarred, suspended or involuntarily inactive? It was noted that although non-lawyers and out-of-state lawyers in good standing may be permitted to do so pursuant to each agency’s policy, current Cal. RPC 1-311(A)(2) [inserted as rule 5.3(d)(2), above] prohibits California lawyers who are disbarred, etc.⁸⁹

- (d) Lawyer licensed and in good standing in a foreign country who holds himself or herself out as a “foreign legal consultant” and provides legal services in compliance with California Rules of Court 988(d). [FOREIGN LAWYER]

~~**Rule of Court 988(d)** [Authority to Practice Law] Subject to all applicable rules, regulations, and statutes, a Registered Foreign Legal Consultant may render legal services in California, except that he or she may not:~~

~~(1) Appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this state or prepare pleadings or any other papers or issue subpoenas in any action or proceeding brought in any court or before any judicial officer;~~

~~(2) Prepare any deed, mortgage, assignment, discharge, lease, or any other instrument affecting title to real estate located in the United States;~~

~~(3) Prepare any will or trust instrument affecting the disposition on death of any property located in the United States and owned by a resident or any instrument relating to the administration of a decedent's estate in the United States;~~

~~(4) Prepare any instrument in respect of the marital relations, rights or duties of a resident of the United States, or the custody or care of the children of a resident; or~~

~~(5) Otherwise render professional legal advice on the law of the State of California, any other state of the United States, the District of Columbia, the United States, or of any jurisdiction other than the jurisdiction(s) named in satisfying the requirements of subdivision (c) of this rule, whether rendered incident to preparation of legal instruments or otherwise.~~

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- (e) Non-lawyer patent agent [or lawyer not licensed to practice in California but otherwise in good standing] registered to practice before the United States Patent and Trademark Office holding himself or herself out as able to prepare and prosecute, and preparing and prosecuting, patent applications before the United States Patent and Trademark Office. See 35 USCA §§ 31; *Sperry v. State of Fla. ex rel. Florida Bar* (1963) 373 U.S. 379, 385-387, 83 S.Ct. 1322, 1326-1327 (Preparation of patent applications is the “practice of law” under Florida law, but patent office regulations, promulgated pursuant to 35 U.S.C. §§ 31 et seq., expressly permits non-lawyer to practice before the PTO, so Florida cannot enjoin such practice by non-lawyer.) **[NON-LAWYER OR OUT-OF-STATE LAWYER]**
- (f) Non-lawyer giving tax advice or appearing behalf of another before the United States Internal Revenue Service not involving an *interpretation* of general or tax law or uncertainties as to the *application* of law to a particular transaction. *Agran v. Shapiro, supra*, 127 Cal.App.2d Supp. at 819, 273 P.2d at 626 (accountant). **[NON-LAWYER]**

- (g) Non-lawyer offering opinions to a friend or relation, without compensation, which may involve an interpretation or application of the law or legal principles to specific facts and circumstance. [*People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599, 1609, 264 Cal.Rptr. 548, 554] **[NON-LAWYER]**

Court at 1608, 264 Cal.Rptr. at 553:

~~“[S]uch services do not amount to the practice of law as long as the service offered by LPS was merely clerical, i.e., the service did not engage in the practice of law if it made forms available for the client’s use, filled the forms in at the specific direction of the client and filed and served those forms as directed by the client. Likewise, merely giving a client a manual, even a detailed one containing specific advice, for the preparation of an unlawful detainer action and the legal incidents of an eviction would not be the practice of law if the service did not personally advise the client with regard to his specific case.”~~

Court at 1609, 264 Cal.Rptr. at 554:

~~“LPS argues that what it describes as the “larger sense” definition of the practice of law, i.e., the giving of legal advice, is not a viable definition since it potentially applies, for example, to friends who give opinions or advice about each other’s legal problems. While it is true the inherent and necessarily general nature of any definition of legal practice may allow the formulation of hypothetical situations that render the definition unworkable, we need not be concerned with such a reductio ad absurdum argument in this case. Our research has found no case in which one friend was either enjoined from giving legal advice to a friend or prosecuted for the giving of such advice. Moreover, the hypothetical situation is not before us. As we have noted any definition of legal practice is, given the complexity and variability of the subject, incapable of universal application and can provide only a general guide to whether a particular act or activity is the practice of law. To restrict or limit the test in the interest of specificity would also limit its applicability to situations in which the public requires protection. Finally, we do not consider the present case a close one which strains the test or pushes it to an unacceptable application.”~~

- (h) Non-lawyer performing clerical services on behalf of another, e.g., filling in blanks on a form selected by a party representing himself

or herself. (*People v. Landlords Professional Services*, supra, 215 Cal.App.3d at 1606, 264 Cal.Rptr. at 551-552; *People v. Sipper*(1943) 61 Cal.App.2d Supp. 844, 846-847, dis. on other grounds in *Murguia v. Mun. Ct.* (1975) 15 Cal.3d 286, 301 [NON-LAWYER]⁹²

~~Sipper court stated, 61 Cal. App.2d at 846-47, 142 P.2d at 962:~~

~~“If defendant had only been called upon to perform and had only undertaken to perform the clerical service of filling in the blanks on a particular form in accordance with information furnished him by the parties, or had merely acted as a scrivener to record the stated agreement of the parties to the transaction, he would not have been guilty of practicing law without a license. *Eley v. Miller*, 1893, 7 Ind.App. 529, 535, 34 N.E. 836, 837; *State ex rel. Wright v. Barlow*, 1936, 131 Neb. 294, 268 N.W. 95; *In re Matthews*, 1938, 58 Idaho 772, 79 P.2d 535, 537; *Gustafson v. V. C. Taylor & Sons*, 1941, 138 Ohio St. 392, 35 N.E.2d 435. But the record supports the conclusion that he went further--that he determined for the parties the kind of a legal document they should execute in order to effectuate their purpose. This constituted the practice of law.”~~

- (i) A liability insurance carrier which negotiates and settles a claim against an insured, authorized by a contract of insurance by the insured to “settle or defend” claims or suits against the insured for damages covered by the policy within the policy limits.[See *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 110 Cal.Rptr. 511] [NON-LAWYER/ CORPORATION]
- (j) An insurance company employing its own in-house staff attorneys or creating a captive law firm to defend the company’s insureds against third party claims. [*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1405, 120 Cal.Rptr.2d 392, 403] [CORPORATION?]
- (k) Non-lawyer operating a collection agency. [See *Le Doux v. Credit Research Corp.* (1975) 52 Cal.App.3d 451, 454-456, 125 Cal.Rptr. 166, 168-169 (collection agency’s lawyer held to have represented the creditor-assignor of the debt, and not the agency itself)] [NON-LAWYER/ CORPORATION]

Drafters' Note: Note that the collection agency's lawyer was held to be representing the creditor-assignor of the debt, not the agency itself.

- (l) Non-lawyer accompanying a State Bar member to a deposition to provide assistance, under the direct supervision of the lawyer, who takes no part in the deposition proceedings, including asking questions or interposing objections. **[NON-LAWYER]**

- (m) Non-lawyer publishing and sellign “do-it-yourself” manuals, designed to allow purchasers to represent themselves, provided that the instructions are addressed to the public in general rather than to the specific legal problems of a specific person. [*People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599, 1606, 264 Cal.Rptr. 548, 551] **[NON-LAWYER]**

- (n) Non-lawyer selling legal forms, including blank wills, deeds, trust instruments, or court forms. [*People v. Landlords Professional Services*, supra, 215 Cal.App.3d at 1605-1606, 264 Cal.Rptr. at 551] **[NON-LAWYER]**

- (o) Non-lawyer delivering and filing with the court clerk pleadings on behalf of another.[*People v. Landlords Professional Services*, supra, 215 Cal.App.3d at 1608, 264 Cal.Rptr. at 553; *Drake v. Sup.Ct. (Clements)* (1994) 21 Cal.App.4th 1826, 1832, 26 Cal.Rptr.2d 829, 833, fn. 5] **[NON-LAWYER]**

- (p) Law corporation providing legal services through active members of the State Bar if the corporation is registered with and certified by the State Bar of California and operate under the California Professional Corporation Act. [Ca Corp §§ 13400 et seq.; Ca Bus & Prof §§ 6160 et seq.; State Bar Law Corporation Rules, Rule I et seq.] **[“CORPORATION”]**

- (q) Non-lawyer acting as a “legal document assistant” or “unlawful detainer assistant” in compliance with Bus & Prof §§ 6400 et seq. [Ca Bus & Prof §§ 6400 et seq. ; see Ca Bus & Prof §§ 6402, 6402.1] **[NON-LAWYER]**

~~*But cf. Broeckey v. Moore* (3d Dist. 2/20/2003) 107 Cal.App.4th 86, 131 Cal.Rptr.2d 746, in which court held that business exceeded authority granted under the statute by, inter alia, providing legal advice on which forms to file.~~

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- (r) Law student engaging in activities as a certified law students as permitted by and in compliance with the State Bar Rules Governing the Practical Training of Law Students. [Cal. Rule of Court 983.2] **[NON-LAWYER]**

- (s) Lawyer not licensed to practice law in California but otherwise in good standing elsewhere appearing on behalf of another in a commercial arbitration in California involving international commercial disputes in compliance with Code of Civil Procedure §§ 1297.351 et seq. or in an arbitrations under collective bargaining agreements in California in compliance with Code of Civil Procedure §§ 1282.4(g) & (i)(2). [abrogating *Birbrower, Montalbano, Condon & Frank, P.C. v. Sup.Ct. (ESQ Business Services, Inc.)* (1998) 17 Cal.4th 119, 130-131, 70 Cal.Rptr.2d 304, 310] **[OUT-OF-STATE LAWYER]**

- (t) [Non-lawyer/lawyer not licensed to practice law in California but otherwise in good standing ?] appearing on behalf of another in an arbitration in California in compliance with Ca Code Civ. Proc. §1282.4 and CRC 983.4. **[NON-LAWYER OR OUT-OF-STATE LAWYER]**

- (u) Non-lawyer providing legal information as a Family Law Facilitator or under the direction of a Family Law Facilitator.[Cal. Family Code §10000 et seq.] **[NON-LAWYER]**

CRPC 1-600:

There is no equivalent ABA MRPC for CRPC 1-600.⁹⁴ The same comment as set forth with proposed MRPC 5.3 and 5.4 would be appropriate to add to the comment of any such rule.

Rule 1-600. Legal Service Programs

(A) A member shall not participate in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services, which allows any third person or organization to interfere with the member's independence of professional judgment, or with the client-lawyer relationship, or allows unlicensed persons to practice law, or allows any third person or organization to receive directly or indirectly any part of the consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules.

(B) The Board of Governors of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on members.

Discussion:

[1] The participation of a member in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of these rules.

[2] Rule 1-600 is not intended to override any contractual agreement or relationship between insurers and insureds regarding the provision of legal services.

[3] Rule 1-600 is not intended to apply to the activities of a public agency responsible for providing legal services to a government or to the public.

[4] For purposes of paragraph (A), "a nongovernmental program, activity, or organization" includes, but is not limited to group, prepaid, and voluntary legal service programs, activities, or organizations.

[5] **Concerning the meaning of "the practice of law" or "practice law" see rule 1-300, Discussion section.**

ENDNOTES

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1. Per the vote at the 9/5/2003 Commission meeting, only alternative #1, the rules in the Model Rule format, have been included. Note that ABA MR 5.1 (“Responsibilities of Partners, Managers, and Supervisory Lawyers”) and MR 5.2 (“Responsibilities of a Subordinate Lawyer”) from the 5 series of the Model Rules are not included in this series of rules related to the “practice of law”.

2. **Issue:** A concern was raised at the 10/23/03 meeting about this rule making lawyers responsible for independent contractors (e.g., a biologist retained to draft an environmental impact statement who kills off an endangered species). Another member noted, however, that the rule cannot just be limited to employees; it should also cover “outsourcing” of administrative functions, etc. The 11/28/03 draft posed the question whether the Discussion should make specific reference to outsourcing. No consensus was reached about this issue at the 5/8/2004 meeting. The concern focused on the phrase “associated with.” Some possibilities were suggested: (1) Limit discipline to those situations where a lawyer has retained or employed someone in one of the “regular assistance roles employed in the provision of the member’s services as a lawyer”; (2) substitute the phrase “supervised by” for “associated with” as the rule is narrower than dealing with experts; (3) leave the concern with outsourcing to malpractice; no further change need be made.

As to point (1), that concept is already covered in Discussion ¶. [1], below (“act for the lawyer in rendition of the lawyer’s professional services.”) As to point (2), using the language “supervised by” might sufficiently narrow the rule to assuage some of the concerns raised by RRC member over imposing broad liability for the actions of non-lawyers. On the other hand, it ignores the concerns other members have expressed over outsourcing. Consider also the following excerpt, from the 8/24-26/1979 Minutes of the Kutak Commission, discussing proposed rule 7.2 [*now rule 5.1, re supervising lawyers*]:

“The group turned its attention to a new section: “Responsibilities of a Supervisory Lawyer” (7.2). As a preliminary comment, it was noted that there is an emphasis on “supervision.” That is, the rule stated is not an automatic application of *respondeat superior* reasoning, but aims at the actual lawyer directing and controlling a subordinate’s conduct. The lawyer whom this section addresses has specific, effective responsibility or real control over the professional conduct of another lawyer in a given situation. Authority and responsibility, it was noted, are often matters of proximity and degree. The rule requires analysis of these factors in its application.”

Although the foregoing discussion related to eventual MR 5.1 and supervisory responsibilities over lawyers, it is instructive about the general approach the ABA took over supervision.

Drafters’ Decision: The drafters decided to leave the ABA language as is, relying on point (3), above. The rules cannot cover every eventuality and perhaps the outsourcing problem is best dealt in the realm of malpractice.

3. **Note:** No consensus was reached at the 5/8/2004 meeting as to whether the term “lawyer” is more appropriate in this rule, the discussion better left for the rule 1-100 debate.

Issue: Should “member” or “lawyer” be used here?

4. **Note:** At 5/8/2004 Meeting, by consensus RRC decided to keep “comparable.” A suggestion had been made at the 10/23/2003 meeting that the term “comparable managerial authority” was confusing. See 10/28/03 Draft 4 of rule, at note 4.

5. **Note:** At 5/8/2004 Meeting, by consensus the RRC rejected the concept of imposing joint & several liability on all partners if a firm does not have a supervisory/managing partner. Discussion ¶. [2a] was also deleted. See 10/28/03 Draft 4, at note 5.

6. **Issue:** Should the phrase “is compatible with the professional obligations of the lawyer” be changed to conform with the language in Model Rule 5.1 (a) and (b), concerning the responsibilities of managing lawyers for conduct of subordinate *lawyers* and partners, which use the phrase “conform[s] to the Rules of Professional Conduct.”

Research: KEM contacted Becky Stretch and Sue Campbell at the ABA, (see 5/12/2004 KEM E-mail to Campbell & Stretch, and Campbell 5/20/04 Reply), and requested information as to why the two rules use different language. Sue Campbell faxed KEM minutes from the Kutak Commission’s discussion of the rules at its 8/10/1979 and 8/24-26/1979 meetings. The research was inconclusive. Although there was mention made in the 8/24-26/1979 minutes that the rules 5.1 and 5.3 “might have to be distinguished along somewhat different axes,” there was no specific reference to the different language – “professional obligations of the lawyers” in 5.3 vs. “Rules of Professional Conduct” in 5.3 – used in the two rules. (A complete transcript of the minutes excerpt is provided with these materials.) However, Ms. Campbell also faxed a copy of the 8/10/1979 draft of rule 7.4 (now rule 5.3), which provided:

7.4 SUPERVISION OF NON-LAWYER ASSISTANTS

A lawyer shall use reasonable care to prevent non-lawyers employed or retained by the lawyer from engaging in conduct in the course of their work that would violate *the Rules of Professional Conduct if done by a lawyer*. [Emphasis added].

Comment:

Lawyers generally employ assistants in their practice, including secretaries, investigators, and para-professionals. Such assistance, whether employees or independent contractors, act for the lawyer in rendition of the lawyer’s professional services. The lawyer should use reasonable efforts to see that such persons *observe the professional obligations of the lawyer*, for example the duties to preserve client confidences, to be candid with the court, and to deal fairly with other parties. [Emphasis added].

Drafters’ Observations: The italicized language in rule 7.4 proper (“the Rules of Professional Conduct if done by a lawyer”) shows that originally, the Kutak Commission contemplated language similar to that used in current rule 5.1, modified to reflect that non-lawyers are not subject to discipline for violations of the rules of professional conduct. The Kutak Commission, however, ultimately rejected that language in favor of the italicized language in the

comment, above.

The RRC could replace the current 5.3 language (“compatible with the professional obligations of the lawyer”) with the language used in the rule proper of the 1979 draft of rule 7.4. Similarly, the RRC could replace the current commentary with something more like the 1979 rule 7.4 comment, above. However, the 8/24-26/1979 minutes include the following, suggesting that adoption of the 1979 language might create more problems than solve:

“Most of the comments on 7.4, however, centered on the desirability of imposing a so-called “forbidden fruit” rule on the use of lawyers of material obtained by nonlawyers through methods which, if undertaken by attorneys, would be improper.

This suggestion was met with general disfavor on a number grounds. Several saw the door being opened to a new tactic in litigation, contributing to delay, cost and the whole panoply of undesirables the Commission has sought to avoid in formulating other rules. Others detected some professional arrogance in extending lawyerly concepts of candor and openness to such activities as investigation, where deception may be a standard of practice in its own right. Furthermore, the attempt to invade the law of evidence through the Rules of Professional Conduct was largely disapproved.

On the other side of the question, however, it was thought by some that at least attorneys should be dissuaded from associating with persons or entities known to systematically employ methods offensive to the Rules.”

Drafters’ Recommendation: If the RRC wants to adopt the Chapter 5 series of the ABA Model Rules, it should keep the current language of rule 5.3 (“professional obligations of the lawyer.”) Changing the language to the 1979 version might mislead lawyers who are trying to conform the management of a California office of a national firm to the rest of the country.

7. **Note:** This sentence was added to rule 1-311 by vote of the RRC at the 5/2/2003 Meeting. *See* 06/03/2003 Voogd Memo re rule 1-311.

8. **Note:** The change in paragraph (i)(2) was made to correct an inadvertent error in the present rule 1-311, which arose because paragraph (c) of the official statutes runs into paragraph (d)(1). *See* March 26 & 27, 2003 E-mail Exchange amongst Voogd, Difuntorum & Mohr.

9. **Deleted** “and are not subject to professional discipline” because the duty to supervise should not depend on whether the person being supervised is himself or herself subject to discipline. Even if the sentence is construed as discussing the type or degree of instruction and/or supervision rather than discussing the fact of a duty to instruct or supervise, the type or degree of instruction should not necessarily depend upon whether the subordinate may also be subject to discipline by his or her own profession.

RRC Action: At 5/8/2004 meeting, RRC voted 8 to 1 in favor of deleting the quoted language, above, but not to include the explanatory language (“because the duty to supervise,” etc.) in a separate discussion paragraph, as requested by Jerry Sapiro in his 2/19/04 e-mail to the RRC list. However, drafters were instructed to include the explanatory language in the drafter’s

comments.

10. **RRC Action:** At 5/8/2004 meeting, RRC voted unanimously, 9 to 0, to keep the word “assurance” in paragraph [2], notwithstanding a member’s concern that “assurance” might connote “strict liability.” See 10/28/03 Draft 4, at **note 6** & JS 2/19/04 e-mail.

Note also that during this discussion, a member suggested that we include the statement, “These rules are rules of reason” in rule 1-100.

11. **Note:** A suggestion was made [JS - 102303 E-mail] that we need not include language referring to “internal policies,” which implies *written* internal policies. Sentence could be deleted or rewritten as follows [See JS 021904 E-mail]:

“Paragraph (a) requires **lawyers** with managerial authority within a law firm to make reasonable efforts to ~~establish internal policies and procedures designed to provide reasonable assurance that~~ instruct nonlawyers in the firm will how to act in a way compatible with the Rules of Professional Conduct.” See 10/28/03 Draft 4, at **note 7**.

RRC Action: At 5/8/2004 meeting, the RRC rejected a motion to adopt the foregoing changes to Discussion ¶. [2] by a vote of 2 for, 6 against and 1 abstain. Effect of vote was to keep the ABA language.

12. Comment 1 to MR 5.1, which rule addresses the “responsibilities of partners, managers, and supervisory lawyers,” provides:

“Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership and, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in the a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) [which refers to “A lawyer having direct supervisory authority over another lawyer”] applies to lawyers who have supervisory authority over the work of other lawyers in a firm.”

Issue: Will the Commission want to adopt a rule analogous to MR 5.1, and thus keep this cross-reference? Compare Cal. Rule 3-110, Discussion ¶. 1. See also 4/22/04 Ruvolo E-mail re 1-310X [transmitted by Lauren McCurdy on 4/26/04] in which author discusses the hierarchical responsibilities in rules 5.1 and 5.2 as a basis for regulating improper billing practices within a law firm.

Note: At the 5/8/2004 meeting, the drafters were asked to flag this issue for consideration when the RRC addresses MR 5.1.

13. **Note:** Paragraph [2a], drafted after the 10/23/03 meeting to address the situation when a firm has no managing partner, was redacted by consensus of the RRC. See note 5, above. Paragraph

[2a] provided: “In the event that no lawyer in the firm has been designated as managing partner, then every partner in the firm is deemed to have comparable managerial authority and responsibilities within the meaning of this rule.” The effect of the foregoing language would have been to impose joint & several liability on all partners.

14. **Note:** A suggestion has been made to remove reference to “practice law,” as that phrase does not appear in the rule, but it does appear in the definition of “Involuntarily inactive member” in section (i)(2) of the rule. It also appears in several other places in the rules, e.g., 1-300(B) (rule 5.5, below); 1-500(A) & Discussion; 1-600(A); 2-400(A)(1).

15. **Note:** The first Discussion paragraph to current rule 1-311 has been redacted. The discussion of “activities that constitute the practice of law” has been substantially expanded in Discussion ¶¶. [2] – [4] of proposed rule 5.5, *below*.

16. Note that “this rule” has been changed to “rule 5.3” to conform it to the format style of the Cal. RPC’s.

17. This rule is already under consideration as proposed rule 1-310X. The notes for this rule are probably better left for that discussion, and have been forwarded to the principal drafter of that rule, Mark Tuft.

18. It has been suggested (JS-102303) that paragraph (c) tracks our rule 3-310(F), which addresses conflicts when a third-party payor is involved and that we may not want to repeat ourselves. We can probably keep paragraph (c) here for now and defer deciding where it belongs until we address 3-310. One possibility is to keep the third party payor rule with conflicts and include in the Discussion for this rule something like:

“As to the effect on independence of judgment of a third person who recommends, employs or pays the lawyer to render legal services for another, see rule [3-310(F)].”

Note that the comment [2] to this already contains a cross-reference to MR 1.8(f), the Model Rules’ equivalent of 3-310(F).

19. A suggestion has been made [JS - 102303] to delete "association" and substitute "or other entity".

20. A concern about some of the language of (d)(1) has been raised:

“You refer to the fiduciary representative of the "estate of a lawyer" holding stock or an interest of the lawyer for a reasonable time during administration. However, probates often are not swift. They may last unreasonable lengths of time. Working out repurchases of interests and the tax consequences of them often cannot be done quickly. In addition, the wording suggests by negative inference that a lawyer may not donate his or her shares in a professional corporation (or other interests in a law firm) to an inter vivos trust for tax planning or probate avoidance purposes. Do we intend to prohibit this common estate planning practice? If so, we will be cutting lawyers out of major estate planning and estate

tax minimization opportunities. It seems to me that, if the donor lawyer is the trustee of his or her own inter vivos trust, the purpose of professional independence is not impaired. Since a marital community may own an interest in the lawyer's participation in a law practice, the trust should also not be improper if the lawyer's spouse is also a co-trustee. On the other hand, a non-lawyer fiduciary ought not to have a voice in management of the firm, but that issue is not discussed in the draft rule. I think the rule should permit common estate planning techniques but forbid intrusion of a non-lawyer fiduciary into the attorney-client relationship.” [JS - 102303]

KEM: If the Commission were to adopt (d)(1), then I think the concerns expressed can be addressed in the Discussion section. I don't think that the language of (d)(1) needs to be changed; it does, after all, expressly limit the fiduciary's interest to a “reasonable time.”

21. See note 14, above.

22. **Drafters' Note:** California and the pre-2002 ABA language are virtually identical. We have reversed the order of presentation and have a very few nonsubstantive word differences.

23. **Drafters' Note:** At this point, we have added the new Model Rule 5.5, adopted in August 2002, to this document for informational purposes only.

Please note, however, that in a future draft we will need to address the effect of the recently adopted Rules of Court 964-967 concerning multijurisdictional practice in California.

Some Questions To Consider re the California MJP rules of court:

1. Should the rule proper restate the rules of court?
2. If not, should the Discussion restate the rules of court?
3. If not, should the Discussion include a cross-reference to the rules of court?
4. If there is a cross-reference to the rules of court, should there be an explanation of the rules or simply a reference?

24. **Bluestein v. State Bar – out-of-state lawyer**

[Westlaw] Actions which include introducing unlicensed person to clients at law office, informing clients that the unlicensed person is an attorney in another state and has practiced law in Europe, and subsequently allowing the unlicensed person to consult with clients without any supervision by a licensed attorney would constitute aiding and abetting the unlicensed person to practice law whether or not the unlicensed person in fact does advise client in California regarding foreign law and notwithstanding contention that unlicensed person would be doing nothing but assisting clients in obtaining counsel in a foreign country and that such referral of clients to foreign counsel is constitutionally protected speech.

25. **Birbrower – out-of-state lawyers**

[Westlaw - Birbrower] Term “practice law,” as used in statute restricting practice to persons who are members of state bar, means doing and performing services in court of

justice in any matter depending therein throughout its various stages and in conformity with adopted rules of procedure, and includes legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in course of litigation

[Westlaw - Birbrower] Term “practice law in California,” as used in statute restricting practice to persons who are members of state bar, entails sufficient contact with California client to render nature of legal service a clear legal representation, and primary inquiry is whether unlicensed lawyer engaged in sufficient activities in state, or created continuing relationship with California client that included legal duties and obligations.

People v. Merchants’ Protective Corp. – Corporation practicing law/offering legal services

[Westlaw] Where a corporation charged a yearly membership fee for dispensing legal advice and services of the sort usually furnished by attorneys to their clients, and part of this membership fee was paid to attorneys for rendering services as agents and representatives of the corporation, the corporation was engaged in the practice of law, in view of Const. art. 6, § 22, and Code Civ.Proc. § 171, § 281 (repealed. See Business and Professions Code, § 6127), and § 1209, subd. 13.

[Citing *Eley v. Miller*, 7 Ind. App. 529, 34 N. E. 836] “As the term is generally understood, the practice of the law is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court.”

Baron v. City of Los Angeles – In-state non-lawyers “practicing law”/lobbying

[Westlaw] Where city ordinance requiring registration of local lobbyists defined “municipal legislation” so broadly that ordinance applied to virtually all activities of attorneys representing clients before any local administrative agencies, including activities unrelated to lobbying as traditionally defined, ordinance was invalid insofar as conflicting with provisions of State Bar Act regulating “practice of law,” i. e., performing services in representative capacity in manner which would constitute unauthorized practice of law if performed by layman.

State Bar Act preempts field of regulation of attorneys only insofar as they are “practicing law” under the Act, i. e., performing services in representative capacity in manner which would constitute unauthorized practice of law if performed by layman.

26. People v. Merchants’ Protective Corp. – Corporation practicing law/offering legal services

Note that case involved a corporation, other than a law corporation, providing legal services to third parties. [Citing *Eley v. Miller*, 7 Ind. App. 529, 34 N. E. 836.]

27. Bluestein v. State Bar – out-of-state lawyer

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[Westlaw] Where a corporation charged a yearly membership fee for dispensing legal advice and services of the sort usually furnished by attorneys to their clients, and part of this membership fee was paid to attorneys for rendering services as agents and representatives of the corporation, the corporation was engaged in the practice of law, in view of Const. art. 6, § 22, and Code Civ.Proc. § 171, § 281 (repealed. See Business and Professions Code, § 6127), and § 1209, subd. 13.

[Citing *Eley v. Miller*, 7 Ind. App. 529, 34 N. E. 836] “As the term is generally understood, the practice of the law is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity

to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court.”

30. **Gamet v. Blanchard – California corporation representing itself**

[footnote 5] Until this court advised appellants the corporation’s appeal would be dismissed because it had to appear through an attorney, no one advised the corporation it could not represent itself. In California a corporation may not represent itself, except in a small claims proceeding. This prohibition stems from the notion a corporate representative who would likely appear on behalf of the corporation would be engaged in the unlicensed practice of law. (Merco Construction Engineers, Inc. v. Municipal Court (1978) 21 Cal.3d 724, 147 Cal.Rptr. 631, 581 P.2d 636.) The ban on corporate self-representation does not prevent a court from granting a motion to withdraw as attorney of record, even if it leaves the corporation without representation. Such an order puts pressure on the corporation to obtain new counsel, or risk forfeiting important rights through nonrepresentation. (Ferruzzo v. Superior Court (1980) 104 Cal.App.3d 501, 504, 163 Cal.Rptr. 573.) It is the duty of the trial judge to advise the representative of the corporation of the necessity to be represented by an attorney. (Van Gundy v. Camelot Resorts, Inc. (1983) 152 Cal.App.3d Supp. 29, 31, 199 Cal.Rptr. 771.) Yet every opportunity to so advise was missed by the court in this case. As already mentioned, the rule of court requiring such notice was not followed, the January 23, 1996 order relieving counsel implied the corporation could represent itself, and the letter sent by the judge to Gamet that same day did not mention the corporation.

Merco Const. Engineers, Inc. v. Municipal Court - California corporation representing itself

“Practice of law” is doing and performing services in court of justice, in any matter depending therein through its various stages.

[Westlaw: Separation of Powers Issue!] Code of Civil Procedure section permitting corporations to appear as parties in proceedings in justice courts through directors, officers, or employees, whether or not such natural persons are attorneys constitutes legislative attempt to permit persons judiciary has deemed not qualified for practice of law to engage in limited practice of law, and as such offends separation of powers clause of Constitution and is of no force and effect.

31. **People ex rel. Dept. of Pub. Works v. Malone – Power of Attorney**

[Westlaw] Power of attorney does not permit agent to act as attorney at law. One condemnee, not an attorney at law, could not by virtue of special power of attorney executed by second condemnee participate in litigation on behalf of second condemnee and stipulate to judgment, what first condemnee purported to do for the second in place of an attorney was a nullity and judgment entered could not be upheld as to second

condemnee

Drake v. Superior Court (Clements) – Power of Attorney Act

[Westlaw] Attorney in fact could not practice law on behalf of pro per litigants, despite language in Uniform Statutory Power of Attorney Act authorizing attorney in fact to assert and prosecute before court or administrative agency a claim or cause of action for principals, to bring action to determine adverse claims, intervene in litigation and act as amicus curiae, and to appear for principals in connection with prosecution, settlement or defense of claim or litigation. West's Ann.Cal.Civ.Code § 2494.

[Westlaw] Nothing in Uniform Statutory Power of Attorney Act changes rule that attorney in fact may not act as attorney at law; authority of attorneys in fact under Act is subject to conditions of fact and law that exist outside of Act, and one such law is State Bar Act's prohibition against practice of law by nonlawyers. West's Ann.Cal.Civ.Code § 2494; West's Ann.Cal.Bus. & Prof.Code §§ 6125, 6126.

[Westlaw] Clerical functions such as delivering and filing pleadings with clerk are not included as practice of law for principal that attorney in fact would be precluded from doing. West's Ann.Cal.Civ.Code § 2494; West's Ann.Cal.Bus. & Prof.Code §§ 6125, 6126.

32. It was suggested that the opening clause “Lawyer not licensed to practice law in California” be changed to “Lawyer licensed outside of California.” Change not made because lawyer licensed outside of California can also be licensed in California. However, to shorten clause, we could delete phrase “to practice law.”

33. Ex parte McCue – out-of-state lawyer (also licensed in California federal courts).

Court at 68, 293 P. at 52: “His appearance before the officer before whom a deposition was being taken at the request of the attorney of record is a practice not to be commended. This proceeding, even though held without the court, was in fact a proceeding in court. Applicant was not within his rights in appearing at said hearing, and the fact that he was acting without compensation does not furnish any justification for his actions. He had no consent from the court to appear at said hearing, and he was clearly violating the ethics of his profession as well as the laws of his adopted state by acting as an attorney in said matter without a license. However, we do not consider this conduct on his part as in any way involving his moral character, or that it is sufficient in itself to deprive him of his right to a license to practice law in this state.”

34. Z.A. v. San Bruno Park School Dist. – Out-of-state lawyer

[Westlaw] Under California law, clients of attorney admitted to local federal bar but not California bar could not recover attorney fees under IDEA for prevailing in state administrative proceeding concerning client's special education placement. Individuals

with Disabilities Education Act.

35. **Gentis v. Safeguard Business Systems – Out-of-state lawyer**

Court at 1308, 71 Cal.Rptr.2d at 130: “Defendants’ petition for rehearing or for modification of the opinion is denied. The attorney who filed the petition on defendants’ behalf is not licensed to practice law in this state. Nor did that attorney request permission to appear as counsel pro hac vice in connection with the appeal or this rehearing petition. (Cal. Rules of Court, rule 983.) An attorney who is not an active member of the California State Bar, and who has not been granted permission to appear in a particular matter, may not represent a party in this state’s courts. Bus. & Prof. Code, § 6125; *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 127-135, 70 Cal.Rptr.2d 304.”

36. **People v. Sipper (1943) 61 Cal.App.2d Supp. 844, 846-847, 142 P.2d 960, 962 (overruled on other grounds in Murguia v. Mun.Ct. (1975) 15 Cal.3d 286, 301, 124 Cal.Rptr. 204, 214, fn. 11) (Advice re kind of legal document to execute to secure loan on real estate) – Non-lawyer**

People v. Landlords Professional Services (1989) 215 Cal.App.3d 1599, 1609, 264 Cal.Rptr. 548, 553 (Eviction assistance not limited to clerical services or provision of manual) – Non-lawyer

37. **Agran v. Shapiro (1954) 127 Cal.App.2d Supp. 807, 818-819, 273 P.2d 619, 626 (Accountant in tax matter) – Non-lawyer**

From the case (at 813-814): “A different and more serious question arises, however, with respect to the services rendered by the plaintiff in preparing the applications for a carry back adjustment and refund of taxes paid for the previous two years, and the preparation of the 1949 return wherein a deduction was claimed for a portion of the Pritchard loss, as well as his subsequent services in resisting the additional assessment proposed by the Treasury Department upon the ground that the Pritchard loss did not constitute a ‘net operating loss’ within the meaning of the ‘carry back’ provisions of the statute. At this stage no question of accounting was involved. Neither the fact that the loss had been sustained nor the manner in which it arose was questioned. The only question was whether, under the admitted facts, the loss was one which could be ‘carried back,’ the answer to which depended upon whether or not it was a loss ‘attributable to the operation of a trade or business regularly carried on by the taxpayer’ within the meaning of that phrase as used in the Internal Revenue Code, section 122(d)(5), 26 U.S.C.A. § 122(d)(5). We see no escape from the conclusion that under the circumstances this question was purely one of law.”

38. **People v. Merchants’ Protective Corp. (1922) 189 Cal. 531, 535, 209 P 363, 365 – non-lawyer**

Smallberg v. State Bar (1931) 212 Cal. 113, 119-120, 297 P 916, 919 (assisting in the UPL; ambulance chaser; the runner drafted the pleadings without oversight by the lawyer) – non-lawyer

Geibel v. State Bar (1938) 11 Cal.2d 412, 422-423, 79 P.2d 1073 (assisting in UPL. Apparently, non-lawyers drafted the documents/pleadings at issue) – non-lawyer

39. Morgan v. State Bar (1990) 51 Cal.3d 598, 797 P.2d 1186, 274 Cal.Rptr. 8.

[Westlaw] Engaging in negotiations with opposing counsel concerning settlement of divorce action, and agreeing that case should be continued until later date, constitutes “practice of law,” for purposes of determining whether attorney has engaged in practice of law while under suspension, even though negotiation takes place in hallway outside of courtroom rather than before judge.

KEM: Note that in Morgan, the court applied the above-quoted language to conclude that the fact the suspended lawyer was not in court when the stipulation he negotiated was entered did not matter. However, need to distinguish cases from other states that have suggested if lawyer provides legal advice on another state’s law, he or she is not UPL, so long as the advice is rendered within the state in which the lawyer is licensed.

40. Abar v. Rogers – Husband not allowed to represent wife

[Westlaw] Husband, who was not licensed to practice law in state, should not have been permitted to represent his wife as a plaintiff in instant action and, hence, to practice law on her behalf.

Court stated, at 865, 177 Cal.Rptr. at 656: “While any person may represent himself, and his own interests, at law and in legal proceedings: “No person shall practice law (for another) in this State unless he is an active member of the state bar.” (Bus. & Prof.Code, s 6125.) A violation of this statute is a criminal act. (Id., s 6126.) Nor is Abar who is (as is Elizabeth) a plaintiff of the instant action aided by Code of Civil Procedure section 371, which provides: “If a husband and wife are sued together, each may defend for his or her own right, but if one spouse neglects to defend, the other spouse may defend for that spouse’s right also.” Here Abar and Elizabeth are the plaintiff suitors.”

41. “If a husband and wife are sued together, each may defend for his or her own right, but if one spouse neglects to defend, the other spouse may defend for that spouse’s right also.”

42. **Question:** It has been suggested [JS - 10/23/03] that all non-lawyers be allowed to appear at an administrative agency hearing unless otherwise prohibited by the rules of the administrative agency. Does that mean that even disbarred, suspended, etc. lawyers (who are, in a sense, “non-lawyers”) should also be allowed? That would necessitate amending rule 1-311(A)(2) [inserted as rule 5.3(d)(2), above.] Such a result would not be accomplished by so stating in this rule.

43. **Rule of Court 988(d)** [Authority to Practice Law] Subject to all applicable rules, regulations, and statutes, a Registered Foreign Legal Consultant may render legal services in California, except that he or she may not:

(1) Appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this state or prepare pleadings or any other papers or issue subpoenas in any action or proceeding brought in any court or before any judicial officer;

(2) Prepare any deed, mortgage, assignment, discharge, lease, or any other instrument affecting title to real estate located in the United States;

(3) Prepare any will or trust instrument affecting the disposition on death of any property located in the United States and owned by a resident or any instrument relating to the administration of a decedent's estate in the United States;

(4) Prepare any instrument in respect of the marital relations, rights or duties of a resident of the United States, or the custody or care of the children of a resident; or

(5) Otherwise render professional legal advice on the law of the State of California, any other state of the United States, the District of Columbia, the United States, or of any jurisdiction other than the jurisdiction(s) named in satisfying the requirements of subdivision (c) of this rule, whether rendered incident to preparation of legal instruments or otherwise.

44. **Court at 1608, 264 Cal.Rptr. at 553:**

“[S]uch services do not amount to the practice of law as long as the service offered by LPS was merely clerical, i.e., the service did not engage in the practice of law if it made forms available for the client's use, filled the forms in at the specific direction of the client and filed and served those forms as directed by the client. Likewise, merely giving a client a manual, even a detailed one containing specific advice, for the preparation of an unlawful detainer action and the legal incidents of an eviction would not be the practice of law if the service did not personally advise the client with regard to his specific case.”

Court at 1609, 264 Cal.Rptr. at 554:

“LPS argues that what it describes as the “larger sense” definition of the practice of law, i.e., the giving of legal advice, is not a viable definition since it potentially applies, for example, to friends who give opinions or advice about each other's legal problems. While it is true the inherent and necessarily general nature of any definition of legal practice may allow the formulation of hypothetical situations that render the definition unworkable, we need not be concerned with such a reductio ad absurdum argument in this case. Our research has found no case in which one friend was either enjoined from giving legal

advice to a friend or prosecuted for the giving of such advice. Moreover, the hypothetical situation is not before us. As we have noted any definition of legal practice is, given the complexity and variability of the subject, incapable of universal application and can provide only a general guide to whether a particular act or activity is the practice of law. To restrict or limit the test in the interest of specificity would also limit its applicability to situations in which the public requires protection. Finally, we do not consider the present case a close one which strains the test or pushes it to an unacceptable application.”

45. **Sipper court stated, 61 Cal. App.2d at 846-47, 142 P.2d at 962:**

“If defendant had only been called upon to perform and had only undertaken to perform the clerical service of filling in the blanks on a particular form in accordance with information furnished him by the parties, or had merely acted as a scrivener to record the stated agreement of the parties to the transaction, he would not have been guilty of practicing law without a license. *Eley v. Miller*, 1893, 7 Ind.App. 529, 535, 34 N.E. 836, 837; *State ex rel. Wright v. Barlow*, 1936, 131 Neb. 294, 268 N.W. 95; *In re Matthews*, 1938, 58 Idaho 772, 79 P.2d 535, 537; *Gustafson v. V. C. Taylor & Sons*, 1941, 138 Ohio St. 392, 35 N.E.2d 435. But the record supports the conclusion that he went further--that he determined for the parties the kind of a legal document they should execute in order to effectuate their purpose. This constituted the practice of law.”

46. *But cf. Brockey v. Moore* (3d Dist. 2/20/2003) 107 Cal.App.4th 86, 131 Cal.Rptr.2d 746, in which court held that business exceeded authority granted under the statute by, inter alia, providing legal advice on which forms to file.

47. **KEM 10/6/03 Note:** Although MR 6.3 is entitled “Membership in Legal Services Organizations,” it is directed at a different issue from Cal. Rule 1-600. 2. MR 6.3 is concerned with a lawyer being an officer or director of a legal services organization, e.g., the ACLU, and the conflicts which may arise when the organization represents persons with interests adverse to the lawyer's clients. 3. Rule 1-600, on the other hand, appears to be primarily concerned with a lawyer accepting referrals from lawyer referral services that are operated by non-lawyers.

48. Per the vote at the 9/5/2003 Commission meeting, only alternative #1, the rules in the Model Rule format, have been included. Note that ABA MR 5.1 (“Responsibilities of Partners, Managers, and Supervisory Lawyers”) and MR 5.2 (“Responsibilities of a Subordinate Lawyer”) from the 5 series of the Model Rules are not included in this series of rules related to the “practice of law”.

49. **Issue:** A concern was raised at the 10/23/03 meeting about this rule making lawyers responsible for independent contractors (e.g., a biologist retained to draft an environmental impact statement who kills off an endangered species). Another member noted, however, that the rule cannot just be limited to employees; it should also cover “outsourcing” of administrative functions, etc. The 11/28/03 draft posed the question whether the Discussion should make specific reference to outsourcing. No consensus was reached about this issue at the 5/8/2004 meeting. The concern focused on the phrase “associated with.” Some possibilities were

suggested: (1) Limit discipline to those situations where a lawyer has retained or employed someone in one of the “regular assistance roles employed in the provision of the member’s services as a lawyer”; (2) substitute the phrase “supervised by” for “associated with” as the rule is narrower than dealing with experts; (3) leave the concern with outsourcing to malpractice; no further change need be made.

As to point (1), that concept is already covered in Discussion ¶. [1], below (“act for the lawyer in rendition of the lawyer’s professional services.”) As to point (2), using the language “supervised by” might sufficiently narrow the rule to assuage some of the concerns raised by RRC member over imposing broad liability for the actions of non-lawyers. On the other hand, it ignores the concerns other members have expressed over outsourcing. Consider also the following excerpt, from the 8/24-26/1979 Minutes of the Kutak Commission, discussing proposed rule 7.2 [*now rule 5.1, re supervising lawyers*]:

“The group turned its attention to a new section: “Responsibilities of a Supervisory Lawyer” (7.2). As a preliminary comment, it was noted that there is an emphasis on “supervision.” That is, the rule stated is not an automatic application of *respondeat superior* reasoning, but aims at the actual lawyer directing and controlling a subordinate’s conduct. The lawyer whom this section addresses has specific, effective responsibility or real control over the professional conduct of another lawyer in a given situation. Authority and responsibility, it was noted, are often matters of proximity and degree. The rule requires analysis of these factors in its application.”

Although the foregoing discussion related to eventual MR 5.1 and supervisory responsibilities over *lawyers*, it is instructive about the general approach the ABA took over supervision.

Drafters’ Decision: The drafters decided to leave the ABA language as is, relying on point (3), above. The rules cannot cover every eventuality and perhaps the outsourcing problem is best dealt in the realm of malpractice.

50. ~~Even if the Commission decides to retain the “member” terminology, this paragraph is probably one of the places where~~**Note: No consensus was reached at the 5/8/2004 meeting as to whether the term “lawyer” is more appropriate in this rule, the discussion better left for the rule 1-100 debate.**

Issue: Should “member” or “lawyer” be used here?

51. ~~At the 10/23/03 meeting, there were comments that the phrase~~**Note: At 5/8/2004 Meeting, by consensus RRC decided to keep “comparable.” A suggestion had been made at the 10/23/2003 meeting that the term “comparable managerial authority” was confusing. The Reporter’s Explanation of Changes for MR 5.3 states as follows:**

~~“Paragraphs (a) and (c)(2): Modify to apply to lawyers with managerial authority comparable to that of partner~~

~~As with Rule 5.1, this change was made to clarify in the Rule text that paragraph (a) applies to managing lawyers in corporate and government legal departments~~

and legal service organizations, as well as to partners in private law firms. No change in substance is intended.”

One way to avoid the confusion would be to delete the word “comparable” and change the word “firm” to office. Then we are simply referring to whoever in the law office has management authority. Alternatively, keep “firm,” but add the “or office,” so the rule reads:

“(a) _____ a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or law office shall make reasonable efforts ...”See 10/28/03 Draft 4 of rule, at note 4.

52. **Note:** At 5/8/2004 Meeting, by consensus the RRC rejected the concept of imposing joint & several liability on all partners if a firm does not have a supervisory/managing partner. Discussion ¶. [2a] was also deleted. See 10/28/03 Draft 4, at note 5.

53. **Joint & Several Liability?** ~~It was suggested at the 10/23/03 meeting that either the Rule or the Discussion should make explicit that if a firm does not have a supervisory/managing lawyer, then if something goes wrong, all the partners are jointly & severally liable. See Comment [2a], below.~~**Issue:** Should the phrase “is compatible with the professional obligations of the lawyer” be changed to conform with the language in Model Rule 5.1 (a) and (b), concerning the responsibilities of managing lawyers for conduct of subordinate *lawyers* and partners, which use the phrase “conform[s] to the Rules of Professional Conduct.”

Research: KEM contacted Becky Stretch and Sue Campbell at the ABA, (see 5/12/2004 KEM E-mail to Campbell & Stretch, and Campbell 5/20/04 Reply), and requested information as to why the two rules use different language. Sue Campbell faxed KEM minutes from the Kutak Commission’s discussion of the rules at its 8/10/1979 and 8/24-26/1979 meetings. The research was inconclusive. Although there was mention made in the 8/24-26/1979 minutes that the rules 5.1 and 5.3 “might have to be distinguished along somewhat different axes,” there was no specific reference to the different language – “professional obligations of the lawyers” in 5.3 vs. “Rules of Professional Conduct” in 5.3 – used in the two rules. (A complete transcript of the minutes excerpt is provided with these materials.) However, Ms. Campbell also faxed a copy of the 8/10/1979 draft of rule 7.4 (now rule 5.3), which provided:

7.4 SUPERVISION OF NON-LAWYER ASSISTANTS

A lawyer shall use reasonable care to prevent non-lawyers employed or retained by the lawyer from engaging in conduct in the course of their work that would violate *the Rules of Professional Conduct if done by a lawyer.* [Emphasis added].

Comment:

Lawyers generally employ assistants in their practice, including secretaries, investigators, and para-professionals. Such assistance, whether employees or independent contractors, act for the lawyer in rendition of the lawyer’s professional services. The lawyer should use reasonable efforts to see that such persons *observe the professional obligations of the lawyer*, for example the duties to preserve client confidences, to be

candid with the court, and to deal fairly with other parties. [Emphasis added].

Drafters' Observations: The italicized language in rule 7.4 proper (“the Rules of Professional Conduct if done by a lawyer”) shows that originally, the Kutak Commission contemplated language similar to that used in current rule 5.1, modified to reflect that non-lawyers are not subject to discipline for violations of the rules of professional conduct. The Kutak Commission, however, ultimately rejected that language in favor of the italicized language in the comment, above.

The RRC could replace the current 5.3 language (“compatible with the professional obligations of the lawyer”) with the language used in the rule proper of the 1979 draft of rule 7.4. Similarly, the RRC could replace the current commentary with something more like the 1979 rule 7.4 comment, above. However, the 8/24-26/1979 minutes include the following, suggesting that adoption of the 1979 language might create more problems than solve:

“Most of the comments on 7.4, however, centered on the desirability of imposing a so-called “forbidden fruit” rule on the use of lawyers of material obtained by nonlawyers through methods which, if undertaken by attorneys, would be improper.

This suggestion was met with general disfavor on a number grounds. Several saw the door being opened to a new tactic in litigation, contributing to delay, cost and the whole panoply of undesirables the Commission has sought to avoid in formulating other rules. Others detected some professional arrogance in extending lawyerly concepts of candor and openness to such activities as investigation, where deception may be a standard of practice in its own right. Furthermore, the attempt to invade the law of evidence through the Rules of Professional Conduct was largely disapproved.

On the other side of the question, however, it was thought by some that at least attorneys should be dissuaded from associating with persons or entities known to systematically employ methods offensive to the Rules.”

Drafters' Recommendation: If the RRC wants to adopt the Chapter 5 series of the ABA Model Rules, it should keep the current language of rule 5.3 (“professional obligations of the lawyer.”) Changing the language to the 1979 version might mislead lawyers who are trying to conform the management of a California office of a national firm to the rest of the country.

54. **Note:** This sentence was added to rule 1-311 by vote of the RRC at the 5/2/2003 Meeting. See 06/03/2003 Voogd Memo re rule 1-311.

55. **Note:** The change in paragraph (i)(2) was made to correct an inadvertent error in the present rule 1-311, which arose because paragraph (c) of the official statutes runs into paragraph (d)(1). See March 26 & 27, 2003 E-mail Exchange amongst Voogd, Difuntorum & Mohr.

56. **Deleted** “and are not subject to professional discipline” because the duty to supervise should not depend on whether the person being supervised is himself or herself subject to discipline. Even if the sentence is construed as discussing the type or degree of instruction and/or supervision rather than discussing the fact of a duty to instruct or supervise, the type or degree of instruction should not necessarily depend upon whether the subordinate may also be subject to discipline by

his or her own profession.

RRC Action: At 5/8/2004 meeting, RRC voted 8 to 1 in favor of deleting the quoted language, above, but not to include the explanatory language (“because the duty to supervise,” etc.) in a separate discussion paragraph, as requested by Jerry Sapiro in his 2/19/04 e-mail to the RRC list. However, drafters were instructed to include the explanatory language in the drafter’s comments.

57. **RRC Action:** At 5/8/2004 meeting, RRC voted unanimously, 9 to 0, to keep the word “assurance” in paragraph [2], notwithstanding a member’s concern that “assurance” might connote “strict liability.” See 10/28/03 Draft 4, at **note 6** & JS 2/19/04 e-mail.

Note also that during this discussion, a member suggested that we include the statement, “These rules are rules of reason” in rule 1-100.

58. **IssuNote:** A suggestion ~~has been~~was made [JS - 102303 E-mail] that we need not include language referring to “internal policies,” which implies *written* internal policies. Sentence could be deleted or rewritten as follows [See JS 021904 E-mail]:

“Paragraph (a) requires **lawyers** with managerial authority within a law firm to make reasonable efforts to ~~establish internal policies and procedures designed to provide reasonable assurance~~ assure that instruct nonlawyers in the firm will how to act in a way ~~compatible~~ compatiblely with the Rules of Professional Conduct.”

~~How else besides setting out policies can management assure compliance?~~ See 10/28/03 Draft 4, at note 7.

RRC Action: At 5/8/2004 meeting, the RRC rejected a motion to adopt the foregoing changes to Discussion ¶. [2] by a vote of 2 for, 6 against and 1 abstain. Effect of vote was to keep the ABA language.

59. Comment 1 to MR 5.1, which rule addresses the “responsibilities of partners, managers, and supervisory lawyers,” provides:

“Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership and, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in the a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) [which refers to “A lawyer having direct supervisory authority over another lawyer”] applies to lawyers who have supervisory authority over the work of other lawyers in a firm.”

Issue: Will the Commission want to adopt a rule analogous to MR 5.1, and thus keep this cross-reference? Compare Cal. Rule 3-110, Discussion ¶. 1. See also 4/22/04 Ruvolo E-mail re 1-310X

[transmitted by Lauren McCurdy on 4/26/04] in which author discusses the hierarchical responsibilities in rules 5.1 and 5.2 as a basis for regulating improper billing practices within a law firm.

Note: At the 5/8/2004 meeting, the drafters were asked to flag this issue for consideration when the RRC addresses MR 5.1.

60. **Note:** Paragraph [2a], drafted after the 10/23/03 meeting to address the situation when a firm has no managing partner, was redacted by consensus of the RRC. See note 5, above. Paragraph [2a] provided: “In the event that no lawyer in the firm has been designated as managing partner, then every partner in the firm is deemed to have comparable managerial authority and responsibilities within the meaning of this rule.” The effect of the foregoing language would have been to impose joint & several liability on all partners.

61. **Note:** A suggestion has been made to remove reference to “practice law,” as that phrase does not appear in the rule, but it does appear in the definition of “Involuntarily inactive member” in section (i)(2) of the rule. It also appears in several other places in the rules, e.g., 1-300(B) (rule 5.5, below); 1-500(A) & Discussion; 1-600(A); 2-400(A)(1).

62. **Note:** The first Discussion paragraph to current rule 1-311 has been redacted. The discussion of “activities that constitute the practice of law” has been substantially expanded in Discussion ¶¶. [2] – [4] of proposed rule 5.5, *below*.

63. Note that “this rule” has been changed to “rule 5.3” to conform it to the format style of the Cal. RPC’s.

64. This rule is already under consideration as proposed rule 1-310X. The notes for this rule are probably better left for that discussion, and have been forwarded to the principal drafter of that rule, Mark Tuft.

65. It has been suggested (JS-102303) that paragraph (c) tracks our rule 3-310(F), which addresses conflicts when a third-party payor is involved and that we may not want to repeat ourselves. We can probably keep paragraph (c) here for now and defer deciding where it belongs until we address 3-310. One possibility is to keep the third party payor rule with conflicts and include in the Discussion for this rule something like:

“As to the effect on independence of judgment of a third person who recommends, employs or pays the lawyer to render legal services for another, see rule [3-310(F)].”

Note that the comment [2] to this already contains a cross-reference to MR 1.8(f), the Model Rules’ equivalent of 3-310(F).

66. A suggestion has been made [JS - 102303] to delete "association" and substitute "or other entity".

67. A concern about some of the language of (d)(1) has been raised:

“You refer to the fiduciary representative of the "estate of a lawyer" holding stock or an interest of the lawyer for a reasonable time during administration. However, probates often are not swift. They may last unreasonable lengths of time. Working out repurchases of interests and the tax consequences of them often cannot be done quickly. In addition, the wording suggests by negative inference that a lawyer may not donate his or her shares in a professional corporation (or other interests in a law firm) to an inter vivos trust for tax planning or probate avoidance purposes. Do we intend to prohibit this common estate planning practice? If so, we will be cutting lawyers out of major estate planning and estate tax minimization opportunities. It seems to me that, if the donor lawyer is the trustee of his or her own inter vivos trust, the purpose of professional independence is not impaired. Since a marital community may own an interest in the lawyer's participation in a law practice, the trust should also not be improper if the lawyer's spouse is also a co-trustee. On the other hand, a non-lawyer fiduciary ought not to have a voice in management of the firm, but that issue is not discussed in the draft rule. I think the rule should permit common estate planning techniques but forbid intrusion of a non-lawyer fiduciary into the attorney-client relationship.” [JS - 102303]

KEM: If the Commission were to adopt (d)(1), then I think the concerns expressed can be addressed in the Discussion section. I don't think that the language of (d)(1) needs to be changed; it does, after all, expressly limit the fiduciary's interest to a “reasonable time.”

68. See [footnote 6](#) [note 14](#), above.

69. **Drafters' Note:** California and the pre-2002 ABA language are virtually identical. We have reversed the order of presentation and have a very few nonsubstantive word differences.

70. **Drafters' Note:** At this point, we have added the new Model Rule 5.5, adopted in August 2002, to this document for informational purposes only. =

Please note, however, that in a future draft we will need to address the effect of the recently adopted Rules of Court 964-967 concerning multijurisdictional practice in California.

Some Questions To Consider re the California MJP rules of court:

1. Should the rule proper restate the rules of court?

2. If not, should the Discussion restate the rules of court?

3. If not, should the Discussion include a cross-reference to the rules of court?

4. If there is a cross-reference to the rules of court, should there be an explanation of the rules or simply a reference?

71. **Bluestein v. State Bar – out-of-state lawyer**

[Westlaw] Actions which include introducing unlicensed person to clients at law office, informing clients that the unlicensed person is an attorney in another state and has practiced law in Europe, and subsequently allowing the unlicensed person to consult with clients without any supervision by a licensed attorney would constitute aiding and abetting

the unlicensed person to practice law whether or not the unlicensed person in fact does advise client in California regarding foreign law and notwithstanding contention that unlicensed person would be doing nothing but assisting clients in obtaining counsel in a foreign country and that such referral of clients to foreign counsel is constitutionally protected speech.

72. **Birbrower – out-of-state lawyers**

[Westlaw - Birbrower] Term “practice law,” as used in statute restricting practice to persons who are members of state bar, means doing and performing services in court of justice in any matter depending therein throughout its various stages and in conformity with adopted rules of procedure, and includes legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in course of litigation

[Westlaw - Birbrower] Term “practice law in California,” as used in statute restricting practice to persons who are members of state bar, entails sufficient contact with California client to render nature of legal service a clear legal representation, and primary inquiry is whether unlicensed lawyer engaged in sufficient activities in state, or created continuing relationship with California client that included legal duties and obligations.

People v. Merchants’ Protective Corp. – Corporation practicing law/offering legal services

[Westlaw] Where a corporation charged a yearly membership fee for dispensing legal advice and services of the sort usually furnished by attorneys to their clients, and part of this membership fee was paid to attorneys for rendering services as agents and representatives of the corporation, the corporation was engaged in the practice of law, in view of Const. art. 6, § 22, and Code Civ.Proc. § 171, § 281 (repealed. See Business and Professions Code, § 6127), and § 1209, subd. 13.

[Citing *Eley v. Miller*, 7 Ind. App. 529, 34 N. E. 836] “As the term is generally understood, the practice of the law is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court.”

Baron v. City of Los Angeles – In-state non-lawyers “practicing law”/lobbying

[Westlaw] Where city ordinance requiring registration of local lobbyists defined “municipal legislation” so broadly that ordinance applied to virtually all activities of attorneys representing clients before any local administrative agencies, including activities unrelated to lobbying as traditionally defined, ordinance was invalid insofar as conflicting with provisions of State Bar Act regulating “practice of law,” i. e., performing services in

representative capacity in manner which would constitute unauthorized practice of law if performed by layman.

State Bar Act preempts field of regulation of attorneys only insofar as they are “practicing law” under the Act, i. e., performing services in representative capacity in manner which would constitute unauthorized practice of law if performed by layman.

73. People v. Merchants’ Protective Corp. – Corporation practicing law/offering legal services

Note that case involved a corporation, other than a law corporation, providing legal services to third parties. [Citing *Eley v. Miller*, 7 Ind. App. 529, 34 N. E. 836.]

74. Bluestein v. State Bar – out-of-state lawyer

[Westlaw] Actions which include introducing unlicensed person to clients at law office, informing clients that the unlicensed person is an attorney in another state and has practiced law in Europe, and subsequently allowing the unlicensed person to consult with clients without any supervision by a licensed attorney would constitute aiding and abetting the unlicensed person to practice law whether or not the unlicensed person in fact does advise client in California regarding foreign law and notwithstanding contention that unlicensed person would be doing nothing but assisting clients in obtaining counsel in a foreign country and that such referral of clients to foreign counsel is constitutionally protected speech.

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77. **Gamet v. Blanchard – California corporation representing itself**

[footnote 5] Until this court advised appellants the corporation’s appeal would be dismissed because it had to appear through an attorney, no one advised the corporation it could not represent itself. In California a corporation may not represent itself, except in a small claims proceeding. This prohibition stems from the notion a corporate representative who would likely appear on behalf of the corporation would be engaged in the unlicensed practice of law. (*Merco Construction Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 147 Cal.Rptr. 631, 581 P.2d 636.) The ban on corporate self-representation does not prevent a court from granting a motion to withdraw as attorney of record, even if it leaves the corporation without representation. Such an order puts pressure on the corporation to obtain new counsel, or risk forfeiting important rights through nonrepresentation. (*Ferruzzo v. Superior Court* (1980) 104 Cal.App.3d 501, 504, 163 Cal.Rptr. 573.) It is the duty of the trial judge to advise the representative of the corporation of the necessity to be represented by an attorney. (*Van Gundy v. Camelot Resorts, Inc.* (1983) 152 Cal.App.3d Supp. 29, 31, 199 Cal.Rptr. 771.) Yet every opportunity to so advise was missed by the court in this case. As already mentioned, the rule of court requiring such notice was not followed, the January 23, 1996 order relieving counsel implied the corporation could represent itself, and the letter sent by the judge to Gamet that same day did not mention the corporation.

Merco Const. Engineers, Inc. v. Municipal Court - California corporation representing itself

“Practice of law” is doing and performing services in court of justice, in any matter depending therein through its various stages.

[**Westlaw: Separation of Powers Issue!**] Code of Civil Procedure section permitting corporations to appear as parties in proceedings in justice courts through directors, officers, or employees, whether or not such natural persons are attorneys constitutes

legislative attempt to permit persons judiciary has deemed not qualified for practice of law to engage in limited practice of law, and as such offends separation of powers clause of Constitution and is of no force and effect.

78. **People ex rel. Dept. of Pub. Works v. Malone – Power of Attorney**

[Westlaw] Power of attorney does not permit agent to act as attorney at law. One condemnee, not an attorney at law, could not by virtue of special power of attorney executed by second condemnee participate in litigation on behalf of second condemnee and stipulate to judgment, what first condemnee purported to do for the second in place of an attorney was a nullity and judgment entered could not be upheld as to second condemnee

Drake v. Superior Court (Clements) – Power of Attorney Act

[Westlaw] Attorney in fact could not practice law on behalf of pro per litigants, despite language in Uniform Statutory Power of Attorney Act authorizing attorney in fact to assert and prosecute before court or administrative agency a claim or cause of action for principals, to bring action to determine adverse claims, intervene in litigation and act as amicus curiae, and to appear for principals in connection with prosecution, settlement or defense of claim or litigation. West’s Ann.Cal.Civ.Code § 2494.

[Westlaw] Nothing in Uniform Statutory Power of Attorney Act changes rule that attorney in fact may not act as attorney at law; authority of attorneys in fact under Act is subject to conditions of fact and law that exist outside of Act, and one such law is State Bar Act’s prohibition against practice of law by nonlawyers. West’s Ann.Cal.Civ.Code § 2494; West’s Ann.Cal.Bus. & Prof.Code §§ 6125, 6126.

[Westlaw] Clerical functions such as delivering and filing pleadings with clerk are not included as practice of law for principal that attorney in fact would be precluded from doing. West’s Ann.Cal.Civ.Code § 2494; West’s Ann.Cal.Bus. & Prof.Code §§ 6125, 6126.

79. It was suggested that the opening clause “Lawyer not licensed to practice law in California” be changed to “Lawyer licensed outside of California.” Change not made because lawyer licensed outside of California can also be licensed in California. However, to shorten clause, we could delete phrase “to practice law.”

80. **Ex parte McCue – out-of-state lawyer (also licensed in California federal courts).**

Court at 68, 293 P. at 52: “His appearance before the officer before whom a deposition was being taken at the request of the attorney of record is a practice not to be commended. This proceeding, even though held without the court, was in fact a proceeding in court. Applicant was not within his rights in appearing at said hearing, and the fact that he was acting without compensation does not furnish any justification for his

actions. He had no consent from the court to appear at said hearing, and he was clearly violating the ethics of his profession as well as the laws of his adopted state by acting as an attorney in said matter without a license. However, we do not consider this conduct on his part as in any way involving his moral character, or that it is sufficient in itself to deprive him of his right to a license to practice law in this state.”

81. Z.A. v. San Bruno Park School Dist. – Out-of-state lawyer

[Westlaw] Under California law, clients of attorney admitted to local federal bar but not California bar could not recover attorney fees under IDEA for prevailing in state administrative proceeding concerning client’s special education placement. Individuals with Disabilities Education Act.

82. Gentis v. Safeguard Business Systems – Out-of-state lawyer

Court at 1308, 71 Cal.Rptr.2d at 130: “Defendants’ petition for rehearing or for modification of the opinion is denied. The attorney who filed the petition on defendants’ behalf is not licensed to practice law in this state. Nor did that attorney request permission to appear as counsel pro hac vice in connection with the appeal or this rehearing petition. (Cal. Rules of Court, rule 983.) An attorney who is not an active member of the California State Bar, and who has not been granted permission to appear in a particular matter, may not represent a party in this state’s courts. Bus. & Prof. Code, § 6125; *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 127-135, 70 Cal.Rptr.2d 304.)”

83. People v. Sipper (1943) 61 Cal.App.2d Supp. 844, 846-847, 142 P.2d 960, 962 (overruled on other grounds in Murguia v. Mun.Ct. (1975) 15 Cal.3d 286, 301, 124 Cal.Rptr. 204, 214, fn. 11) (Advice re kind of legal document to execute to secure loan on real estate) – Non-lawyer

People v. Landlords Professional Services (1989) 215 Cal.App.3d 1599, 1609, 264 Cal.Rptr. 548, 553 (Eviction assistance not limited to clerical services or provision of manual) – Non-lawyer

84. Agran v. Shapiro (1954) 127 Cal.App.2d Supp. 807, 818-819, 273 P.2d 619, 626 (Accountant in tax matter) – Non-lawyer

From the case (at 813-814): “A different and more serious question arises, however, with respect to the services rendered by the plaintiff in preparing the applications for a carry back adjustment and refund of taxes paid for the previous two years, and the preparation of the 1949 return wherein a deduction was claimed for a portion of the Pritchard loss, as well as his subsequent services in resisting the additional assessment proposed by the Treasury Department upon the ground that the Pritchard loss did not constitute a ‘net operating loss’ within the meaning of the ‘carry back’ provisions of the statute. At this stage no question of accounting was involved. Neither the fact that the loss had been

sustained nor the manner in which it arose was questioned. The only question was whether, under the admitted facts, the loss was one which could be ‘carried back,’ the answer to which depended upon whether or not it was a loss ‘attributable to the operation of a trade or business regularly carried on by the taxpayer’ within the meaning of that phrase as used in the Internal Revenue Code, section 122(d)(5), 26 U.S.C.A. § 122(d)(5). We see no escape from the conclusion that under the circumstances this question was purely one of law.”

85. People v. Merchants’ Protective Corp. (1922) 189 Cal. 531, 535, 209 P 363, 365 – non-lawyer

Smallberg v. State Bar (1931) 212 Cal. 113, 119-120, 297 P 916, 919 (assisting in the UPL; ambulance chaser; the runner drafted the pleadings without oversight by the lawyer) – non-lawyer

Geibel v. State Bar (1938) 11 Cal.2d 412, 422-423, 79 P.2d 1073 (assisting in UPL. Apparently, non-lawyers drafted the documents/pleadings at issue) – non-lawyer

86. Morgan v. State Bar (1990) 51 Cal.3d 598, 797 P.2d 1186, 274 Cal.Rptr. 8.

[Westlaw] Engaging in negotiations with opposing counsel concerning settlement of divorce action, and agreeing that case should be continued until later date, constitutes “practice of law,” for purposes of determining whether attorney has engaged in practice of law while under suspension, even though negotiation takes place in hallway outside of courtroom rather than before judge.

KEM: Note that in Morgan, the court applied the above-quoted language to conclude that the fact the suspended lawyer was not in court when the stipulation he negotiated was entered did not matter. However, need to distinguish cases from other states that have suggested if lawyer provides legal advice on another state’s law, he or she is not UPL, so long as the advice is rendered within the state in which the lawyer is licensed.

87. Abar v. Rogers – Husband not allowed to represent wife

[Westlaw] Husband, who was not licensed to practice law in state, should not have been permitted to represent his wife as a plaintiff in instant action and, hence, to practice law on her behalf.

Court stated, at 865, 177 Cal.Rptr. at 656: “While any person may represent himself, and his own interests, at law and in legal proceedings: “No person shall practice law (for another) in this State unless he is an active member of the state bar.” (Bus. & Prof.Code, s 6125.) A violation of this statute is a criminal act. (Id., s 6126.) Nor is Abar who is (as is Elizabeth) a plaintiff of the instant action aided by Code of Civil Procedure section 371, which provides: “If a husband and wife are sued together, each may defend for his or her own right, but if one spouse neglects to defend, the other spouse may defend for that

spouse's right also." Here Abar and Elizabeth are the plaintiff suitors."

88. "If a husband and wife are sued together, each may defend for his or her own right, but if one spouse neglects to defend, the other spouse may defend for that spouse's right also."

89. **Question:** It has been suggested [JS - 10/23/03] that all non-lawyers be allowed to appear at an administrative agency hearing unless otherwise prohibited by the rules of the administrative agency. Does that mean that even disbarred, suspended, etc. lawyers (who are, in a sense, "non-lawyers") should also be allowed? That would necessitate amending rule 1-311(A)(2) [inserted as rule 5.3(d)(2), above.] Such a result would not be accomplished by so stating in this rule.

90. **Rule of Court 988(d)** [Authority to Practice Law] Subject to all applicable rules, regulations, and statutes, a Registered Foreign Legal Consultant may render legal services in California, except that he or she may not:

(1) Appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this state or prepare pleadings or any other papers or issue subpoenas in any action or proceeding brought in any court or before any judicial officer;

(2) Prepare any deed, mortgage, assignment, discharge, lease, or any other instrument affecting title to real estate located in the United States;

(3) Prepare any will or trust instrument affecting the disposition on death of any property located in the United States and owned by a resident or any instrument relating to the administration of a decedent's estate in the United States;

(4) Prepare any instrument in respect of the marital relations, rights or duties of a resident of the United States, or the custody or care of the children of a resident; or

(5) Otherwise render professional legal advice on the law of the State of California, any other state of the United States, the District of Columbia, the United States, or of any jurisdiction other than the jurisdiction(s) named in satisfying the requirements of subdivision (c) of this rule, whether rendered incident to preparation of legal instruments or otherwise.

91. **Court at 1608, 264 Cal.Rptr. at 553:**

"[S]uch services do not amount to the practice of law as long as the service offered by LPS was merely clerical, i.e., the service did not engage in the practice of law if it made forms available for the client's use, filled the forms in at the specific direction of the client and filed and served those forms as directed by the client. Likewise, merely giving a client a manual, even a detailed one containing specific advice, for the preparation of an unlawful detainer action and the legal incidents of an eviction would not be the practice of law if the service did not personally advise the client with regard to his specific case."

Court at 1609, 264 Cal.Rptr. at 554:

“LPS argues that what it describes as the “larger sense” definition of the practice of law, i.e., the giving of legal advice, is not a viable definition since it potentially applies, for example, to friends who give opinions or advice about each other’s legal problems. While it is true the inherent and necessarily general nature of any definition of legal practice may allow the formulation of hypothetical situations that render the definition unworkable, we need not be concerned with such a reductio ad absurdum argument in this case. Our research has found no case in which one friend was either enjoined from giving legal advice to a friend or prosecuted for the giving of such advice. Moreover, the hypothetical situation is not before us. As we have noted any definition of legal practice is, given the complexity and variability of the subject, incapable of universal application and can provide only a general guide to whether a particular act or activity is the practice of law. To restrict or limit the test in the interest of specificity would also limit its applicability to situations in which the public requires protection. Finally, we do not consider the present case a close one which strains the test or pushes it to an unacceptable application.”

92. Sipper court stated, 61 Cal. App.2d at846-47, 142 P.2d at 962:

“If defendant had only been called upon to perform and had only undertaken to perform the clerical service of filling in the blanks on a particular form in accordance with information furnished him by the parties, or had merely acted as a scrivener to record the stated agreement of the parties to the transaction, he would not have been guilty of practicing law without a license. Eley v. Miller, 1893, 7 Ind.App. 529, 535, 34 N.E. 836, 837; State ex rel. Wright v. Barlow, 1936, 131 Neb. 294, 268 N.W. 95; In re Matthews, 1938, 58 Idaho 772, 79 P.2d 535, 537; Gustafson v. V. C. Taylor & Sons, 1941, 138 Ohio St. 392, 35 N.E.2d 435. But the record supports the conclusion that he went further--that he determined for the parties the kind of a legal document they should execute in order to effectuate their purpose. This constituted the practice of law.”

93. *But cf. Brockey v. Moore* (3d Dist. 2/20/2003) 107 Cal.App.4th 86, 131 Cal.Rptr.2d 746, in which court held that business exceeded authority granted under the statute by, inter alia, providing legal advice on which forms to file.

94. **KEM 10/6/03 Note:** Although MR 6.3 is entitled “Membership in Legal Services Organizations,” it is directed at a different issue from Cal. Rule 1-600. 2. MR 6.3 is concerned with a lawyer being an officer or director of a legal services organization, e.g., the ACLU, and the conflicts which may arise when the organization represents persons with interests adverse to the lawyer's clients. 3. Rule 1-600, on the other hand, appears to be primarily concerned with a lawyer accepting referrals from lawyer referral services that are operated by non-lawyers.