

Proposed Rule 1.0.1 [1-100]

“Terminology”

(Draft #6.1, 04/24/10)

Summary: Proposed Rule 1.0.1, which is based on Model Rule 1.0 (“Terminology”), defines 15 terms used in other Rules in order to place these definitions in a single location for ease of reference (it also cross-references one definition that is located in another Rule and one definition defined in California by statute). Eleven of these definitions exactly track or closely track the corresponding Model Rule definition; the remaining definitions differ from the Model Rule counterpart, as explained in the Comparison Chart.

Comparison with ABA Counterpart

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

Primary Factors Considered

- Existing California Law

Rule

RPC 3-310(A)

Statute

Evid. Code section 250

Case law

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

Michigan Rule 1.0.1(b) (definition of “person”).

- Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below)

Favor Rule as Recommended for Adoption 9

Opposed Rule as Recommended for Adoption 0

Abstain 1

Approved on Consent Calendar

Approved by Consensus

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See minority position re definition of “tribunal.”): Yes No

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

The Commission’s definitions of certain terms (i.e., “fraud,” “screened,” and “tribunal”) depart from the Model Rule counterpart definitions and the rules which use those terms will, as a result, be subject to different interpretations and may effectively constitute different standards of conduct notwithstanding the fact that the same terms are used in the respective California and ABA rules.

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.0.1* Terminology

April 2010

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 1.0.1 is based on Model Rule 1.0. For convenience of reference, this Rule is the repository for most of the defined terms used in other rules. It contains 15 separate definitions, including the incorporation of the Evidence Code definition of “writing”. It also contains a cross-reference to the definition found in another rule of the term “information protected by Business and Professions Code section 6068(e)”. The Commission recommends including this cross-reference because the term is particularly important since it is used in several other rules. The Commission believes this cross-reference will make it more easily available.

Minority. A minority of the Commission dissents from the Commission’s recommended departure from the Model Rule’s definition of tribunal. The minority takes the position that the Commission’s proposed definition is substantially narrower than in any other jurisdiction and will be a source of confusion for lawyers practicing in California. See full Minority Dissent, below.

Variations in other jurisdictions. There is a wide range of variation among the jurisdictions in their adoption of Model Rule 1.0. Although nearly every jurisdiction has adopted the Model Rule number (Alaska is an exception), many have revised, added, or deleted terms within the Rule. See “Selected State Variations,” below.

A Note on the Rule Number. Because the Commission has recommended and the Board of Governors has adopted Rule 1.0, which sets forth the purpose and scope of the Rules of Professional Conduct, the Commission recommends re-numbering the Terminology section as “Rule 1.0.1”.

* Proposed Rule 1.0.1, Draft #6.1 (4/24/10).

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.0.1 Terminology</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.</p>	<p>(a) "Belief" or "believes" denotes<u>means</u> that the person involved actually supposed<u>supposes</u> the fact in question to be true. A person's belief may be inferred from circumstances.</p>	<p>The Commission recommends changing "denotes" to "means" throughout the definitions in order to be more specific and definite. At least Maine has also made the same change in its Rules.</p> <p>The verb "supposes" has been substituted for "supposed" to conform its tense with "believes".</p>
<p>(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.</p>	<p>(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.</p>	<p>The phrase "confirmed in writing" is not used in the proposed Rules and therefore has been removed. The proposed Rules use either the Model Rule term "informed consent" [see paragraph (e), below] or California's higher standard of "informed written consent" [see paragraph (e-1), below].</p>
	<p>(b) [Reserved]</p>	<p>The Commission has decided to leave paragraph (b) as "[Reserved]" in an attempt to keep the Commission's proposed definitions as close as possible to the Model Rule numbering.</p>

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<p>(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.</p>	<p>(c) "Firm" or "law firm" denotes a lawyer or lawyers in <u>means</u> a law partnership; <u>a</u> professional <u>law</u> corporation; <u>a</u> sole proprietorship or other <u>an</u> association authorized to <u>engaged in the</u> practice <u>of</u> law; or lawyers employed in a legal services organization or <u>in</u> the legal department, <u>division or office</u> of a corporation, <u>of a government organization,</u> or other <u>of another</u> organization.</p>	<p>Paragraph (c) modifies the Model Rule definition in several non-substantive ways, including referring to governmental law offices (this is not stated in the Model Rule but is intended, as is shown by the Model Rule Comment). This change emphasizes the need to comply with the California principle that all lawyers are bound by the Rules of Professional Conduct, specifically including government lawyers. See <i>People ex rel. Deumkejian v. Brown</i> (1981) 29 Cal.3d 150). The substitution of "engage in" for "authorized to" is to assure that the requirements of the Rules apply to everyone acting as a law firm even if not authorized to do so [at least Maryland, Michigan, and South Carolina similarly have removed "authorized to"]. The remaining changes are for clarity.</p>
<p>(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.</p>	<p>(d) "Fraud" or "fraudulent" denotes <u>means</u> conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.</p>	<p>Paragraph (d) is nearly identical to the Model Rule definition but removes "substantive or procedural" because of difficulty with the concept that a procedural requirement can define fraud. These three words also have been removed in Alaska, Florida, North Dakota, Ohio and Tennessee, often with substantial additional changes. There are other substantive changes to the definition in the versions adopted in New York, North Carolina, South Carolina, Washington, and Wyoming.</p>
<p>(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.</p>	<p>(e) "Informed consent" denotes the agreement by <u>means</u> a person <u>person's agreement</u> to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the <u>reasonably foreseeable</u> material risks of, and reasonably available</p>	<p>The re-ordering of the first portion of this definition is for clarity. The same change has been made at least in Maine. The addition of "reasonably foreseeable" conforms the definition to California case law that a lawyer's disclosure only needs to include reasonably foreseeable consequences. See, e.g., <i>Sharp v. Next Entertainment, Inc.</i> (2008) 163 Cal. App. 4th 410, 429-31. There</p>

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	<p>alternatives to, the proposed course of conduct.</p>	<p>are substantive changes to the definition in Alaska, Maine Rule, Michigan Missouri; New York, North Carolina, Oregon, Penn., South Carolina, and Wyoming.</p>
	<p>(e-1) "Informed written consent" means that both the communication and consent required by paragraph (e) must be in writing.</p>	<p>Paragraph (e-1) has no counterpart in Model Rule 1.0. The Commission has added this definition of California's higher standard of written disclosure and written consent, a concept that is not found in the Model Rules. The use of Model Rule language is not intended to substantively change California's current rule 3-310(A) definition.</p>
	<p>(e-2) "Information protected by Business & Professions Code section 6068(e)" is defined in Rule 1.6, Comments [3] - [6].</p>	<p>Paragraph (e-3) has no counterpart in Model Rule 1.0. The threshold use of the term "information protected by Business & Professions Code section 6068(e)" is in the confidentiality rule, Rule 1.6, and the Commission proposes to keep the definition in that Rule. It has added this cross-reference merely to simplify locating the definition. New York and North Carolina similarly cross-reference their Rule 1.6 definitions. Oregon has changed its term to "information relating to the representation of a client", and Wyoming uses the Model Rule term, but both have placed their definitions in Rule 1.0.</p>
<p>(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.</p>	<p>(f) "Knowingly," "known," or "knows" denotesmeans actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.</p>	<p>Paragraph (f) is identical to the Model Rule definition except for the substitution of "means" for "denotes". See Explanation for paragraph (a).</p>

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<p>(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.</p>	<p>(g) "Partner" denotes<u>means</u> a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.</p>	<p>Paragraph (g) is identical to the Model Rule definition except for the substitution of "means" for "denotes". See Explanation for paragraph (a).</p>
	<p><u>(g-1) "Person" means a natural person or an organization.</u></p>	<p>Paragraph (g-1) has no counterpart in Model Rule 1.0. The Commission added the paragraph (g-1) definition in order to avoid any possibility that "person" might be read as referring only to natural persons. There are six other jurisdictions that have adopted definitions of "person"; the Commission's definition is based on the definition adopted in Michigan.</p>
<p>(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.</p>	<p>(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes<u>means</u> the conduct of a reasonably prudent and competent lawyer.</p>	<p>Paragraph (h) is identical to the Model Rule definition except for the substitution of "means" for "denotes". See Explanation for paragraph (a).</p>
<p>(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.</p>	<p>(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes<u>means</u> that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.</p>	<p>Paragraph (i) is identical to the Model Rule definition except for the substitution of "means" for "denotes". See Explanation for paragraph (a).</p>

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<p>(j) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.</p>	<p>(j) “Reasonably should know” when used in reference to a lawyer denotes<u>means</u> that a lawyer of reasonable prudence and competence would ascertain the matter in question.</p>	<p>Paragraph (j) is identical to the Model Rule definition except for the substitution of “means” for “denotes”. See Explanation for paragraph (a).</p>
<p>(k) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.</p>	<p>(k) “Screened” denotes<u>means</u> the isolation of a lawyer from any participation in a matter through, including the timely imposition of procedures within a <u>law</u> firm that are reasonably adequate under the circumstances <u>(i) to protect information that the isolated lawyer is obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and non-lawyer personnel communicating with the lawyer with respect to the matter.</u></p>	<p>Paragraph (k) is identical to the Model Rule definition but makes three changes. First, the substitution of “including” for “through” reflects the variability of what is needed to impose an effective screen, as is discussed in Comment [10], below. Second, the removal of “reasonably” is intended to avoid the suggestion that half-way measures will suffice. The imposition of a non-consensual screen by a law firm is an extremely serious matter. Finally, the Commission recommends added the concept in subpart (ii), which fills a gap in the Model Rule definition.</p>
<p>(l) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.</p>	<p>(l) “Substantial” when used in reference to degree or extent denotes<u>means</u> a material matter of clear and weighty importance.</p>	<p>Paragraph (l) is identical to the Model Rule definition except for the substitution of “means” for “denotes”. See Explanation for paragraph (a).</p>
<p>(m) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral</p>	<p>(m) “Tribunal” denotes<u>means: (i)</u> a court, an arbitrator in a binding arbitration proceeding, or a legislative body, an administrative agency or other body<u>law judge</u> acting in an adjudicative capacity. A legislative body, administrative agency and authorized to make a decision that</p>	<p>Paragraph (m) is a material change from the Model Rule definition. The purpose of the changes is to distinguish the extremely high standards that apply to a lawyer’s conduct as a client representative in a court of law or its equivalent, which is labeled as a “tribunal” by this definition (see Rule 3.3), from the more limited but still important duty of honesty that applies when a</p>

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<p>official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.</p>	<p>can be binding on the parties involved; or (ii) a special master or other body acts in an adjudicative capacity when <u>person to whom a neutral official, after the presentation of evidence court refers one or legal argument by a party more issues and whose decision or parties, will render a recommendation can be binding legal judgment directly affecting a party's interests in a particular matter on the parties if approved by the court.</u></p>	<p>lawyer appears in a representative capacity before a legislative or administrative body (see Rule 3.9). The Commission concluded that this distinction is important because First Amendment protections apply in dealing with legislative and administrative bodies, involved in such things as writing statutes and administrative regulations and granting and denying governmental licenses and permits. First Amendment considerations do not similarly apply to court proceedings. Also, a lawyer's representative work with legislative and administrative bodies involves elements of contractual and other negotiations that are not present in courts, and that role is more akin to a lawyer serving as an advocate in non-governmental negotiations.</p>
<p>(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.</p>	<p>(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing. <u>"Writing" or "written" has the meaning stated in Evidence Code section 250.</u></p>	<p>Because California has a statutory definition of "writing", the Commission recommends substituting a reference to it in place of the Model Rule definition. Although the statutory definition and the Model Rule definition are substantially the same, the Commission concluded that substituting a cross-reference to the statute would avoid confusion by California lawyers who are familiar with the statutory definition.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Confirmed in Writing</p> <p>[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.</p>	<p>Confirmed in Writing</p> <p>[1]— If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.</p>	<p>The Commission removed Model Rule 1.0, cmt. [1] because the term explained in the Comment is not used in the proposed Rules.</p>
<p>Firm</p> <p>[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule</p>	<p><u>Firm or Law Firm</u></p> <p>[2] Whether two or more lawyers constitute a <u>law</u> firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a <u>law</u> firm. However, if they present themselves to the public in a way that suggests that they are a <u>law</u> firm or conduct themselves as a <u>law</u> firm, they should<u>may</u> be regarded as a <u>law</u> firm for purposes of the<u>these</u> Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying</p>	<p>Comment [1] is nearly the same as Model Rule 1.0, cmt. [2], but the Commission recommends removal of the last Model Rule sentence because it does not serve to explain the defined term but instead muses about other legal issues.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.</p>	<p>purpose of the Rule<u>rule</u> that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.</p>	
<p>[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.</p>	<p>[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.</p>	<p>The Commission recommends deleting Model Rule 1.0, cmt. [3]. The first sentence contradicts the plain language of paragraph (c). The second sentence does not help explain the rule but instead muses to no effect on the question of who a lawyer's client is.</p>
	<p>[2] <u>Whether a lawyer who is denominated as "of counsel" should be deemed a member of a law firm will also depend on the specific facts. The term "of counsel" implies that the lawyer so designated has a relationship with the law firm, other than as a partner or associate, or officer or shareholder, that is close, personal, continuous, and regular. Thus, to the extent the relationship between a law firm and a lawyer is sufficiently "close, personal, regular and</u></p>	<p>Comment [2] has no counterpart in Model Rule 1.0. The Commission recommends its addition in order to express a pertinent rule of California law.</p>

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	<p><u>continuous," such that the lawyer is held out to the public as "of counsel" for the law firm, the relationship of the law firm and "of counsel" lawyer will be considered a single firm for purposes of disqualification. See, e.g., <i>People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.</i> (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816]. On the other hand, even when a lawyer has associated as "of counsel" with another lawyer and is providing extensive legal services on a matter, they will not necessarily be considered the same law firm for purposes of dividing fees under Rule 1.5.1 where, for example, they both continue to maintain independent law practices with separate identities, separate addresses of record with the State Bar, and separate clients, expenses, and liabilities. See, e.g., <i>Chambers v. Kay</i> (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536]. Whether a lawyer should be deemed a member of a law firm when denominated as "special counsel", or by another term having no commonly understood definition, also will depend on the specific facts.</u></p>	
<p>[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.</p>	<p>[43] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.</p>	<p>Comment [3] is identical to Model Rule 1.0, cmt. [4].</p>

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	<p>[4] This Rule does not authorize any person or entity to engage in the practice of law in this state except as otherwise permitted by law.</p>	<p>Comment [4] has no counterpart in Model Rule 1.0. The Commission recommends its addition in order to prevent the definition of "law firm" from being misread as an authorization to practice law. The consequence is that anyone acting as a law firm has all the duties of law firms even if not authorized to practice law.</p>
<p>Fraud</p> <p>[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.</p>	<p>Fraud</p> <p>[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.</p>	<p>Comment [5] is identical to Model Rule 1.0, cmt. [5], changed only to track the revision to paragraph (d).</p>
<p>Informed Consent</p> <p>[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication</p>	<p><i>Informed Consent <u>and Informed Written Consent</u></i></p> <p>[6] Many of the rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. Other rules require a lawyer to obtain informed written consent. See, e.g.,</p>	<p>Comment [6] is based on Model Rule 1.0, cmt. [6]. It has been modified to cover the paragraph (e) and (e-1) definitions of "informed consent" and "informed written consent". The removal of "ordinarily" clarifies that the obligation to disclose exists invariably. The addition of "reasonably available" tracks the change in paragraph (e), explained above. The removal of the two sentences beginning "In some circumstances ..." sentence</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving</p>	<p>Rules 1.2(c), 1.6(a), and 1.7(b). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily <u>In any event</u>, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's or other person's <u>reasonably available</u> options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or</p>	<p>removes practice tips that do not explain the Rule. The removal of the last sentence is to avoid its suggestion that a lawyer has no disclosure obligation to a client that is independently represented.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>the consent should be assumed to have given informed consent</p>	<p>other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.</p>	
<p>[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).</p>	<p>[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent However, except where the standard is one of informed written consent, consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7 paragraph (b) and 1.9(a). For afor the definition of "writing" and "confirmed in writing, written" see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).</p>	<p>Comment [7] is based on Model Rule 1.0, cmt. [7]. Changes conform the Comment to the paragraph (e) definition.</p>
<p>Screened</p> <p>[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.</p>	<p>Screened</p> <p>[8] This definition applies to situations where screening of a personally disqualifiedprohibited lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, or 1.12 or 1.18.</p>	<p>Comment [8] is identical to Model Rule 1.0, cmt. [8], except that the reference to Rule 1.10 has been deleted because the Board has declined to adopt Model Rule 1.10, and the reference to Rule 1.18 has been deleted because the Commission has recommended that Model Rule 1.18 not be adopted.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.</p>	<p>[9] The purpose of screening is to assure the affected parties<u>client, former client, or prospective client</u> that confidential information known by the personally disqualified<u>prohibited</u> lawyer remains protected<u>is neither disclosed to other law firm lawyers or non-lawyer personnel nor used to the detriment of the person to whom the duty of confidentiality is owed</u>. The personally disqualified<u>prohibited</u> lawyer should<u>shall</u> acknowledge the obligation not to communicate with any of the other lawyers <u>and non-lawyer personnel</u> in the <u>law</u> firm with respect to the matter. Similarly, other lawyers <u>and non-lawyer personnel</u> in the <u>law</u> firm who are working on the matter should<u>promptly shall</u> be informed that the screening is in place and that they may not communicate with the personally disqualified<u>prohibited</u> lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers<u>law firm personnel</u> of the presence of the screening, it may be appropriate for the <u>law</u> firm to undertake such procedures as a written undertaking by the screened<u>personally prohibited</u> lawyer to avoid any communication with other <u>law</u> firm personnel and any contact with any <u>law</u> firm files or other materials relating to the matter, written notice and instructions to all other <u>law</u> firm personnel forbidding any communication with the screened<u>personally prohibited</u> lawyer relating to the matter, denial of access by the screened<u>that</u> lawyer</p>	<p>Comment [9] is based on Model Rule 1.0, cmt. [9], but makes several changes: First, “parties” in the first sentence is replaced because a lawyer’s duty of confidentiality is owed only to clients, former clients, and prospective clients and not to anyone else that might be called a “party”. Second, to conform to proposed language in the applicable conflicts rules, “disqualified” has been replaced throughout the comment with “prohibited”. Similarly, the one appearance of the phrase “screened lawyer” has been replaced with “personally prohibited lawyer.” Third, a gap in the Model Rule Comment has been eliminated by stating on each occasion that screening involves both all other law firm lawyers and all non-lawyer personnel. The same change has been made to paragraph (k). Fourth, the obligation of the screened lawyer to acknowledge the existence of the screen is stated in mandatory (“shall”) rather than permissive (“should”) terms. Fifth, the obligation to inform other law firm personnel of the screen is made mandatory and, to conform to the paragraph (k) requirement of timeliness, the requirement is to do so “promptly”. This mandatory statement also appears in the Connecticut Comment, and the mandatory language also appears in the New York Comment.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.0 Terminology Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>to law firm files or other materials relating to the matter, and periodic reminders of the screen to the screenedpersonally prohibited lawyer and all other law firm personnel.</p>	
<p>[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.</p>	<p>[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.</p>	<p>Comment [10] is identical to Model Rule 1.0, cmt. [10].</p>
	<p><u>Tribunal</u></p> <p>[11] This definition is limited to courts and their equivalent in order to distinguish the special and heightened duties that lawyers owe to courts from the important but more limited duties of honesty and integrity that a lawyer owes when acting as an advocate before a legislative body or administrative agency. Compare Rule 3.3 to Rule 3.9.</p>	<p>Comment [11] has no counterpart in Model Rule 1.0. It has been added as a brief explanation of the narrow definition of “tribunal” that the Commission recommends. See the paragraph (m) explanation, above.</p>
	<p><u>Writing and Written</u></p> <p>[12] These Rules utilize California's statutory definition to avoid confusion by California lawyers familiar with it. It is substantially the same as the definitions in the ABA Model Rules and most other jurisdictions.</p>	<p>See the Explanation for paragraph (n), above.</p>

Rule 1.0.1: Terminology

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (a) “Belief” or “believes” means that the person involved actually ~~supposed~~supposes the fact in question to be true. A person's belief may be inferred from circumstances.
- ~~(b) “Confidential information relating to the representation” is defined in Rule 1.6, Comments [3]–[6].~~
- (b) [reserved]
- (c) “Law Firm” or “law firm” means a law partnership; a professional law corporation; a sole proprietorship or an association engaged in the practice of law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government ~~entity~~organization, or ~~other~~of another organization.
- (d) “Fraud” or “fraudulent” means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.
- (e) “Informed consent” means a person's agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the reasonably foreseeable material risks of, and reasonably available alternatives to, the proposed course of conduct.
- (e-1) “Informed written consent” means that both the communication and consent required by paragraph (e) must be in writing.
- ~~(e-2) “Information protected by Business & Professions Code section 6068(e)” is defined in Rule 1.6, Comments [3]–[6].~~
- (f) “Knowingly,” “known,” or “knows” means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
- (g) “Partner” means a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
- (g-1) “Person” means a natural person or an organization.
- (h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.
- (i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
- (j) “Reasonably should know” when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.
- (k) “Screened” means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm that are adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and non-lawyer personnel communicating with the lawyer with respect to the matter.

- (l) “Substantial” when used in reference to degree or extent means a material matter of clear and weighty importance.
- (m) “Tribunal” means: (i) a court, an arbitrator, or an administrative law judge acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.
- (n) “Writing” or “written” has the meaning stated in Evidence Code section 250.

COMMENT

Firm or Law Firm

[1] ~~A sole proprietorship is a law firm for purposes of these Rules.~~ Whether two or more lawyers constitute a law firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a [law](#) firm. However, if they present themselves to the public in a way that suggests that they are a [law](#) firm or conduct themselves as a [law](#) firm, they may be regarded as a law firm for purposes of these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved.

[2] Whether a lawyer who is denominated as “of counsel” should be deemed a member of [a law firm](#) ~~can~~[will](#) also depend on the specific facts. The term “of counsel” implies that the lawyer so designated has a relationship with the [law](#) firm, other than as a partner or associate, or officer or shareholder, that is close, personal, continuous, and regular. Thus, to the extent the relationship between a law firm and a lawyer is sufficiently “close, personal, regular and continuous,” such that the lawyer is held out to the public as “of counsel” for the law firm, the relationship of the [law](#) firm and “of counsel” lawyer will be considered a single firm for purposes of disqualification. See, e.g., *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816]. On the other hand, even when a lawyer has associated as “of counsel” with another lawyer and is providing extensive legal services on a matter, they will not necessarily be considered the same [law](#) firm for purposes of dividing fees under Rule 1.5.1 where, for example, they both continue to maintain independent law practices with separate identities, separate addresses of record with the State Bar, and separate clients, expenses, and liabilities. See, e.g., *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536]. Whether a lawyer should be deemed a member of a law firm when denominated as “special counsel”, or by another term having no commonly understood definition, also will depend on the specific facts.

[3] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

- [4] This Rule ~~is~~does not ~~intended to~~ authorize any person or entity to engage in the practice of law in this state except as otherwise permitted by law.

Fraud

- [5] When used in these Rules, the terms “fraud” or “fraudulent” refer to conduct that is characterized as such under the law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent and Informed Written Consent

- [6] Many of the ~~Rules~~rules require a lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. Other ~~Rules~~rules require a lawyer to obtain informed written consent. See, e.g., Rules 1.2(c), 1.6(a), and 1.7. The communication necessary to obtain such consent will vary according to the ~~Rule~~rule involved and the circumstances giving rise to the need to obtain consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. In any event, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's or other person's

reasonably available options and alternatives. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent.

- [7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. However, except where the standard is one of informed *written* consent, consent may be inferred from the conduct of a client or other person who has reasonably adequate information about the matter. See paragraph (n) for the definition of “writing” and “written”.

Screened

- [8] This definition applies to situations where screening of a personally ~~disqualified~~prohibited lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11,~~1.12~~ or ~~4.18~~1.12.
- [9] The purpose of screening is to assure the affected client, former client, or prospective client that confidential information known by the personally prohibited lawyer is neither disclosed to other law firm lawyers or non-lawyer personnel nor used to the detriment of the person to whom the duty of confidentiality is owed. The personally prohibited lawyer shall acknowledge the obligation not to communicate with any of the other lawyers and non-lawyer personnel in the law firm with respect to the matter. Similarly, other lawyers and non-lawyer personnel in the law firm who are working on the matter promptly shall be informed that the screening is in place and that they may not

communicate with the personally prohibited lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected [law](#) firm personnel of the presence of the screening, it may be appropriate for the [law](#) firm to undertake such procedures as a written undertaking by the ~~screened~~[personally prohibited](#) lawyer to avoid any communication with other [law](#) firm personnel and any contact with any [law](#) firm files or other materials relating to the matter, written notice and instructions to all other [law](#) firm personnel forbidding any communication with the ~~screened~~[personally prohibited](#) lawyer relating to the matter, denial of access by ~~the screened~~[that](#) lawyer to [law](#) firm files or other materials relating to the matter, and periodic reminders of the screen to the ~~screened~~[personally prohibited](#) lawyer and all other [law](#) firm personnel.

- [10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Tribunal

- [11] This definition is limited to courts and their equivalent in order to distinguish the special and heightened duties that lawyers owe to courts from the important but more limited duties of honesty and integrity that a lawyer owes when acting as an advocate before a legislative body or administrative agency. Compare Rule 3.3 to Rule 3.9.

Writing and Written

- [12] These Rules utilize California's statutory definition to avoid confusion by California lawyers familiar with it. It is substantially the same as the definitions in the ABA Model Rules and most other jurisdictions.

Dissent to Proposed Rule 1.0.1(m) – Definition of “Tribunal”

A minority dissents from the proposed definition of “tribunal” in paragraph (m). The definition proposed by the Commission is substantially narrower than the definition of “tribunal” in Model Rule 1.0(m) and the rules in most jurisdictions. If approved, various governmental agencies and boards acting in an adjudicative capacity and deciding contested matters will not have the protection of rules governing lawyers appearing as advocates in such proceedings. Under the definition proposed by the Commission, “tribunal” would be limited to a court, an arbitrator, an ALJ or a special master or other person to whom a court refers an issue for recommendation or decision. The definition would exclude numerous administrative agencies and boards at the federal, state and local level acting in an adjudicative capacity and rendering legally binding decisions directly affecting a party’s interests following the presentation of evidence or legal arguments (e.g., the PUC, Worker’s Compensation Appeals Board, SEC and FTB). The result will be that a host of administrative and legislative boards and agencies that adjudicate disputes will be left without the protection of rules aimed at assuring candor, impartiality and decorum by lawyers who represent clients as advocates in such matters. This includes Rule 3.3 (candor toward the tribunal) and Rule 3.5 (impartiality and decorum of the tribunal). For example, there would be no rule prohibiting ex parte communications and other forms of improper influence in adjudicative proceedings before various boards and administrative agencies that

would otherwise come within the definition of “tribunal” under the Model Rule but which are excluded under the Commission’s definition.

The Commission’s restricted definition of “tribunal” is without precedent and will be a source of confusion as evidenced by the comments received from OCTC and the San Diego County Bar Association. No other jurisdiction employs such an overly restrictive definition of tribunal in the rules. There is no First Amendment or other reason for excluding from the definition of “tribunal” a legislative or administrative board or agency acting in an adjudicative capacity and rendering binding decisions directly affecting a person’s rights based on the presentation of evidence or legal argument by counsel. One of the stated objectives of the rules is promoting the fair administration of justice. This objective is not limited to courts but includes governmental agencies and bodies acting in an adjudicative capacity as defined in Model Rule 1.0(m). The explanation that a narrow definition is needed to distinguish proceedings governed by Rule 3.9 (advocate in non-adjudicative proceedings) is incorrect. The definition of “tribunal” in the Model Rules does not apply in situations governed by Rule 3.9. California should conform to the Model Rule definition and explain, if necessary, in a comment that the definition of tribunal does not apply in situations governed by proposed rule 3.9.

Rule 1.0.1: Terminology

(Commission's Proposed Rule – Clean Version)

- (a) "Belief" or "believes" means that the person involved actually supposes the fact in question to be true. A person's belief may be inferred from circumstances.
- (b) [reserved]
- (c) "Firm" or "law firm" means a law partnership; a professional law corporation; a sole proprietorship or an association engaged in the practice of law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.
- (d) "Fraud" or "fraudulent" means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.
- (e) "Informed consent" means a person's agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the reasonably foreseeable material risks of, and reasonably available alternatives to, the proposed course of conduct.
- (e-1) "Informed written consent" means that both the communication and consent required by paragraph (e) must be in writing.
- (e-2) "Information protected by Business & Professions Code section 6068(e)" is defined in Rule 1.6, Comments [3] – [6].
- (f) "Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
- (g) "Partner" means a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
- (g-1) "Person" means a natural person or an organization.
- (h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.
- (i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
- (j) "Reasonably should know" when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.
- (k) "Screened" means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm that are adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and non-lawyer personnel communicating with the lawyer with respect to the matter.

- (l) “Substantial” when used in reference to degree or extent means a material matter of clear and weighty importance.
- (m) “Tribunal” means: (i) a court, an arbitrator, or an administrative law judge acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.
- (n) “Writing” or “written” has the meaning stated in Evidence Code section 250.

COMMENT

Firm or Law Firm

- [1] Whether two or more lawyers constitute a law firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a law firm. However, if they present themselves to the public in a way that suggests that they are a law firm or conduct themselves as a law firm, they may be regarded as a law firm for purposes of these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved.

- [2] Whether a lawyer who is denominated as “of counsel” should be deemed a member of a law firm will also depend on the specific facts. The term “of counsel” implies that the lawyer so designated has a relationship with the law firm, other than as a partner or associate, or officer or shareholder, that is close, personal, continuous, and regular. Thus, to the extent the relationship between a law firm and a lawyer is sufficiently “close, personal, regular and continuous,” such that the lawyer is held out to the public as “of counsel” for the law firm, the relationship of the law firm and “of counsel” lawyer will be considered a single firm for purposes of disqualification. See, e.g., *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816]. On the other hand, even when a lawyer has associated as “of counsel” with another lawyer and is providing extensive legal services on a matter, they will not necessarily be considered the same law firm for purposes of dividing fees under Rule 1.5.1 where, for example, they both continue to maintain independent law practices with separate identities, separate addresses of record with the State Bar, and separate clients, expenses, and liabilities. See, e.g., *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536]. Whether a lawyer should be deemed a member of a law firm when denominated as “special counsel”, or by another term having no commonly understood definition, also will depend on the specific facts.

- [3] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

- [4] This Rule does not authorize any person or entity to engage in the practice of law in this state except as otherwise permitted by law.

Fraud

- [5] When used in these Rules, the terms “fraud” or “fraudulent” refer to conduct that is characterized as such under the law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent and Informed Written Consent

- [6] Many of the rules require a lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. Other rules require a lawyer to obtain informed written consent. See, e.g., Rules 1.2(c), 1.6(a), and 1.7. The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. In any event, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client’s or other person’s reasonably available options and alternatives. In determining whether the information and

explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent.

- [7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client’s or other person’s silence. However, except where the standard is one of informed *written* consent, consent may be inferred from the conduct of a client or other person who has reasonably adequate information about the matter. See paragraph (n) for the definition of “writing” and “written”.

Screened

- [8] This definition applies to situations where screening of a personally prohibited lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11 or 1.12.
- [9] The purpose of screening is to assure the affected client, former client, or prospective client that confidential information known by the personally prohibited lawyer is neither disclosed to other law firm lawyers or non-lawyer personnel nor used to the detriment of the person to whom the duty of confidentiality is owed. The personally prohibited lawyer shall acknowledge the obligation not to communicate with any of the other lawyers and non-lawyer personnel in the law firm with respect to the matter. Similarly, other lawyers and non-lawyer personnel in the law firm who are working on the matter promptly shall be informed that the screening is in place and that they may not communicate with the personally prohibited lawyer with respect to the

matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected law firm personnel of the presence of the screening, it may be appropriate for the law firm to undertake such procedures as a written undertaking by the personally prohibited lawyer to avoid any communication with other law firm personnel and any contact with any law firm files or other materials relating to the matter, written notice and instructions to all other law firm personnel forbidding any communication with the personally prohibited lawyer relating to the matter, denial of access by that lawyer to law firm files or other materials relating to the matter, and periodic reminders of the screen to the personally prohibited lawyer and all other law firm personnel.

- [10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Tribunal

- [11] This definition is limited to courts and their equivalent in order to distinguish the special and heightened duties that lawyers owe to courts from the important but more limited duties of honesty and integrity that a lawyer owes when acting as an advocate before a legislative body or administrative agency. Compare Rule 3.3 to Rule 3.9.

Writing and Written

- [12] These Rules utilize California's statutory definition to avoid confusion by California lawyers familiar with it. It is substantially the same as the definitions in the ABA Model Rules and most other jurisdictions.

**Rule 1.0.1 Terminology
[Sorted by Commenter]**

TOTAL = 7	Agree = 4
	Disagree = 0
	Modify = 3
	NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response required.
2	COPRAC	M		(e)	In paragraph (e), COPRAC objects to the requirement that, for consent to be informed, the lawyer must communicate (among other things) the “reasonably available alternatives to the proposed course of conduct.” No such communication is required under the current California rules with respect to informed consent or informed written consent, nor is such communications generally necessary for consent to be informed.	COPRAC is correct that the current California rule, rule 3-310(A)(1), does not state the lawyer’s obligation to advise the client of alternatives to either accepting or rejecting the representation; however, the Commission believes that a client’s consent cannot fairly be described as having been “informed” if the lawyer has not competently advised the client about the situation. Competent advice includes an explanation of the reasonably available alternatives. As a result, the “reasonably available alternatives” requirement also is found in the Model Rule version of paragraph (e). This treatment is consistent with the requirements of Rule 1.4(b): “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Also, see Comment [6], which helps to explain paragraph (e).
				(k)	In paragraph (k), COPRAC disagrees with the deletion of the word “reasonably” from the Model Rule (as in “the timely imposition of procedures within a firm that are reasonably	See the response to the similar comment from the O.C. Bar Assoc.

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

**Rule 1.0.1 Terminology
[Sorted by Commenter]**

TOTAL = 7
Agree = 4
Disagree = 0
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					adequate under the circumstances to (i) protect information . . .). Firms should be entitled to rely on their reasonably imposed procedures, and not be held to a strict liability standard (judged after the fact) as to whether the procedures in fact proved to be adequate. Contrary to the suggestion contained in the Explanation of Changes to paragraph (k), "half-way measures" should never be sufficient anyway because they are not "reasonably adequate."	
				Comment [8]	Comment [8]: This Comment refers to a "personally <i>disqualified</i> " lawyer." Because the rules relate to discipline, we recommend conforming this term to the more preferred "personally prohibited lawyer," or for more clarity: "lawyer who is personally prohibited with respect to a matter."	The Commission agrees and has made the requested change in somewhat different language.
				Comment [9]	Comment [9]: The use of the term "screened lawyer" in this Comment is imprecise and possibly confusing. We recommend revising the language of this Comment to clarify whether it applies to the lawyer in possession of confidential information, all other lawyers in the law firm on the other side of such screen, or both. We further recommend that the language in the last sentence of this Comment be revised to clarify which files or	The Commission agrees and has made the suggested change.

**Rule 1.0.1 Terminology
[Sorted by Commenter]**

**TOTAL = 7 Agree = 4
Disagree = 0
Modify = 3
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [1]	<p>other materials will be subject to restricted access by reference to the appropriately screened lawyer or lawyers.</p> <p>Comment [1]: COPRAC disagrees with the deletion of the last sentence from the corresponding Comment to the Model Rule. We believe that sentence adds textual clarity to the prior sentence and makes a very important point: namely, a group of lawyers may constitute a law firm for purposes of one rule, but not a law firm for the purposes of another rule. We further believe that the commentary for the definition of the term “law firm” is the appropriate place to make this important point. To make this point more clearly, however, COPRAC recommends revising the current last sentence of this proposed Comment, by adding language to the end thereof so that it would read as follows:</p> <p>“Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved, <u>and to recognize that a group of lawyers could be regarded as a law firm for purposes of one rule but such same group of lawyers might not regarded as a law firm purposes of another rule.</u>”</p>	<p>The Commission is not convinced that there are circumstances in which a group of lawyers could be considered a law firm so that they could not represent adverse parties in litigation but not be considered a law firm for purposes of the presumed sharing of information within a law firm. For this reason the Commission has not included any version of the last sentence of Model Rule Comment [2] so that this unusual question can be addressed in case law over time.</p>

**Rule 1.0.1 Terminology
[Sorted by Commenter]**

TOTAL = 7	Agree = 4
	Disagree = 0
	Modify = 3
	NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Finally, we note (and agree with) the Commission’s stated intention to use the single term “law firm,” and to drop the reference to “firm” [see last sentence in the Explanations of Changes to paragraph (c) of the rule]. Consistent with such approach, COPRAC recommends (1) using the term “law firm” consistently throughout the rules and commentary (e.g., the use of the term “firm” in the definition of “Screened” should be conformed), (2) changing the subheading in the commentary above Comment [1] from “Firm” to “Law Firm,” and (3) rearranging the definitions such that the definition of “Law Firm” is correctly placed alphabetically afer the definition of “Knowingly.”	The Commission agrees and has made the suggested changes. On reconsideration, the Commission voted to retain the Model Rule’s use of the dual terms “firm” and “law firm” because there was insufficient reason to depart from the Model Rule on this minor point.
3	McIntyre, Sandra K.	A			No comment.	No response required.
4	Office of the Chief Trial Counsel	M		1.0.1(b)	Many definitions appear later in the rules rather than being consolidated here. It is unclear why certain definitions are included here while others are not. Further, many of the definitions are repeated elsewhere, which is unnecessary. Rule 1.0.1(b) states that “confidential information relating to representation” is defined in Rule 1.6, Comments [3] – [6]. This is not a precise definition. Moreover, the	The Commission’s general policy has been to place in Rule 1.0.1 all of the definitions that are used in more than one substantive Rule so that the definition does not have to be repeated. As a result, this proposed Rule generally tracks the corresponding rule found in other jurisdictions. No response needed as the Commission has eliminated this term.

**Rule 1.0.1 Terminology
[Sorted by Commenter]**

TOTAL = 7 **Agree = 4**
Disagree = 0
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.0.1(m)	<p>Comments are not intended to be binding and, therefore, it is inappropriate to reference them as part of the actual (binding) definition.</p> <p>Rule 1.0.1(m) significantly deviates from the ABA rule defining “tribunal” by excluding legislative bodies acting in adjudicative capacities. OCTC agrees with the ABA drafters that legislative bodies acting in adjudicative capacities should be included within the definition of “tribunal.” Attorneys representing clients before legislative bodies acting in adjudicative capacities should be held to the same standards as those appearing before any other adjudicative body. It is confusing to have comments which simply define terms. For example, Comment [2] discusses the term “of counsel,” if this term needs defining, it should be done in the rule, not a comment. Additionally, Comments [1], [3], [4], [5], [11] and [12] are so general as to provide no meaningful assistance. Comments [6] – [10] attempt to provide a very broad description of the factors involved in informed consent and informed written consent; factors involved in determining whether consent has been given; and the issues involved in screening. OCTC agrees with these Comments but suggests that they belong in the rules involving conflicts, not here.</p>	<p>See response to the comment from the San Diego County Bar Assoc., below.</p> <p>The Commission disagrees and has not made the requested changes. The Comment paragraphs regarding informed written consent and screening are not definitional but descriptive. Also see the response to the O.C. Bar Assn. letter regarding Comment [9] and see the response to S.D. Bar Assn regarding “tribunal”.</p>

**Rule 1.0.1 Terminology
[Sorted by Commenter]**

TOTAL = 7 **Agree = 4**
Disagree = 0
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	Orange County Bar Association	M		(k)	<p>We oppose removing the word “reasonably” from the Model Rule definition of “Screened.” We believe there is little risk members of the Bar will interpret the word “reasonably” as authorizing “half-way” measures. Rather, we believe the greater risk is that removal of “reasonably” from the definition of screening will create a strict liability rule in a context where “adequate” – which would be the only standard remaining – is not even defined.</p> <p>Comment [1] Moreover, the Commission does not appear to have considered whether there is or should be a distinction between “adequate” screening procedures in a large firm versus a small firm. In Comment [1], the Commission proposes adding that “A sole proprietorship is a law firm for purposes of these Rules.” However, because a sole proprietorship already is included in the definition of “law firm” under paragraph (c), it is unnecessary to include the proposed language in Comment [1]. Moreover, the heading to Comment [1] should read “Law Firm” instead of “Firm” in order to be consistent with the Commission’s expressed preference for the former term.</p> <p>Comment [2] We propose revising Comment [2] to generally clarify that the relationship between the attorney and the law firm depends upon</p>	<p>The Commission does not agree and has not made the requested change. It believes that the definition should emphasize the need for rigor because of the significant risk of injury to client trust in lawyers and the legal system that is implicit in any ethics screen imposed by a law firm without client consent. This language does not suggest that the law firm is a guarantor that procedures will be followed, but the law firm should be detailed and conscientious about creating and enforcing the screening protocol.</p> <p>The Commission agrees with the first comment and has deleted the first sentence of Comment [1]. However, the Commission has revised the definition of “law firm” to include both “firm” and “law firm” to conform to the Model Rule, so has not made the second change. See Response to COPRAC.</p> <p>The Commission agrees that Comment [2] would benefit from the addition of a reference to other creative titles that might be assigned to lawyers in a</p>

**Rule 1.0.1 Terminology
[Sorted by Commenter]**

TOTAL = 7
Agree = 4
Disagree = 0
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [9]	<p>the circumstances, rather than the attorney's title. Accordingly, we recommend against singling out the title "Of Counsel" to the exclusion of other, similar titles, like "Special Counsel," "Senior Counsel," and "Special Partner." We also recommend that the substance of this provision (whether revised to encompass additional "alternative" titles or not) be incorporated into a Rule rather than into a Comment because it bears upon the substance of the definition of "law firm."</p> <p>We recommend deleting Comment [9], which contains substantive guidance regarding screening procedures. This guidance, if it is to be given, properly belongs either in one or more substantive Rules related to screening, or in the Comment(s) to those Rules, not in a Comment to a definition, where it is less likely to be seen by lawyers searching for substantive rules regarding screening.</p>	<p>law firm whose meaning might not be obvious. It has made this change by adding a sentence at the end of the Comment. The Commission does not agree that the substance of Comment [2] should be moved to the Rule's definition of "law firm". The question of whether a lawyer is part of a law firm is distinct from the question of what a law firm is. Moreover, it is not possible to define whether a lawyer should be considered to be part of a particular law firm while acting in future, unknown circumstances.</p> <p>The Commission disagrees and has not made the suggested changes. First, it believes that the discussion of screening methods does not belong in the Rule because it is not in the nature of a definition. Instead, it is descriptive and therefore is placed in a Comment. Second, the Commission concluded that the definition and discussion are best placed in this Rule because this is the location used almost without exception in other jurisdictions. Third, non-consensual screening is permitted under multiple rules, e.g., Rules 1.11 and 1.12, and the Commission believes it is better to have the definition and comment in a single location.</p>
6	San Diego County Bar Association Legal Ethics Committee	A			SDCBA expressed concern with the definition of a "tribunal," which is limited to adjudicative bodies and excludes legislative or administrative bodies or mediators. SDCBA suggests a broader definition of "tribunal" so	The Commission believes that an expansive definition of "tribunal" might be appropriate if used only as a reminder of best practices, but it believes that an expansive definition would not function properly as a disciplinary standard. If the Rule 3.3

**Rule 1.0.1 Terminology
[Sorted by Commenter]**

**TOTAL = 7 Agree = 4
Disagree = 0
Modify = 3
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					that a lawyer's duty of candor would extend beyond adjudicative bodies.	duty of candor were extended to legislative and administrative activities, it would intrude on First Amendment requirements. In addition, there are concepts that are problematic outside of the court context. These include, e.g.: (i) the meaning of "legal authority in the controlling jurisdiction" in Rule 3.3(a)(2); and (ii) the application of the <i>ex parte</i> requirements of Rule 3.3(d). Moreover, California uniquely has a statutory duty of honesty under B&P C § 6106 that will supplement Rule 3.3 in egregious situations. The Commission sees no benefit to extending Rule 3.3 to mediation because of California's strict statutory mediation confidentiality under Evid. C. § 1115, <i>et seq.</i> The Commission believes it is important to retain the distinction between the special responsibilities that lawyers have under Rule 3.3 in courts of law and in an arbitration that is equivalent to a court of law, and the different but still important duties that lawyers have under Rule 3.9.
7	Santa Clara County Bar Association	A			No comment.	No response required.

Rule 1.0: Terminology

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2010 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Alaska: In the rules effective April 15, 2009, Rule 9.1 (Alaska’s terminology rule) adds an unusually detailed definition of “substantially related matters” to help guide lawyers in their assessment of conflicts of interest. The definition draws, in part, on Comment 3 to Model Rule 1.9.

Connecticut adds: “‘Client’ or ‘person’ as used in these Rules includes an authorized representative unless otherwise stated.”

District of Columbia defines “matter” as “any litigation, administrative proceeding, lobbying activity, application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a negotiation, estate or family relationship practice issue, or any other representation, except as expressly limited in a particular Rule.”

Massachusetts: Rule 9.1 retains the 1983 version of the ABA Terminology and adds a definition of “Qualified legal assistance organization.” Amended Comment 3 to Rule 9.1 provides as follows: “The final category of qualified legal assistance organization requires that the organization ‘receives no profit from the rendition of legal services.’ That condition refers to the entire legal services operation of the organization; it does not prohibit the receipt of a court-awarded fee that would result in a ‘profit’ from that particular lawsuit.”

New York: In the rules effective April 1, 2009, New York adds definitions for the terms “advertisement,” “computer-accessed communication,” “differing interests,” “domestic relations matters,” “matter,” “person,” “reasonable lawyers,” and “sexual relations.” New York also includes a more detailed definition of “fraud,” providing as follows:

“Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

In addition, the definition of “confirmed in writing” includes “a statement by the person made on the record of any proceeding before a tribunal.”

Ohio: Rule 1.0 defines “fraud” and “fraudulent” as denoting “conduct that has an intent to deceive and is either of the following:”

(1) an actual or implied misrepresentation of a material fact that is made either with knowledge

of its falsity or with such utter disregard and recklessness about its falsity that knowledge may be inferred; (2) a knowing concealment of a material fact where there is a duty to disclose the material fact.

Oregon adds or alters the meaning of a number of phrases, including “electronic communication,” “informed consent,” “law firm,” “knowingly,” and “matter.”

Texas generally retains the 1983 version of the ABA Terminology, but modifies some of the 1983 definitions and adds others that are neither in the 1983 nor current versions of the ABA Terminology. Specifically, Texas includes the following definitions:

“Adjudicatory Official” denotes a person who serves on a Tribunal.

“Adjudicatory Proceeding” denotes the consideration of a matter by a Tribunal. “Competent” or “Competence” denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

“Firm” or “Law firm” denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.

“Fitness” denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer’s responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack

of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

“Should know” when used in reference to a lawyer denotes that a reasonable lawyer under the same or similar circumstances would know the matter in question.

“Substantial” when used in reference to degree or extent denotes a matter of meaningful significance or involvement.

“Tribunal” denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. “Tribunal” includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter; but it does not include jurors, prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity.

Virginia retains the 1983 version of the Terminology section and adds: “‘Should’ when used in reference to a lawyer’s action denotes an aspirational rather than a mandatory standard.”

Wisconsin: Wisconsin adds or alters the meaning of a number of phrases, including “consultation,” “firm,” “misrepresentation,” and “prosecutor.”