Rules of Professional Conduct: Almost 70 New Ways to be More Ethical!

(MCLE Specialty Credit for Legal Ethics)

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Notes:

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NOTE ON THE USE OF THIS PAPER:

This paper is intended to be read in concert with the California Supreme Court Approved California Rules of Professional Conduct:[1]

http://www.calbar.ca.gov/Portals/0/documents/Supreme%20Court%20Order%202018-05-09.pdf

Unless otherwise indicated, all references herein to reports of and tables prepared by the California State Bar Rules Revision Commission can be found in pdf format at:[2]

http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Committees/Rules-Revision/Rules-Commission-2014/Proposed-Rules

References to reports of the Revision Commission will be cited as "Rule XX Report, p. YY."

[1] Last viewed August 13, 2018.
[2] Last viewed August 13, 2018.

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If you are like me, it may be some time since you read through the California Rules of Professional Conduct—maybe since [insert your date of bar passage here]. Absent some problem, most of us just deal with select rules once every 3 years or so, for about an hour, to satisfy the "ethics" MCLE requirement. We may occasionally have to look up the rule on conflicts, or perhaps identity of the client. But on a day to day basis, the Rules exist in the background of our professional lives, operating either as a badge of professionalism,[3] or a trap for the unwary.[4]

The Rules of Professional Conduct have been around since 1928, and have only been updated three times in the last forty years (1975, 1989, 1992)—until this past March, when the California Supreme Court approved 69 of 70 revised rules of professional conduct submitted for consideration by the California State Bar.[5] This comprehensive update of the rules represents 17 years of effort on the part of the Bar and the Supreme Court. The new rules go into effect November 1, 2018, so if you haven't sat down with a warm cup of cocoa to read through them yet[6], you probably should get cracking. And since we each have to read through all of the rules, this paper will focus[7] on some of the changes and the rationale for same, gleaned from the reports and comments available on the State Bar website.

The Process for Amendment

The State Bar's process for amending the rules began in 2001, with the establishment of the Commission for the Revision of the Rules of Professional Conduct (the "Rules Commission" or "RC"). From 2001 to 2009, the RC worked on revisions, which were ultimately approved by the State Bar Board of Trustees. The Board then submitted 17 proposed rule revisions to the Supreme Court.[8] Rather than approve those rules, the Supreme Court and the State Bar worked together to develop a new approach. A second Commission for the Revision of the Rules of Professional Conduct was empaneled ("Rules Commission 2" or "R2C2"), and R2C2 was given a new charge[9] to undertake a comprehensive update of the Rules, with the goal of bringing the rules more into conformity with those of the ABA and other states. Specifically, the R2C2 charter reads as follows:

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[3] Like still having to wear suits in court.
[4] Like malware.
[5] Rule 1.14 "Client with Diminished Capacity" was not approved by the Court, although it is unclear as to whether that is because a) the Court feels the rule is unnecessary as duties owed to a client do not change based upon the client's capacity, or b) the Court feels the rule is redundant because all clients suffer from diminished capacity.
[6] Or a STRONG cup of coffee…or maybe a stiff drink.
[7] Fair warning, though, the focus is occasionally tongue in cheek in a possibly ill-conceived attempt to add some entertainment value to the material—like "comedy" traffic school.
[8] Per Business and Professions Code sections 6076 and 6077, the State Bar, with the approval of the California Supreme Court, can adopt rules for professional conduct and subject members to discipline for violation of same.
[9] *A New Hope*, if you will.

Commission Charter

The Commission is charged with conducting a comprehensive review of the existing California Rules of Professional Conduct and preparing a new set of proposed rules and comments for approval by the Board of Trustees and submission to the Supreme Court no later than March 31, 2017. In conducting its review of the existing Rules and developing proposed amendments to the Rules, the Commission should be guided by the following principles:

1. The Commission's work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection to the public.
2. The Commission should consider the historical purpose of the Rules of Professional Conduct in California, and ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives.
3. The Commission should begin with the current Rules and focus on revisions that (a) are necessary to address changes in law and (b) eliminate, when and if appropriate, unnecessary differences between California's rules and the rules used by a preponderance of the states (in some cases in reliance on the American Bar Association's Model Rules) in order to help promote a national standard with respect to professional responsibility issues whenever possible.
4. The Commission's work should facilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties.
5. Substantive information about the conduct governed by the rule should be included in the rule itself. Official commentary to the proposed rules should not conflict with the language of the rules, and should be used sparingly to elucidate, and not to expand upon, the rules themselves.

The proposed amendments developed by the Commission should be accompanied by a report setting forth the Commission's rationale for retaining or changing any rule and related commentary language.

The State Bar website includes the following documents, which may be of use to you in your study of the new rules, and which were reviewed for the preparation of this paper[10]:

- Existing Rules (through 10/31/2017)
- Proposed New Rules (Board adopted March 9, 2017)
- Tables cross-referencing old to new rules and vice versa
- For each proposed new rule, a report by the Commission that includes:
    - Text of New Rule
    - Commission Executive Summary
    - Redline
    - Rule History

[10] http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Committees/Rules-Revision/Rules-Commission-2014 (last viewed August 13, 2018). Note that there is yet another Commission working on further draft revisions to ultimately submit to the Court—the 2017 Commission, or Commission 3 Proposing an Order—("C3PO").

    - Office of the Chief Trial Counsel/State Bar Court comments (with Commission responses)
    - Public Comments (with Commission responses)[11]
    - Related California Law and ABA Model Rule Adoptions
    - Concepts Accepted/Rejected (with pros and cons discussed)
    - Changes in Duties/Substantive Changes to the Current Rule summarized
    - Non-substantive changes to the current rule summarized
    - Alternatives Considered
    - Dissent commentary from individual Commissioners (if any) and response
    - Commission Recommended Action on proposed rule
- May 9, 2018 Supreme Court Administrative Order S240991, approving new rules (with modifications)
- Clean version of Court- approved new rules.

Mining all of the above, I have attempted to extract information and details that illustrate nuances, ambiguities, and areas of concern, all with a focus on our unique corner of the legal world—work for public entities.[12]

Client-Lawyer Relationship (Rules 1.0-1.18)

Rule 1.0 Purpose and Function of the Rules of Professional Conduct

(AKA You need to find more hours in the day.)

So the first thing to notice is that the numbering system for all of the rules has changed—tracking the ABA Model Rules numbering system. So for anyone familiar with the current rules by number, your most valuable resource will be one of the two tables available on the State Bar website that cross reference current rules to new rules and vice versa.[13] Additionally, the term "member" has been replaced with "lawyer" throughout the new rules, to mirror the language of other jurisdictions, and to expand the application of the rules to non-members (such as those practicing *pro hac vice*[14]).

Beyond that, the most interesting part of this rule is the comments that follow it. Comments are not grounds for discipline, but rather are intended to provide guidance for interpreting and practicing in compliance with the rule[15]. That said, R2C2 felt compelled to add Comment 5:

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[11] Just a brief summary—the actual comments are available upon request from the State Bar.
[12] But you're still going to have to read all of the new rules yourself…and you might want to dust off a copy of the State Bar Act (B&P sections 6000-6243), which also governs lawyer conduct, while you are at it.
[13] http://www.calbar.ca.gov/Portals/0/documents/rules/Cross-Reference-Chart-Rules-of-Professional-Conduct.pdf (Last viewed August 13, 2018).
[14] See discussion concerning Rule 8.5, *infra*.
[15] Rule 1.0, paragraph (c).

"The disciplinary standards created by these rules are not intended to address all aspects of a lawyer's professional obligations. A lawyer, as a member of the legal profession, is a representative and advisor of clients, an officer of the legal system and a public citizen having special responsibilities for the quality of justice. A lawyer should be aware of deficiencies in the administration of justice and of the fact that the poor, and sometimes person who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers are encouraged to devote professional time and resources and use civic influence to ensure equal access to the system of justice for those who because of economic or social barriers cannot afford or secure adequate legal counsel. In meeting this responsibility, every lawyer should aspire to render at least fifty hours of pro bono public legal services per year. In fulfilling this responsibility, the lawyer should provide a substantial majority of such hours to indigent individuals or to nonprofit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged. Also, lawyers may fulfill this pro bono responsibility by providing financial support to organizations providing free legal services. See Business and Professions Code Section 6073."

While this seems like a pretty substantive provision, R2C2 opted to have this included as a comment to the rule based upon the Commission's Charter, which require that the rules set forth clear and enforceable disciplinary standards, rather than purely aspirational objectives. Further, the comment arguably does not "provide guidance for interpreting and practicing in compliance with the rules."

Rule 1.0.1 Terminology

(AKA It's still fraud, even if no one was fooled.)

To mirror the ABA Model Rules, this separate definitions rule has been created. "Person" has been clarified to include an organization as well as a natural person.

In the comments to the rule, whether an "of counsel" attorney is a member of a "firm" is to be determined on a case by case basis[16].

In terms of "fraud", discipline can be imposed, even if no one has relied on or been damaged by the fraud—the definition is intended to regulate conduct, not the consequences of such conduct[17].

There is also a definition of "screened" in recognition of the need for ethical walls in certain situations.

Throughout the new rules an asterisk has been placed next to terms that are defined in this Rule 1.0.1, to remind us that the rule contains a defined term.[18]

[16] Comment 2.
[17] Comment 3.

Rule 1.1 Competence

(AKA It's OK to be simply negligent—just don't be gross about it.)

The current rule incorporated the duties of competence, diligence and supervision—but these concepts are now addressed in three separate rules, again to more closely mirror the ABA Model Rules and those of other jurisdictions.

This rule continues to differ from the ABA Model Rule, in that it prohibits "gross negligence" as opposed to "simple negligence." According to the R2C2's report, "a lawyer's single act of simple negligence should not be the basis for discipline because it does not imply that the lawyer is unfit to practice law or that permitting the lawyer to practice would present a danger to the public."[19]

Of particular interest to me, the Rule does not incorporate the ABA comment language addressing a lawyer's responsibilities concerning the use of technology. According to the R2C2 report, competent use of technology is already implied in the rule, and is also addressed in State Bar opinions.[20]

Rule 1.2 Scope of Representation and Allocation of Authority

(AKA Better get it in writing.)

This rule largely mirrors the ABA Model Rule—previously there was no similar rule in California. Criticism of the rule in the report indicates that this rule is unnecessary because the substance is already covered by caselaw and statute[21]. Of particular note for City Attorneys: Comment 3 specifically states "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."[22]

Practice Pointer: The rule requires that the scope of representation may be limited with the "informed consent" of the client. The Office of Chief Trial Counsel[23] suggested that the rule require "informed written consent" and the R2C2 agreed, indicating that the rule would be revised[24]—but for some reason the final version of the rule does not require a writing. As a practical matter, after the promulgation of this rule, any limited engagement should be express and in writing.

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[18] Or to make us think we are missing a footnote…
[19] Rule 1.1 Report, p. 13.
[20] Rule 1.1 Report, p. 15, referring to Cal. State Bar Formal Op. Nos. 2010-179 and 2012-184. See also, "Preserving Client Confidentiality in a High-Tech Environment: Why Ignorance is no Longer Bliss" by Joseph Montes, League Fall Conference 2015, pp. 2-6.
[21] Rule 1.2 Report, p. 14.
[22] Notwithstanding what non-incumbent candidates may believe in City Council elections.
[23] The chief enforcement officer for the State Bar Attorney disciplinary system per B&P Code Section 6079.5.
[24] Rule 1.2 Report, page 7.

Rule 1.2.1 Assisting, Soliciting, or Inducing Violations

(AKA Almost clears up the cannabis haze.)

Rather than adopt the R2C2's recommendations, the Court renumbered rule 1-120 and approved that as the new rule, pending the submittal of further revisions to the rule by the State Bar. Those revisions deal with the comments to the rule and the issue of advising medical marijuana dispensaries[25]. One version of the draft language would indicate that a lawyer can assist a client in complying with California law, provided that the client is advised of the conflict with Federal law. Alternate language provides the same, "even if the client's actions might violate the conflicting federal law." From a City Attorney perspective, this language would be helpful for lawyers advising jurisdictions that wish to accommodate cannabis businesses, even though such accommodation might be viewed as assisting violations of Federal law.[26]

Rule 1.3 Diligence

(AKA Slow and steady may still win the race.)

This is part 3 of the split of the current competency rule into three parts: competence, diligence and supervision. The split was undertaken primarily to track the format of the ABA Model Rules. One issue that was considered by the R2C2 was whether or not to include a requirement for "promptness" into the rule. But the R2C2 indicated that other more specific requirements for promptness are found elsewhere in the rules and a blanket requirement might just cause confusion[27].

Rule 1.4 Communication with Clients

(AKA Good news and bad news…only later.)

This rule expands the prior rule concerning communication, to add specificity to the various aspects of communication with clients. The rule is supplemented by the State Bar Act obligations (B&P sections 6068(m) and (n)—duty to respond promptly re status request and to provide certain documents). Of note, in expanding the rule, the R2C2 has added the following language to the substantive portion of the rule (as opposed to the comments) that would allow a lawyer to delay bad news:

[25] See 2017 Commission (or C3PO) Report at http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2018-Public-Comment/2018-07 (last viewed August 13, 2018).
[26] This language would eliminate exposure for a State Bar violation—but would not insulate anyone from exposure to Federal prosecution.
[27] Rule 1.3 Report Executive Summary, p. 2.

(c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes that the client would be likely to react in a way that may cause imminent harm to the client or others.[28]

Rule 1.4.1 Communication of Settlement Offers

(AKA Sometimes our rules are just better than the ABA's.)

Unlike most of the updated rules, which seek to conform California's current rules to those of the ABA, there is no equivalent ABA rule for Communication of Settlement Offers (separate from the ABA rule pertaining to Communication with Clients). This new rule largely mirrors current rule 3-510. The R2C2 felt that the communication of settlement offers should continue to stand on its own to accentuate this important duty[29].

Rule 1.4.2 Disclosure of Professional Liability Insurance

(AKA For those who dare to go bare.)

State law requires lawyers to maintain professional liability insurance under certain circumstances.[30] For lawyers not governed by those State law provisions, this rule (which largely reiterates current rule 3-410) describes when a lawyer must disclose the lack of professional liability insurance. The rule still exempts **government lawyers** and in-house counsel from the disclosure obligation. But lawyers providing services to **governmental entities** under contract are still subject to the rule.

Rule 1.5 Fees for Legal Services

(AKA Unreasonable fees are still OK.)

Rather than adopt the ABA Model Rule that prohibits a lawyer from charging "unreasonable" fees, the new rule retains the language from the current rule: lawyers are prohibited from charging "unconscionable" fees. There are standards in the rule to measure "unconscionability", but generally it must be a fee that is "so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called."[31] The R2C2 expressed concern that a reasonableness standard would bog down the discipline system with ordinary fee disputes. California law, unlike other states, provides a client with other forums, in particular mandatory fee arbitration, to contest an unreasonable fee.[32]

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[28] Which may be useful when trying to decide whether or not to publicly correct a councilmember during a council meeting.
[29] Rule 1.4.1 Report, p. 8.
[30] See, e.g., B&P Sections 6171(b), 6174.5, 6155(f)(6), Corp. Code Sections 13406(b), 16956.
[31] *Goldstone v. State Bar* (1931) 214 Cal. 490, 498.
[32] Rule 1.5 Report, p 9.

Of note for lawyers providing services under a contract that includes the term "retainer," the rule allows for non-refundable fees for "retainer" agreements. The rule defines a true retainer as a fee that a client pays to a lawyer to ensure the lawyer's availability to the client, but not to any extent as compensation for legal services performed or to be performed. The first Commission had a comment to this rule that indicated that "a payment purportedly made to secure a lawyer's availability, but that will be applied to the client's account as the lawyer renders services, is not a true retainer."[33] This begs the question of how the rule applies to a contract that provides for a "retainer" that gets applied against work performed, when little or no work is performed. At what point does that retainer then become "unconscionable?"

Rule 1.5.1 Fee Divisions Among Lawyers

(AKA I can't do it—but I knows a guy.)

Again, this rule preserves the California standard, rather than adopt the ABA Model Rule standard for fee-splitting arrangements. Under the ABA standard, a referring lawyer can only be compensated for work done on the matter, or if the referring lawyer retains joint responsibility for the matter. The California rule allows for "pure" referrals, provided that the arrangement between the lawyers is in writing and the client consents in writing. This rule not only preserves the California status quo, but is also intended to encourage lawyers who are not competent to handle a matter to refer it to a lawyer who is.[34]

Rule 1.6 Confidential Information of a Client

(AKA Why Government lawyers can't whistle.)

Unlike most jurisdictions where the duty of confidentiality arises out of common law, California duty arises out of statute. Business and Professions Code section 6068 provides in relevant part that a lawyer's duty includes an obligation:

(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

The new rule largely tracks the old rule, and because the duty is statutory, the bulk of the rule continues to be a lengthy set of comments intended to assist a lawyer in determining the circumstances under which confidential information may be disclosed.

Of particular interest, the R2C2 rejected a suggestion that a **government lawyer** should be able to disclose confidential information as a whistle blower, based upon an argument that the

[33] Rule 1.5 Report, p 22.
[34] Rule 1.5.1 Report, p 11.

government lawyer should be viewed as owing duties to both the **governmental entity** as well as the public. However, the R2C2 rejected this notion, fearing that **governmental lawyer** would not be able to establish the trust necessary to have an effective relationship with client **governmental entities** with such an exception in place. The R2C2 also noted that attempts to create such an exception have failed three times in the last fifteen years.[35]

Rule 1.7 Conflict of Interest: Current Clients

(AKA Conflicts, more or less.)

This rule—along with three others (1.8(f), 1.8(g) and 1.9) replaces the current 3-310. The rule moves California to the ABA Model format and language. There was debate at the R2C2 level about whether to include a "hybrid" of the ABA and California rules—somehow incorporating the checklist format found in 3-310 into the ABA language, but this was rejected as too confusing[36]. Of note, the Model Rule has 35 interpretive comments, and the first R2C2 proposed a rule with 41 interpretive comments. Ultimately the court approved rule only includes 11 comments—so more (4 rules instead of one) and less (11 comments, as opposed to 35) than what this could have been.

Rule 1.8.1 Business Transactions with a Client and Pecuniary Interests Adverse to a Client

(AKA Hollywood here I come.)

This rule did not change significantly in substance, although the numbering is intended to track the ABA rule. However, the R2C2 did reject the portion of the ABA rule that prohibited champerty[37] and negotiating for media and print rights to your client's story during the representation[38]. The R2C2 felt that an absolute disciplinary prohibition in that regard was counter to existing California law and policy.[39]

Rule 1.8.2 Use of Current Client's Information

(AKA Don't stab your client in the back without their consent.)

This rule adopts the substance of ABA model rule 1.8(b). There was some discussion in the R2C2 report about whether this rule was actually necessary, given that the duty to protect client confidentiality (B&P Section 6068(e)) arguably encompasses this rule[40]. But the R2C2 felt that for consistency with other jurisdictions, there should be an express California rule that prohibits use of a client's confidential information (beyond just a prohibition on disclosure of

[35] Rule 1.6 Report at p. 49, discussing a failed attempt to modify rule 3-600, and the veto of AB363 and AB 2713.
[36] Rule 1.7 Report, pp. 46-48.
[37] Yeah, I had to look it up too.
[38] Rule 1.8.1 Report Executive Summary, pp. 2-3.
[39] So when you are writing a brief for a client, you might also want to think about how it would read as a screenplay.
[40] Rule 1.8.2 Report Executive Summary, p. 2.

confidential information). The new rule prohibits use of client confidential information to the disadvantage of a client, unless the client gives informed consent.[41]

Rule 1.8.3 Gifts From Client

(AKA "For me? You shouldn't have. Does it come with a certificate of independent review?")

The rule tracks the prior California rule (4-400) and the comments make clear that a lawyer can still accept a gift from a client subject to general standards of fairness and absence of undue influence.[42] The new rule also adds language from the ABA Model Rule, requiring a certificate of independent review[43] before a lawyer can prepare an instrument giving him or herself a substantial gift from a client.

Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client

(AKA Sign here, then we can talk about who pays for what.)

This rule modifies slightly existing rule 4-210. It is intended to restrict lawyers from inducing a potential client into representation by promising financial assistance.

Rule 1.8.6 Compensation from One Other Than Client

(AKA Put it on Mr. Underhill's tab.)

This rule does not alter the substance of former rule 3-310(f), although, as a reminder to **government lawyers**, this rule still does not apply to a lawyer rendering legal services on behalf of any public agency (and now--nonprofit organization) that provides legal services to other public agencies or the public.

Rule 1.8.7 Aggregate Settlements

(AKA You get a car, and you get a car, and you also get a car.)

This rule modifies the old rule (3-310(D)) to add a prohibition on entering into aggregate plea arrangements in criminal matters. The new rule also moves the exception for class action settlements from the discussion/comments up into the substantive provisions of the rule.

[41] ?!

[42] And isn't that what holidays and birthdays are all about?

[43] Probate Code section 21384.

Rule 1.8.8 Limiting Liability to Client

(AKA Can't we keep this just between us?)

This rule preserves the substance of rule 3-400. The new rule adds a comment that specifically refers to B&P section 6090.5—which prohibits a settlement of a malpractice claim where the client agrees not to report the malpractice to a disciplinary agency (ala the State Bar) or requires the withdrawal of or non-cooperation in a disciplinary complaint.

Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

(AKA The Art of the (self) Deal.)

As proposed by the R2C2, this rule does not change the existing rule 4-300, which generally prohibits self-dealing in foreclosure and similar sales.[44] The R2C2 wrestled with whether or not to address certain provisions of the Probate Code, which arguably are inconsistent with the rule, but opted not to. The Supreme Court, in approving the new rule, modified it to add language addressing the Probate Code exception to participation in foreclosure and similar sales.

Rule 1.8.10 Sexual Relations With Current Client

(AKA Abstinence is the best form of protection.)

This rule revises the current prohibition on sex with clients under certain circumstances to be a flat out prohibition on sex with clients.[45] The ABA has a similar prohibition and for ease of enforcement and integrity of the profession, the R2C2 has revised the rule to be a straightforward prohibition. And for those who represent an organization (in house or outside counsel), the prohibition extends to sex with a constituent of the organization who supervises, directs or regularly consults with the lawyer concerning the organization's legal matters.[46]

Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9

(AKA Guilt by association.)

While lawyers are associated in a firm, a prohibition that applies to one of them under 1.8.1 to 1.8.9, applies to all of them. Note the imputation does not encompass Rule 1.8.10.

[44] The existing and new rules have no ABA Model counterpart.
[45] With the exception of spouses, domestic partners, and pre-existing relationships.
[46] I'm going to opt to refrain from comment on this one.

Rule 1.9 Duties to Former Clients

(AKA Don't forget to check the rearview mirror.)

This is the companion rule to 1.7 concerning current clients. This rule expands former 3-310(E) and covers three concepts: not being adverse to a former client in the same or related matter; not being adverse to a former client from a prior firm; not using or revealing confidential information to the detriment of a former client. Of note, the last comment to the rule expressly requires compliance by **government lawyers** to the extent required by rule 1.11.[47]

Rule 1.10 Imputation of Conflicts of Interest: General Rule

(AKA A screen you can't see through.)

First, this rule does not apply to **government lawyers** (see rule 1.11). This rule imputes conflicts arising out of rules 1.7 and 1.9 to other members of a firm. Of note, for the first time in California, the rule expressly allows the use of an ethical screen for lateral lawyers who join a firm, with written notice to the affected former client[48]. However, unlike the ABA Model Rule, which allows the use of such screens broadly, this new rule limits the use to instances where the lawyer joining a new firm did not substantially participate in the same or a substantially related matter. Screens can also only be used for conflicts arising out of the representation of clients at a former firm—"a law firm could not erect a screen around those firm lawyers who had represented a former client when the lawyers were associated in the same firm in order to represent a new client against that former client."[49]

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees

(AKA Government to private, government to government, but not private to government.)

This rule sets forth the general conflict rules for **government lawyers**. It allows for screening of a lawyer who comes from **government employment** to a private firm (without client consent), whether or not the lawyer practiced law in the public employment. There is no limit to the screening based upon the degree of involvement (as with rule 1.10). Two twists on the application of this rule are mentioned in the comments. First, a lawyer moving from one **governmental agency** to another may have to be screened.[50] Second, when a lawyer moves from the private sector to a **governmental agency**, the extent to which any conflicts may be

[47] No, I'm not going to tell you what that means—you'll have to see below under 1.11.
[48] Consent is not required—but the former client can object to the screening procedures and the firm is required to respond.
[49] Rule 1.10 Report, p. 3.
[50] Comment 6.

imputed to the other lawyers in that **governmental agency** is governed by caselaw, rather than this rule.[51]

Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

(AKA Leave that resume in your back pocket.)

This rule provides for imputation and screening when judges or other third party neutrals, or their staffs, move into private practice. It also limits the circumstances under which such a person can negotiate for employment with a private firm that is appearing before the court or neutral.

Rule 1.13 Organization as Client

(AKA I'm going to tell on you.)

This rule modifies current rule 3-600 by mandating that a lawyer "report up" the actions of constituents within an organization under certain circumstances. More specifically, when a lawyer knows a constituent is acting[52] in a manner that 1) violates the law or a legal obligation and 2) that action is likely to result in substantial injury to the organization, the lawyer must report those actions up the food chain within the organization.[53] If the highest authority within the organization refuses to change course, the lawyer cannot report outside of the organization, as that would violate B&P section 6068(e). The lawyer can continue to act in the best lawful interests of the organization, or resign if appropriate. The comments indicate that this rule applies to both public and private organizations, but also recognizes that defining precisely the identity of the client in a **governmental organization** is beyond the scope of the rule. Further, the rule is not intended to preclude specific reporting duties and procedures that may exist within **governmental organizations**, provided that they comply with B&P section 6068(e).

Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons

(AKA Trust me.)

This rule makes two substantive changes to existing rule 4-100. First, for lawyers who receive an up front payment for work, that money must be deposited into a client trust account unless the client agrees in writing that the money can be deposited into the lawyer's operating account. Second, the language "client or other person" in section (a) and the first comment to the rule indicate that a lawyer might have a duty to third parties (such as lienholders) with regard to any funds held in a client trust account. The rule does not affirmatively state such a duty exists in all instances, rather it points to caselaw that a lawyer might need to consult before disbursing funds from the account.

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[51] Comment 10. See also *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776, p. 806 n. 24.
[52] Or intends to act or is refraining from acting.
[53] If only one of the factors is present, then the lawyer "may" report up.

Rule 1.16 Declining or Terminating Representation

(AKA Wait…you're firing me?)

This rule largely tracks existing Rule 3-700, which governs the circumstances under which a lawyer MUST terminate representation and under which a lawyer MAY terminate representation. The rule clarifies that a lawyer must terminate representation when the client fires the lawyer—so resisting being fired could be grounds for discipline.

Rule 1.17 Sale of a Law Practice

(AKA Original owner, new tires, purrs like a kitten.)

The rule tracks current rule 2-300. The R2C2 opted not to track the ABA Model Rule provision that would allow sales of a portion of a practice, instead retaining the California rule requirement that the sale of a practice apply to "all or substantially all" of a law practice. The R2C2 was worried that selling off pieces of a practice could operate as an end run to referral fee rules, add to the commercialization of the practice of law and make client representation for less lucrative matters scarce.[54]

Rule 1.18 Duties to Prospective Client

(AKA Yet another screen.)

This rule tracks and expands upon the evidence code provisions governing attorney-client privilege. Under those statutes, privileged communications of even a potential client are protected from disclosure. The new rule would prohibit disclosure of confidential information obtained from a potential client and prohibit representation of other clients adverse to the potential client, unless informed written consent is obtained, or unless the lawyer with whom the potential client consulted is screened. This is, once again, unconsented screening with notice to the prospective client to ascertain compliance with the rule. A dissent on the R2C2 raised a concern about too much confidential information being obtained prior to an effective screen being established, but the majority of the R2C2 felt that the rules requirement that the lawyer take "reasonable" measures to limit the amount of information learned, and the burden on the firm to demonstrate timely imposition of adequate screening strikes the right balance.[55]

[54] Rule 1.17 Report, p. 19.
[55] Dissent by Robert Kehr to Rule 1.18(d)(2), p. 4.

Counselor (Rules 2.1-2.4.1)

Rule 2.1 Advisor

(AKA How do you think I should vote on this agenda item?)

"In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." This rule is a new rule for California, but the R2C2 describes the rule as a core duty of every lawyer.[56] Two short comments describe the scope of the rule, and even indicate that the rule does not preclude a lawyer from referring to considerations other than the law, such as moral, economic, social and political factors.[57] So for **government lawyers**, apparently political advice is not out of bounds.

Criticism from the State Bar Court Review Department and the State Bar Chief Trial Counsel suggests the rule is already covered by the duty of competence, and that the comments to this rule may actually misstate the scope of the duty.[58] Of note, the R2C2 declined to define independent professional judgment.

Rule 2.4 Lawyer as Third-Party Neutral

(AKA Are you my Momma?)

This new rule for California requires a lawyer acting as a third-party neutral to inform unrepresented parties that the lawyer is not representing them. Further, if the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer must explain the difference between acting as a third party neutral versus acting as one who represents a client.

Rule 2.4.1 Lawyer as a Temporary Judge, Referee, or Court-Appointed Arbitrator

(AKA The bootstrap.)

This rule restates current rule 1-710, which states that a lawyer who is serving as a temporary judge and is subject to the terms of Judicial Ethics Canon 6D shall comply with that canon. Canon 6D describes which of the canons in the Code of Judicial Ethics cover temporary judges. The new State Bar rule is intended to permit the State Bar to discipline lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial capacity. The enforcement jurisdiction of the Code of Judicial Ethics relates to sitting judges only, so this rule bootstraps those rules into the Rules of Professional Conduct, to capture lawyers who are not "sitting" judges.

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[56] Rule 2.1 Report, p. 1.
[57] Comment 2.
[58] Rule 2.1 Report, pp. 6, 7.

Advocate (Rules 3.1-3.10)

Rule 3.1 Meritorious Claims and Contentions

(AKA I knew this was a bad idea.)

This rule is the first of 9 rules, brought together to mirror chapter 3 of the ABA Model Rules entitled "Advocate." This rule carries forward the substance of existing rule 3-200, but makes one significant change. The existing rule prohibits a lawyer's conduct where the lawyer "knows or should know that the objective of such employment" is to pursue an unmeritorious or malicious course of action. The new rule eliminates the "knowledge of the objective" requirement and simply prohibits 1) actions that lack probable cause and are intended to harass or maliciously injure, or 2) claims or defenses that are unwarranted under existing law without a good faith argument for a change in the law.

Rule 3.2 Delay of Litigation

(AKA The four corner stall.)

This new to California rule prohibits delaying a proceeding without substantial purpose, or causing needless expense. This rule is modeled on the New York rule, rather than the ABA Model Rule—the Model Rule is worded aspirationally, requiring reasonable efforts to expedite litigation. The R2C2 Report includes a quote from the Chief Justice of the U.S. Supreme Court to support adoption of the rule:

"As for the lawyers, most will readily agree—in the abstract—that they have an obligation to their clients, and to the justice system, to avoid antagonistic tactics, wasteful procedural maneuvers, and teetering brinksmanship. I cannot believe that many members of the bar went to law school because of a burning desire to spend their professional life wearing down opponents with creatively burdensome discovery requests or evading legitimate requests through dilatory tactics. The test for plaintiffs' and defendants' counsel alike is whether they will affirmatively search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results."[59]

It will be interesting to see whether in fact there is a sea change in litigation tactics as a result of this rule. The Office of Chief Trial Counsel, who included lengthy concerns about the enforceability of many of the other proposed rules, simply indicated support for this draft rule.[60]

[59] Rule 3.2 Report, p. 6, quoting *2015 Year-End Report on the Federal Judiciary* at page 11.
[60] Rule 3.2 Report, p. 4.

3.3 Candor Toward the Tribunal

(AKA Don't hide the ball—unless you have to.)

This rule follows the ABA Model Rule and elaborates on current rule 5-200. The current rule prohibits misleading the court through a false statement of fact or law, or citing authority that is no longer valid. Rule 3.3 expands on the types of prohibited conduct and then imposes a cure obligation when a lawyer knows or becomes aware of the issue in a proceeding. Unlike the Model Rule, however, the duty of confidentiality is not qualified by the lawyer's duty of candor to the court. Thus, when presented with a question from the court that would disclose client confidential information, the lawyer must indicate an inability to answer based upon applicable ethics rules and statutes (absent consent to disclose from the client).[61]

Also unlike the Model Rule, where the substantive duties of the rule expire upon conclusion of the matter, R2C2 recommended that the duty to correct should expire upon the conclusion of the matter or the representation, whichever comes first—so a lawyer fired mid-litigation would have no further substantive duty under the rule.[62] But the question of whether a lawyer who knows of a misstatement of law or fact and fails to correct it before being fired by the Client could still be subject to discipline was not addressed. The Supreme Court, in approving the rule, altered the language duty to conform to the Model Rule, so the duty extends to the conclusion of the proceeding. Thus a lawyer fired during a matter would still theoretically have an obligation to correct a misstatement of law or fact when he or she becomes aware of such until the proceeding concluded.[63]

Rule 3.4 Fairness to Opposing Party and Counsel

(AKA Play nice in the sandbox.)

This rule incorporates provisions from three current rules concerning evidence, witnesses, discovery and asserting personal opinions (when not a witness) in trial. The rule does not make any substantive additions to existing rules.

Rule 3.5 Contact with Judges, Officials, Employees and Jurors

(AKA There's no party like an ex parte.)

This rule combines into one the current rules governing contact with jurors and contact with judicial officers. The R2C2 preferred the more detailed California language from those rules to that of the ABA Model Rule. Of note, the rule prohibits ex parte contacts with judges absent a rule allowing for such contact. Trustees Michael Colantuono and Sean SeLegue

[61] Rule 3.3 Report, pp. 17-18.
[62] See discussion in Rule 3.3 Report at pp. 23-24 and Dissent pp. 1-2.
[63] That would seem to make for an awkward ex parte.

submitted a memo[64] expressing concern that the inclusion of administrative bodies acting in an adjudicatory capacity within the definition of "judge" could create confusion in, for example, a city council setting where the council has not adopted ex parte contact rules. In that setting, a lawyer could not have ex parte contact with city councilmembers—but a non-lawyer could. Further, a lawyer must ascertain whether or not the particular proceeding before the council was adjudicatory or not before attempting any contact. And all of this even though that Rule 4.2 would allow a lawyer to speak to councilmembers, due to First Amendment concerns. Rule 3.5 was adopted without change by the Supreme Court.

Rule 3.6 Trial Publicity

(AKA Meet the press.)

This rule carries over the substance of existing rule 5-120 which already largely tracked the ABA Model Rule. The rule operates as a limitation on statements that can be made publicly about an investigation or litigation matter. The standard of care was changed from that of a reasonable person to instead be when a lawyer "knows or reasonably should know." The Office of Chief Trial Counsel was critical of the use of the word "knows," believing it may make enforcement difficult, but the R2C2 disagreed, based upon the definition in 1.0.1(f) and a conclusion that knowledge can be inferred from the specific circumstances.[65]

Rule 3.7 Lawyer as Witness

(AKA How to cross-examine yourself.)

This rule expands existing rule 5-120 to include not only proceedings before a jury, but also a trial before a judge, administrative law judge or arbitrator. The rule also addresses use of lawyers from the same firm as witnesses. Finally, for **government lawyers**, before a lawyer may act as a witness in a contested matter, informed written consent must be obtained from the head of the office (or his/her designee) in which the lawyer is employed.

Rule 3.8 Special Responsibilities of a Prosecutor

(AKA How to be a Minister of Justice.)

This rule dramatically expanded the scope of a prosecutor's responsibilities under former former[66] rule 5-110. That rule was one short paragraph long. However, during the pendency of the comprehensive rule update process, the Supreme Court approved a new rule 5-110 on an expedited basis, in December 2017. That "former" rule is now being replaced by rule 3.8—

[64] The Rule 3.5 Report references the memo as attached, but it was not. I obtained a copy from Mr. Colantuono.
[65] The knowledge requirement is raised as a concern by OCTC in several of the new rules, and the response from the Commission in this instance is the typical response asserted. Rule 3.6 Report, p.9.
[66] Not a typo—read on.

which effectively represents a renumbering of the current "former" rule 5-110 (not the former former rule 5-110).

Bottom line, the expanded duties of prosecutors as "ministers of justice"[67] have been in place since December 2017, so for those that serve as prosecutors, you are already subject to and should already be familiar with the expanded scope of responsibilities. The expanded rule language addresses sharing of evidence, advising accused of certain rights, and an obligation to undertake cure efforts when a lawyer becomes aware of evidence indicating a defendant has been wrongly accused or convicted—even in another jurisdiction. Of further note, a prosecutor can be disciplined for insufficiently supervising other lawyers who violate Rule 3.6 (Trial Publicity).

Rule 3.9 Advocate in Nonadjudicative Proceedings

(AKA Please fill out a speaker card.)

This rule is new for California and is modeled on the New York rule, rather than the ABA Model Rule. It applies to a lawyer appearing before a legislative body or administrative agency. It requires that the lawyer indicate they are appearing in a representative capacity (but the lawyer does not have to disclose the client's identity), unless the lawyer is merely seeking information that is available to the public. The purpose for the rule is to identify for the legislative body or administrative agency whether the lawyer is appearing as a concerned citizen, or on behalf of someone. In terms of the necessity for such a rule, the commentary in support of the New York rule cites to Monty Python in support.[68]

Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges

(AKA Extortion's still bad.)

This rule is unusual in that there is no equivalent ABA Model Rule. The body of this rule makes non-substantive changes to existing rule 5-100, which prohibits threatening criminal action to gain a civil advantage. Most helpfully, however, the new rule includes several comments that clarify the rule's scope, and even authorize some activity that contradicts prior State Bar Ethics opinions. Specifically, the State Bar has previously opined that "release-dismissal" agreements, where a prosecution is dismissed in exchange for a civil release, violate this rule. The new comments indicate such a practice is permitted.[69] The comments also clarify that a threat to bring a civil action, or a statement that a lawyer will pursue "all available legal remedies" does not violate the rule.

[67] See Comment 1 to Rule 3.8.
[68] Rule 3.9 Report at p. 4.
[69] Rule 3.10 Report at p. 8 and 11-12.

Transactions with Persons Other than Clients (Rules 4.1-4.4)

Rule 4.1 Truthfulness in Statements to Others

(AKA I cannot tell a lie—I mean a "material" lie.)

This new rule to California prohibits a lawyer from making a false statement of fact or law to a third person and also requires a lawyer to disclose a material fact to avoid assisting a client in a criminal or fraudulent act. The concepts covered by this rule are already covered in statutes and caselaw, and arguably even some other rules, but now would also be a clearly articulable standard of discipline.[70] The rule also ties into Rule 3.9, tempering the types of statements that can be made before a legislative or administrative body.[71]

Rule 4.2 Communication With a Represented Person

(AKA Leave my date alone.)

This rule carries over the substance of existing Rule 2-100, but then adds a definition for "public official" for purposes of making a distinction as to who can be communicated with in a **governmental organization.** As a result, the rule now clarifies that when a public entity is one of the parties, opposing counsel may communicate with public officials, but not other employees of the public entity in connection with the matter. Unfortunately, "public official" is defined as a public officer with the comparable decision-making authority and responsibilities of an "officer, director, partner, or managing agent of the organization." So you will have to ascertain within your own organization how far down the management structure this definition goes.

Rule 4.3 Communicating with an Unrepresented Person

(AKA Help me, help you.)

Rule 4.3 has no equivalent in the current rules. This rule prohibits three activities when a lawyer communicates with an unrepresented party on behalf of a client: 1) stating or implying the lawyer is disinterested; 2) failing to correct the person's misconception if the lawyer knows or reasonably should know the person incorrectly believes the lawyer is disinterested; and 3) providing legal advice, other than to obtain counsel, if the interests of the person are in conflict with the client's interests. Unlike the ABA Model Rule, this version of the rule also prohibits a lawyer from seeking to obtain privileged or confidential information that the lawyer knows or reasonably should know the person may not reveal without violating a duty to another. So it would appear that for that type of information, your client would have to speak to the unrepresented person directly.[72]

[70] Rule 4.1 Executive Summary, pp. 1-2; Report p. 7.
[71] Rule 4.1 Report, p. 7-8.
[72] Rule 4.3 Report, p. 8.

Law Firms and Associations (Rules 5.1-5.6)

Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers

(AKA Have I got your attention, City Attorney?)

The R2C2 has taken one sentence from rule 3-110 that referenced a duty to supervise the work of subordinates and expanded it to three rules (5.1, 5.2 and 5.3), taken from the ABA Model Rules. This rule speaks primarily to the obligations of the lawyers with managerial authority in a law firm[73] to make reasonable efforts to ensure that the firm has in place measures that give reasonable assurance that all lawyers in the firm comply with the rules. Such measures include conflict check systems, calendar/litigation deadline systems, accounting systems, distribution of workload and supervision of less experienced lawyers.

The rule identifies the circumstances under which a supervising lawyer may be subject to discipline for the actions of a subordinate, which include a failure to take remedial action to correct a potential rule violation when the supervisor becomes aware of the issue. As proposed, the rule included a comment 6, that would exculpate a supervisor where a decision to ratify a course of action was a reasonable resolution of an arguable question of professional responsibility. The Supreme Court struck that comment from the rule.

Rule 5.2 Responsibilities of a Subordinate Lawyer

(AKA The anti-Nuremberg rule.)

This rule is the flipside of 5.1, requiring adherence to the rules, notwithstanding directions from a supervisor. That said, this rule does include the caveat that was deleted from 5.1—a subordinate does not violate the rules where the lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.[74]

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

(AKA The buck still stops here.)

This rule tracks the obligations of rule 5.1, but applies the duties to the supervision of secretaries, investigators, law student interns and paraprofessionals. As a managing lawyer in a firm or a lawyer who supervises the activities of nonlawyers, you can still be disciplined for their actions under certain circumstances. But note that here there is no caveat concerning resolution of an arguable question of professional duty.[75]

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[73] The definition of firm includes lawyers working in a **governmental office** (see Rule 1.0.1).

[74] So if you are on the fence about a course of action, best to consult with another attorney in your office—and refer to them as your "supervisor" during the conversation.

[75] But I guess you could still wander down the hall and ask a fellow lawyer "Hey, Supervisor, my secretary is about to…"

Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Lawyer

(AKA The Slytherin[76] Rule.)

This rule carries over the substance of rule 1-311, for which there is no ABA Model Rule counterpart. It still prohibits hiring lawyers who have been disbarred, suspended, resigned (in the face of pending discipline), or been made involuntarily inactive (based upon incapacity) for certain legal work, and allows other work only with the written consent of a client and notification to the State Bar. Now, however, such persons are referred to as "ineligible persons." The rule is intended to provide a vocational rehab opportunity for ineligible persons, but as noted in the dissent "a disciplinary rule, the violation of which may lead to punishment of the employing attorney, is an odd place to set out a purported rehabilitating mechanism that gives no positive incentive to the employing attorney to help the wayward, sidelined attorney."[77]

Rule 5.4 Financial and Similar Arrangements with Nonlawyers

(AKA No Peanut Butter in your Chocolate.)

This rule, based upon the ABA Model Rule, combines three former California rules: 1-310 (Forming a Partnership With a Non-lawyer), 1-320 (Financial Arrangements with Non-Lawyers), and 1-600 (Legal Service Programs). The rule generally prohibits sharing fees with non-lawyers (with some exceptions), prohibits forming partnerships with non-lawyers if the partnership includes the practice of law; and limits the authority of non-lawyers in a law practice. The rule also governs referrals from non-lawyers, and practice with nonprofit legal aid type entities. The substance of the rule remains unchanged, and the thrust of the rule continues to be to protect a lawyer's independent judgment.[78]

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(AKA Not without a Golden Ticket.)

This rule continues the prohibition on aiding someone in the unauthorized practice of law, and against a member of the California bar practicing in another jurisdiction in violation of that jurisdiction's regulations. The rule has been expanded to include the ABA Model Rule provisions that prohibit persons not admitted to practice in California from maintaining an office in California and holding him or herself out as authorized to practice in California.

[76] OK, so some of you may quibble with this because Harry Potter, who was consistently good, could have chosen to be Slytherin-but he actually chose Gryffindor. Snape, on the other hand, was not good, but was ultimately rehabilitated, Q.E.D.
[77] Commission Member Daniel Eaton Dissent, p. 3.
[78] Rule 5.4 Report at pp. 18-19.

Rule 5.6 Restrictions on a Lawyer's Right to Practice

(AKA You can't always get what you want.)

This rule continues the restrictions on provisions in partnership agreements and settlement agreements that would 1) restrict the practice of law after leaving a partnership[79]; 2) prohibit a report of a violation of the rules; or 3) restrict a lawyer from representing another client concerning the same or similar claims. Of note, the R2C2 considered inclusion of a restriction that would prohibit confidential settlement agreements, given that with the existence of confidential settlement agreements, there is no way to tell if the provisions of this rule governing prohibited content in settlement agreements have been violated. However, the R2C2 chose to reject such language given that resulting policy implications are beyond the scope of the Commission's Charter.[80]

Public Service (Rules 6.1-6.5)

Rule 6.3 Membership in Legal Services Organization

(AKA A good deed goes unpunished.)

This new rule to California is based upon the ABA Model Rule and is intended to provide assurances to lawyers that they will not disqualify themselves or their firm from participating as officers or members of a legal services organization. "Such service is important and should be encouraged as long as it does not interfere with the lawyer's duties to his or her clients."[81] The rule describes the prohibited circumstances under which a lawyer should not participate in decisions or actions of the organization.

Rule 6.5 Limited Legal Services Programs

(AKA Rules for speed dating.)

This rule carries forward the substance of current rule 1-650, describing the scope of a lawyer's duties with regard to conflicts in connection with short term representation of a client, such as a pro bono clinic. Given the limited interaction, insufficient time exists to undertake a thorough conflict analysis, so a lawyer only has a conflict if the lawyer knows that a conflict exists. Subsequent to the representation, neither the lawyer nor others at his/her firm are conflicted based upon the prior representation, although the lawyer would still owe a duty of confidentiality to the short term client.[82]

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[79] Although an agreement can include financial consequences for practice after leaving a partnership. Rule 5.6 Report at pp. 7 and 9.
[80] Rule 5.6 Report, p. 12.
[81] Rule 6.3 Report Executive Summary, p. 1.
[82] Rule 6.5 Report, p. 13.

Information About Legal Services (Rules 7.1-7.5)

Rule 7.1 Communications Concerning a Lawyer's Services

(AKA Se Habla Espanol.)

The R2C2 has taken rule 1-400 (Advertising and Solicitation) and converted it into five rules (7.1 – 7.5) to track the ABA Model Rules. Substantively, the requirements of rule 1-400 remain intact, so discussion of this and the next four rules will simply highlight a few updates to the language. Rule 7.1 covers communications generally, the format of which are covered in rules 7.2 through 7.5. Rule 7.1 also retains the right for the State Bar Governing Board to adopt standards for communications that are presumed to violate the rules.

El comentario 5 a esta regla requiere que cuando un abogado represente que puede proporcionar servicios legales en un idioma que no sea el inglés, pero que personalmente no puede hacerlo, también debe indicar en ese otro idioma el título de empleo de la persona que habla dicho idioma.[83]

Rule 7.2 Advertising

(AKA Mad Men (or Women))

This rule allows advertising, under certain circumstances. It also allows for payments or gifts for referrals, under certain circumstances. Of note, the previous requirement to retain copies of all advertisements for two years has been removed. The rule now contemplates advertising via electronic means, and the R2C2 felt that retaining copies of a fluid website would be cumbersome.[84]

Rule 7.3 Solicitation of Clients

(AKA Would you like to buy a Girl Scout Cookie?)

This rule addresses "real-time" solicitation of clients. "The concern is the ability of lawyers to employ their 'skills in the persuasive arts' to overreach and convince a person in need of legal services to retain the lawyer without the person having had time to reflect on this important decision."[85] The R2C2 discussed whether or not a savings clause found in the prior rule should be retained, based upon constitutional concerns. The First Commission believed that Supreme Court precedent invalidating a prohibition on accountants cold-calling customers may invalidate the prohibition for lawyers. But the R2C2 pointed out that the Court drew a

[83] Comment 5 to this rule requires that where a lawyer represents they can provide legal services in a language other than English, but they personally cannot, they must also state in that other language the employment title of the person who speaks such language.
[84] Rule 7.2 Report, p. 15.
[85] Rule 7.3 Report, p. 12.

distinction between accountants and lawyers, the former not being "skilled in the persuasive arts."[86]

The rule also addresses solicitation via written and electronic communication.

Rule 7.4 Communication of Fields of Practice and Specialization

(AKA Certifiable.)

This rule prohibits communicating that a lawyer is a certified specialist in a particular area of law, unless he or she actually is certified by the Board of Legal Specialization, or an entity accredited by the State Bar to designate specialties. Interestingly, however, the rule now includes language that indicates a lawyer may communicate that his or her practice "specializes in" a particular field of law.[87]

Rule 7.5 Firm Names and Trade Names

(AKA Well you can call me Ray…)

Substantively, no change to this rule. Of note for cities, the rule carries over the language that prohibits use of a firm name, trade name or other professional designation that states or implies a relationship with a **government agency**.

Maintaining the Integrity of the Profession (Rules 8.1-8.5)

Rule 8.1 False Statement Regarding Application for Admission to Practice Law

(AKA The wrong type of bar for lies.)

This rule largely tracks the current rule. A person submitting an application cannot make a false statement or make a statement "with reckless disregard as to its truth or falsity." In contrast, a lawyer, in connection with another person's application for admission to practice law, is prohibited from making a statement of material fact that the lawyer knows to be false. This distinction is made in recognition that many people seeking admission to practice solicit support from persons such as law professors and judges who are not in a position to undertake an investigation of facts and the process is better with the participation of those individuals.[88]

[86] Wow—we needed the U.S. Supreme Court to tell us that. See Rule 7.3 Report at p. 17-18 and Edenfield v. Fane, (1993) 507 U.S. 761, pp. 774-775.
[87] Not sure a potential client can appreciate the distinction when he sees it driving by a billboard or bus bench ad.
[88] Rule 8.1 Report, p. 11.

Rule 8.1.1 Compliance with Conditions of Discipline and Agreements in Lieu of Discipline

(AKA Fool me once…)

This rule carries forward the substance of rule 1-110 with slight modifications. Essentially the rule makes non-compliance with imposed discipline or the conditions in an agreement in lieu of discipline a disciplinable offense.

Rule 8.2 Judicial Officials

(AKA Bootstrap from the other boot.)

Like rule 2.4, where reference to the Canons of the Code of Judicial Ethics were referenced as a way of gaining State Bar jurisdiction to enforce the referenced canons, here a candidate for judicial office or a lawyer seeking appointment to judicial office are required to comport with identified canons, and are thereby subject to discipline by the State Bar for their violation. Of note for those not desiring to wear the robes, a lawyer can now be disciplined for making false statements of fact, or statements with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or judicial candidate. However, note that the rule only addresses false statements of fact—the R2C2 recognizes that a lawyer has a right to criticize the judiciary if the criticisms are supported by a reasonable factual basis.[89]

Rule 8.4 Misconduct

(AKA The 6 Commandments)

This rule collects in one place various rules "intended to facilitate compliance and enforcement by clearly stating these principles in a single rule where lawyers, judges and the public can identify basic standards of conduct addressing honesty, trustworthiness and fitness to practice with which a lawyer must comply."[90] The principle debate over this rule was whether or not to include "attempt" to violate the rules as a violation. The R2C2 opted not to include attempt in this general rule, as discipline for an attempted violation works with the language of certain rules, but not others.[91] The R2C2 feels that this rule is not a substantive change to the existing rules, as it aggregates concepts taken from existing rules, statutes and caselaw.[92]

[89] Rule 8.2 Report, p. 4, referencing *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1438.
[90] So why do we need the other 68?
[91] Rule 8.4 Report, pp. 10-12.
[92] Rule 8.4 Report, p. 16.

Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation

(AKA The State Bar FEHA Policy.)

This rule updates rule 2-400, an anti-harassment, anti-discrimination rule from 1994. The rule is updated to more current language/standards that would be seen in similar policies and statutes adopted more recently.

The major change to the rule, however, is the elimination of the former threshold requirement that a court of competent jurisdiction must have already found that the alleged unlawful conduct occurred. That elimination results in original jurisdiction for the State Bar to pursue a violation. The State Bar Court raised concerns regarding the limited discovery, differing burden of proof, inapplicability of the Evidence Code and lack of jury trials in a proceeding for violation of a rule that could simultaneously be pursued by other government agencies specifically authorized to investigate and prosecute similar conduct.[93] A dissent by Commissioner Robert Kerr raises similar concerns, as well as the potential that this rule could result in a wave of State Bar complaints for conduct better handled, at least in the first instance, by other governmental entities.[94]

The R2C2's response indicates that because the new rule requires a lawyer who is the subject of an OCTC investigation for violation of this rule to notify the State Bar of any criminal, civil or administrative action premised on the same conduct, the State Bar and OCTC will have access to related proceedings that might weigh in favor of abating, or deferring a State Bar proceeding. Additionally, the rule also requires a lawyer who receives a notice of a disciplinary charge under this rule to provide a copy to the State and Federal agencies tasked with primary responsibility for coordinating enforcement of laws and regulations prohibiting unlawful discrimination. If those agencies initiate their own proceedings, the OCTC and State Bar Court can defer to those proceedings.[95]

Rule 8.5 Disciplinary Authority; Choice of Law

(AKA Home Field Advantage.)

This rule replaces existing rule 1-100(D) and conforms the substance to that of the ABA Model Rule. Specifically, lawyers admitted to practice in California are subject to discipline in California, regardless of where the conduct occurs. Lawyers not admitted in California are subject to discipline for legal services performed in California. A lawyer may be subject to discipline in more than one jurisdiction, depending upon where the violation occurs.

[93] Rule 8.4.1 Report, pp. 12-13.
[94] Rule 8.4.1 Report, Robert Kerr Dissent, pp. 1-8.
[95] Rule 8.4.1 Report, Robert Kerr Dissent, pp. 9-11.

Conclusion

The new rules go into effect November 1, 2018 and all lawyers practicing in California are subject to them. As you become familiar with the new rules, hopefully the substance of this paper has provided some focus or insight into issues that may be of particular interest to you.[96]

[96] So you won't have to read all of the reports and back up materials!