

S240991

ADMINISTRATIVE ORDER 2018-05-09

MAY 10 2018

Jorge Navarrete Clerk

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

ORDER RE REQUEST FOR APPROVAL OF PROPOSED AMENDMENTS
TO THE RULES OF PROFESSIONAL CONDUCT OF
THE STATE BAR OF CALIFORNIA.

On March 30, 2017, the Board of Trustees of the State Bar of California filed a request for approval of comprehensive amendments to the California Rules of Professional Conduct. (Bus. & Prof. Code, § 6076.) The submission included 70 new or amended rules. The request is granted in part and denied in part.

Twenty-seven rules are approved as submitted by the State Bar:

- Rule 1.1 Competence
- Rule 1.3 Diligence
- Rule 1.4.1 Communication of Settlement Offers
- Rule 1.4.2 Disclosure of Professional Liability
- Rule 1.5 Fees for Legal Services
- Rule 1.6 Confidential Information of Client
- Rule 1.8.2 Use of Current Client's Information
- Rule 1.8.3 Gifts from Clients
- Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client
- Rule 1.8.7 Aggregate Settlements
- Rule 1.8.8 Limiting Liability to Client

- Rule 1.8.10 Sexual Relations with Client
- Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9
- Rule 1.10 Imputation of Conflicts of Interest: General Rule
- Rule 2.1 Advisor
- Rule 2.4 Lawyer as Third-Party Neutral
- Rule 3.2 Delay of Litigation

- Rule 3.7 Lawyer as Witness
- Rule 3.8 Special Responsibilities of a Prosecutor¹
- Rule 3.9 Advocate in Nonadjudicative Proceedings
- Rule 4.1 Truthfulness in Statements to Others
- Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
- Rule 6.5 Limited Legal Services Programs
- Rule 7.1 Communications Concerning the Availability of Legal Services
- Rule 7.3 Solicitation of Clients
- Rule 7.4 Communication of Fields of Practice and Specialization
- Rule 7.5 Firm* Names and Letterheads

Forty-two rules are approved as modified by the court:

- Rule 1.0 Purpose and Function of the Rules of Professional Conduct - The court revises the citation in Comment [1] to conform to the California Style Guide. The court amends Comment [5].
- Rule 1.0.1 Terminology - The court revises the definition of "person" under paragraph (g-1). The court adds an asterisk after the term "person" or "person's" in paragraphs (a), (e), (f), (m), and (n), after the term "writing" in paragraphs (e-1), after the term "firm" in paragraph (g) and (k), and after "screen" or "screening" in Comments [5] and [6].
- Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer - The court revises Comment [4] to conform to the California Style Guide.
- Rule 1.2.1 Assisting, Soliciting, or Inducing Violations - The court amends current rule 1-120 and adopts it as rule 1.2.1 pending the State Bar's submission of additional revisions to proposed rule 1.2.1.
- Rule 1.4 Communication with Clients - The court removes an unnecessary comma from subparagraph (a)(l).
- Rule 1.5.1 Fee Divisions Among Lawyers - The court substitutes semicolons for commas at the end of each item in the list in subparagraph (a)(2).

¹ On December 6, 2017, the State Bar filed a supplemental request to withdraw the original version of proposed rule 3.8 that it had submitted on March 30, 2017 and to approve a subsequent version approved by the State Bar's Board of Trustees on November 3, 2017. The court grants the State Bar's supplemental request.

- Rule 1.7 Conflict of Interest: Current Clients - The court deletes Comment [2], moves the definition of "matter" to the text of the rule as paragraph (e), and renumbers the subsequent Comments. The court deletes "or organization" and adds as asterisk next to "person" in Comment [1].
- Rule 1.8.1 Business Transactions with a Client and Pecuniary Interests Adverse to a Client-The court modifies paragraph (a) and makes additional revisions to the citations in Comments [1] and [4] to comply with the California Style Manual.
- Rule 1.8.6 Compensation from One Other Than Client - The court adds Comment [5].
- Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review - The court adds paragraph (c) and a Comment.
- Rule 1.9 Duties to Former Clients - The court adds as asterisk next to "person's" in paragraph (a) and "person" in subparagraph (b)(1). The court modifies citations in Comment [1] to comply with the California Style Manual and corrects internal citations in Comments [2] and [6].
- Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees - The court amends an internal citation in Comment [2] and substitutes the words "personally prohibited from participating" in place of "disqualified" in Comment [7]. The court revises the citations in Comments [6] and [10] to comply with the California Style Manual.
- Rule 1.12 Former Judge, Arbitrator, Mediator, Or Other Third-Party Neutral - The court substitutes the phrase "seek employment from" for "participate in discussions regarding prospective employment with" where it appears in paragraph (b). The court deletes the asterisk after "third" in paragraph (b). The court adds the terms "personally and" before "substantially" in paragraph (b). The court substitutes the words "personally prohibited from participating" in place of "disqualified" in Comment [3].
- Rule 1.13 Organization as Client - The court adds the term "resignation," before "or withdrawal" in paragraph (e).
- Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons - The court corrects copyediting errors in paragraph (a) and Standard (1)(a)(i) through (iii), and (1)(b)(i) through (ii). The court adds an asterisk after "person" in Standard (1){a)(i), (ii) and (iv). The court revises the citation in Comment [I] to comply with the California Style Manual.

- Rule 1.16 Declining Or Terminating Representation - The court adds an asterisk after "person" in subparagraph (a)(1) and after "tribunal's" in Comment [4].
- Rule 1.17 Sale of a Law Practice - The court corrects an error at the end of the second sentence of Comment [2].
- Rule 1.18 Duties to Prospective Clients - The court adds an asterisk after "person's" in Comment [1]. The court deletes an unnecessary comma in Comment [2] and revises the citation in Comment [4] to comply with the California Style Manual.
- Rule 2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator - The court revises to citation in the rule and Comment [1] to the California Code of Judicial Ethics to comply with the California Style Manual.
- Rule 3.1 Meritorious Claims and Contentions - The court adds an asterisk after the word "person" in subparagraph (a)(1).
- Rule 3.3 Candor Toward The Tribunal*-The court amends paragraph (c) and Comment [6]. The court revises the citation in Comment [5] to comply with the California Style Manual. The court adds the heading "Ex Parte Communications" before Comment [7]. The court adds an asterisk after "tribunal's" in Comment [1] and after "tribunal" in Comment [7].
- Rule 3.4 Fairness to Opposing Party and Counsel - The court amends Comment [2].
- Rule 3.5 Contact With Judges, Officials, Employees, and Jurors - The court adds the terms "rule or" before "ruling" in the introductory phrase to paragraph (b). The court deletes the word "or" at the end of subparagraphs (b)(1) through (b)(3). The court adds the word "or" at the end of subparagraph (g)(2). The court amends Comment [1].
- Rule 3.6 Trial Publicity - The court amends the internal rule citation in Comment [2]. The court adds an asterisk after "person" in subparagraph (b)(7)(ii).
- Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges -The court revises the citation in Comment [3] to comply with the California Style Manual. The court adds a pinpoint citation to rule 3.8(a) in Comment [4].
- Rule 4.2 Communicating with a Unrepresented Person* - The court adds an asterisk next to "Person" in the rule title, next to "person's" in Comment [5], and next to "person" at the end of Comment [9]. The court revises the citation in Comment [4] to comply with the California Style Manual.

- Rule 4.3 Dealing with Unrepresented Person* - The court adds an asterisk after "Person" in the rule title and after "person's" in Comment [2].
- Rule 4.4 Duties Concerning Inadvertently Transmitted Writings* - The court adds an asterisk next to "person" in Comment [2].
- Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers - The court removes Comment [6] and renumbers the subsequent Comments accordingly.
- Rule 5.2 Responsibilities of a Subordinate Lawyer - The court adds an asterisk after "person" in paragraph (a).
- Rule 5.3 Responsibilities Regarding Nonlawyer Assistants - The court adds an asterisk after "person's" in paragraph (b).
- Rule 5.4 Financial and Similar Arrangements with Nonlawyers - The court adds an asterisk after "persons" in subparagraph (a){1}. The court deletes "or organization" and "organization or group" from paragraph (f). The court revises the citation in Comment [3] to conform with the California Style Manual. The court adds Comment[5].
- Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law- The court adds the word "or" at the end of subparagraph (a)(1) and adds the phrase "in that jurisdiction" to the end of subparagraph (a)(2). The court deletes the words "or entity" in paragraph (a)(2). The court revises the citations in the Comment to conform with the California Style Manual.
- Rule 5.6 Restrictions on a Lawyer's Right to Practice - The court corrects a copyediting error in subparagraph (a)(1).
- Rule 6.3 Membership In Legal Services Organization - The court adds references to rules 1.6(a) and 1.18 in paragraph (a).
- Rule 7.2 Advertising- The court deletes the terms "or entity" from paragraph (b) and subparagraph (b)(5).
- Rule 8.1 False Statements Regarding Application for Admission to Practice Law - The court adds an asterisk after the term "person's" in paragraphs (a) and (b) and Comment[1].
- Rule 8.1.1 Compliance with Conditions of Discipline and Agreement in Lieu of Discipline - The court revises the citation in the Comment to conform with the California Style Manual.
- Rule 8.2 Judicial and Legal Officers - The court revises the references to the California Code of Judicial Ethics in paragraphs (b) and (c) to comply with the California Style Manual.
- Rule 8.4 Misconduct - The court adds the word "those" before "activities" and "particular" before "lawyer" in Comment[6].

ATTACHMENT 1

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate these rules or the State Bar Act, knowingly* assist, solicit, or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official, or to achieve results by means that violate these rules, the State Bar Act, or other law; or
- (t) knowingly* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this rule, "judge" and "judicial officer" have the same meaning as in rule 3.5(c).

Comment

[1] A violation of this rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

[2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code sections 6101 et seq., or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal. Rptr. 375].)

[4] A lawyer may be disciplined under Business and Professions Code section 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

An asterisk(*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

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[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these rules and the State Bar Act.

[6] This rule does not prohibit those activities of a particular lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation

- (a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:
 - (1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic; or
 - (2) unlawfully retaliate against persons.*

- (b) In relation to a law firm's operations, a lawyer shall not:
 - (1) on the basis of any protected characteristic,
 - (i) unlawfully discriminate or knowingly* permit unlawful discrimination;
 - (ii) unlawfully harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or
 - (iii) unlawfully refuse to hire or employ a person*, or refuse to select a person* for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment; or
 - (2) unlawfully retaliate against persons.*

An asterisk(*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

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- (c) For purposes of this rule:
- (1) "protected characteristic" means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;
 - (2) "knowingly permit" means to fail to advocate corrective action where the lawyer knows* of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);
 - (3) "unlawfully" and "unlawful" shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and
 - (4) "retaliate" means to take adverse action against a person* because that person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by paragraphs (a)(I) or (b)(I) of this rule.
- (d) A lawyer who is the subject of a State Bar investigation or State Bar Court proceeding alleging a violation of this rule shall promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding.
- (e) Upon being issued a notice of a disciplinary charge under this rule, a lawyer shall:
- (1) if the notice is of a disciplinary charge under paragraph (a) of this rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review Section; or
 - (2) if the notice is of a disciplinary charge under paragraph (b) of this rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.

An asterisk(*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

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- (f) This rule shall not preclude a lawyer from:
- (1) representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;
 - (2) declining or withdrawing from a representation as required or permitted by rule 1.16; or
 - (3) providing advice and engaging in advocacy as otherwise required or permitted by these rules and the State Bar Act.

Comment

[1] Conduct that violates this rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. (See rule 8.4(a).) In relation to a law firm's operations, this rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel. Law firm* management and supervisory lawyers retain their separate responsibility under rules 5.1 and 5.3. Neither this rule nor rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this rule any responsibility to advocate corrective action.

[2] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Cal. Code Jud. Ethics, canon 3B(6) ["A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others."].) A lawyer does not violate paragraph (a) by referring to any particular status or group when the reference is relevant to factual or legal issues or arguments in the representation. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] A lawyer does not violate this rule by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations. A lawyer also does not violate this rule by otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these rules or other law.

An asterisk(*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

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[4] This rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

[5] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows* of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer's relationship to the lawyer or law firm* implementing that policy or practice. For example, a law firm* non-management and non-supervisory lawyer who becomes aware that the law firm* is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm* management lawyer who would have responsibility under rule 5.1 or 5.3 to take reasonable* remedial action upon becoming aware of a violation of this rule.

[6] Paragraph (d) ensures that the State Bar and the State Bar Court will be provided with information regarding related proceedings that may be relevant in determining whether a State Bar investigation or a State Bar Court proceeding relating to a violation of this rule should be abated.

[7] Paragraph (e) recognizes the public policy served by enforcement of laws and regulations prohibiting unlawful discrimination, by ensuring that the state and federal agencies with primary responsibility for coordinating the enforcement of those laws and regulations is provided with notice of any allegation of unlawful discrimination, harassment, or retaliation by a lawyer that the State Bar finds has sufficient merit to warrant issuance of a notice of a disciplinary charge.

[8] This rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.

[9] A disciplinary investigation or proceeding for conduct coming within this rule may also be initiated and maintained if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

An asterisk(*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.