



The State Bar of California

Rule 8.4 Misconduct (Rule Approved by the Supreme Court, Effective November 1, 2018)

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
- (f) 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.

[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.

**NEW RULE OF PROFESSIONAL CONDUCT 8.4
(Former Rule 1-120)
Misconduct**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 1-120 (Assisting, Soliciting, or Inducing Violations) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 8.4 (concerning professional misconduct of a lawyer). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed Rule 8.4 (Misconduct).

Rule As Issued For 90-day Public Comment

Proposed rule 8.4 carries forward the substance of current rule 1-120 by prohibiting a lawyer from knowingly assisting in, soliciting or inducing a violation of the Rules of Professional Conduct or the State Bar Act. The proposed rule also incorporates the substance of ABA Model Rule 8.4, which contains a similar prohibition as well as additional provisions that describe misconduct that warrants the imposition of discipline. The proposed rule is designed to collect in a single rule various misconduct provisions that are currently found in other California rules of professional conduct or in the Business and Professions Code. The rule is 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.

Paragraph (a), which carries forward the substance of current rule 1-120, prohibits a lawyer from violating the rules of professional conduct, or the State Bar Act, or knowingly assist, solicit or induce another to do so. In addition, this paragraph prohibits a lawyer from doing any of the aforementioned through the acts of another.

One issue considered with respect to paragraph (a) was whether to follow the approach in ABA Model Rule 8.4(a) which would generally prohibit a lawyer from “attempting” to violate a rule or a provision of the State Bar Act. The Commission determined that the question of whether an attempted violation should be an independent basis for discipline is better addressed on a rule-by-rule basis. This approach means that any prohibition on an attempt would be tailored to a specific rule’s violation and potential harm rather than a generalized standard for all of the rules and the State Bar Act. This avoids possible unintended consequences of a one size fits all attempt standard that would not account for the specific purpose of individual rules. For example, in proposed rule 1.5 [4-200], the Commission has recommended a rule that provides a lawyer “shall not make an agreement for, charge, or collect an unconscionable fee or illegal fee.” The terms “make” and “charge” in effect prohibit an attempt to “collect” an unconscionable fee.¹ Although only the actual collection of an unconscionable fee will result in harm to a client,

¹ This is similar to the standard in Business and Professions Code section 6090.5 that, in part, prohibits a lawyer from agreeing or seeking an agreement that professional misconduct shall not be reported to the State Bar. This section was revised in 1996 in response to a State Bar Court finding that the prior version of the section did not include terms that could be construed fairly as a prohibition on attempts. (See [Assembly Bill No. 2787 \(Kuehl\)](#) 1995-1996 session; and *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752.)

even an attempt to impose a legal obligation on a client to pay an unconscionable or illegal fee should be prohibited as disciplinable misconduct. On the other hand, the Commission also recommends adoption of proposed rule 4.2 [2-100], which prohibits a lawyer who represents a client in a matter from communicating about the subject of the representation with a person who is represented by a lawyer in the same matter. For this rule, the harm is the actual communication with the represented person that could result in the disclosure of privileged information or otherwise interfere with a lawyer-client relationship. A generalized prohibition against an attempt to engage in such a communication does not further the purpose of this rule and it would pose a risk of unduly interfering with a lawyer's ability to investigate a claim as a lawyer often cannot know that a person is represented until the lawyer has contacted the person.

Paragraph (b), as initially circulated for 90-day public comment, incorporated the language of Model Rule 8.4(b) but also added an express reference to "moral turpitude." (See "Revisions Following 90-Day Public Comment Period," below, for changes the Commission subsequently made to this provision.) This provision focuses on crimes committed by a lawyer that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer, all of which are central principles in lawyer conduct. The reference to moral turpitude was added to maintain conformity with the broader public protection afforded by Business and Professions Code section 6106.

Paragraph (c) incorporates the language of Model Rule 8.4(c) but adds the words "reckless or intentional" to modify "misrepresentation." The conduct prohibited in this provision – dishonesty, fraud, deceit and reckless or intentional misrepresentation – are central concepts of conduct in which lawyers must not engage if respect for the legal profession and the proper administration of justice is to be maintained. The addition of "reckless or intentional" is intended to clarify that negligent misrepresentation is not regarded as dishonesty that should result in discipline under this rule.² In addition, as initially circulated for 90-day public comment, paragraph (c) included an express reference to "moral turpitude." (See "Revisions Following 90-Day Public Comment Period," below.)

Paragraph (d) incorporates the language of Model Rule 8.4(d) concerning conduct "prejudicial to the administration of justice." The Commission concluded that a lawyer's fitness to practice law is called into question by conduct prejudicial to the administration of justice regardless of whether the conduct occurs in connection with the practice of law.

Some members of the Commission raised a concern that this provision might not survive a Constitutional challenge if it were not limited to situations where the lawyer's conduct occurs "in connection with the practice of law." Compare, *United States v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996) (former Bus. & Prof. Code § 6068(f), prohibiting "offensive personality," was found to be unconstitutional.) Proposed Comment [6] seeks to address this concern by specifying that paragraph (d) does not apply to constitutionally-protected conduct.

Paragraph (e) incorporates the language of Model Rule 8.4(e) prohibiting a lawyer from stating or implying the ability to improperly influence a government agency or official.

Paragraph (f) incorporates the language of Model Rule 8.4(f) prohibiting a lawyer from knowingly assisting a judge in conduct that is a violation of judicial conduct rules. Expressly

² Compare proposed rule 1.1, under which discipline is imposed only if a lawyer has "intentionally, recklessly, repeatedly, or with gross negligence" failed to act competently.

stating that such conduct is prohibited should contribute to the confidence that the public places in the legal profession and administration of justice is justified.

Finally, non-substantive changes to the current rule include rule numbering to track the Commission's general proposal to use the Model Rule numbering system and the substitution of the term "lawyer" for "member."

Proposed rule 8.4 contains six comments intended to clarify how the rule is to be applied. Of particular note is Comment [6] which, as noted above, has been added to clarify that the paragraph (d) does not apply to constitutionally-protected conduct.

Revisions Following 90-Day Public Comment Period

After consideration of comments received in response to the initial 90-day public comment period, the Commission removed the references to "moral turpitude" from both 8.4(b) and 8.4(c) and placed them in a comment. Paragraph (f) was modified to be parallel with paragraph (a) to include inducement and solicitation, and to clarify the meaning of judge and judicial officer. The Commission also modified Comment [4] to provide notice to lawyers that Bus. & Prof. Code § 6106 remains a source of discipline for acts of moral turpitude, dishonesty, or corruption. Finally, Comment [6] was modified to clarify that paragraph (c) does not extend to activities protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Commission Action on the Proposed Rule Following 45-Day Public Comment Period

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

The Board adopted proposed rule 8.4 at its March 9, 2017 meeting.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as modified by the Court to be effective November 1, 2018. In Comment [6], the word "those" was added before the word "activities." Also in Comment [6], the word "particular" was added before the work "lawyer."

Other nonsubstantive changes were implemented.

Rule ~~1-120~~ ~~Assisting, Soliciting, or Inducing Violations~~ 8.4 Misconduct
(Redline Comparison to the California Rule Operative Until October 31, 2018)

~~A member shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act.~~

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- (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
- (f) 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).

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or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these rules and the State Bar Act.

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