

# Everything You Need to Know About the New California Rules of Professional Conduct

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## Agenda

- A Brief History of the Long Evolution of the New California Rules of Professional Conduct
- Organization of the New California Rules
- Significant Changes to the California Rules
- Rules with Minor Revisions
- Comparison Charts for ABA Model Rules and California Rules, Old and New

## Evolution of the California Rules

- California's transition to Rules of Professional Conduct based on the ABA Model Rules took 29 years . . . .
- While California's 1989 Rules were not dramatically different from the ABA Model Rules, California's Rules were numbered very differently and had some unique features
- **California is the final State to adopt Rules of Professional Conduct based on the ABA Model Rules** -- with some modifications

## Organization of the New California Rules

- California's 46 prior Rules now are replaced with 69 Rules
- The California Rules now mirror the ABA's numbering system
  - Permits easier comparison of Rules across jurisdictions
  - Will facilitate legal research of ethics opinions and judicial decisions in other states

## Significant Changes to the California Rules

- **California's Rules continue to be among the most stringent in the United States**
  - Continued emphasis on professional integrity and protection of clients
- **New Rules offer increased specificity, and interpretation guidance**
  - Comments to Rules have been expanded to provide more clarity
  - Terms defined in the Rules are asterisked
  - "Person" now defined in Rules consistently with Avid. Code 175

## Significant Changes: Discrimination, Harassment and Retaliation

- Rule 8.4.1 removes a fundamental gate from prior Rule 2-400
  - Prior Rule prohibited unlawful discrimination, harassment or retaliation in connection with the representation of a client, refusal to accept representation, or law firm operations; **BUT** Rule required a civil "adjudicated complaint" of unlawful conduct before the Bar could investigate or discipline
  - **New Rule eliminates the prerequisite of a civil determination**
- Rule 8.4.1(a) prohibits the "unlawful" harassment of or discrimination against a person on the basis of a "protected characteristic"
  - Rule also prohibits "unlawful retaliation" against any person
- Rule 8.4.1(e) requires notice of disciplinary charge until 8.4.1(a) to be provided by the lawyer to DFEH and DOJ

## Significant Changes: Client Trust Accounts

- **Rule 1.15 requires client funds “received or held” to be deposited into a Client Trust Account**
  - Prior Rule 4-100 required Client Trust Account deposits only for advanced costs
- With limited exceptions, Client Trust Account must be located in California
- Rule does not apply to “true retainer,” i.e., funds provided to ensure lawyer is available when needed

## Significant Changes: Sexual Relations with Clients

- Prior Rule focused on eliminating quid pro quo sexual relationships with clients, coerced relations, and relations resulting in incompetent representation
- New Rule 1.8.10 prohibits sexual relations with clients, unless client is
  - Spouse
  - **Registered** domestic partner
  - Sexual relationship **pre-existing** the lawyer-client relationship
  - When client is an organization, Rule applies to person overseeing the representation (Comment 2)
- Rule 1.8.10 substantially adopts the prohibitions of ABA Model Rule 1.8(j)

## Significant Changes: Conflicts of Interest

- California's prior Rule on Conflicts of Interest was equivalent in spirit to the Model Rule, but materially different in approach
- New Rule 1.7 adopts Model Rule test for direct adversity
- New Rule retains the “informed written consent” language of the former Rule 3-310
  - New Rule makes more specific the old Rule's requirement for written disclosure, **even without significant risk of material limitation because of another representation**,
    - If another lawyer in firm has one of several enumerated “relationships” with a party, party's lawyer, or witness
- Comment 9 recognizes advance waivers under some circumstances, and acknowledges that client experience and sophistication bear on what comprises “informed” consent

## Significant Changes: Imputed Conflicts

- Rule 1.10 expressly permits ethical screening of lateral attorneys who did not “**substantially participate in**” a matter at former firm/company
  - Lateral must acknowledge firm's conclusion of non-substantial participation (Comment 5)
  - Government lawyers moving into private practice may be ethically screened from matters in which they participated “personally and substantially”
- Common-law imputation principles are captured in new Rules 1.10, 1.8.11 and 1.18(c)

## Rules with Minor Revisions

- Also worth noting are minor changes to the prior California Rules that reflect a change in emphasis:
  - **The Rules now cover “Competence” and “Diligence” separately**
  - Rule 1.8.2 emphasizes the importance of the duty of loyalty by expressly stating client-confidential information cannot be used to the client’s disadvantage without the client’s written consent
  - Factors in identifying “unconscionable” fees now include failure to disclose material facts, and overreaching in negotiating fees (Rule 1.5)
  - Rule 3.2 expressly states that lawyers cannot “delay or prolong” litigation by “means that have no substantial purpose”

## More Rules with Minor Revisions

- Rule 1.18 revised to state expressly that the duty of confidentiality extends to **prospective** clients who reasonably anticipate they may retain the lawyer
- Lawyers who represent clients before legislative or administrative bodies in an official, “non-adjudicative” hearing, must disclose their representational status but not the name of their client, under Rule 3.9
- Rules 5.1 through 5.3, set out the duties of “Managerial” and “Supervisory” lawyers, and the responsibilities of their subordinate lawyers and “non-lawyer assistants”
- Rule 2.1, “Advisor”, requires lawyers to “exercise independent professional judgment” and “render candid advice;” and the Comments clarify that a lawyer may “initiate” advice, and “refer to considerations other than the law” when doing so is in the client’s interest

## Some New California Rules Reflect Differences in Philosophy From Model Rules

- Rule 1.4.2 requires written disclosure to client of lack of, or material change in, malpractice insurance coverage
- ABA Model Rules prohibit unreasonable or excessive fees; California Rule 1.5 prohibits only “unconscionable” fees, without reference to market rates
- California Rule 1.5.1 permits a referring lawyer to split fees, without doing any work or retaining any liability, unlike the Model Rules or NY Rule; client must consent in writing
- California Rule 1.7(a) requires “informed written consent” **from the client**, unlike Model Rule’s requirement for written confirmation by lawyer that he/she made disclosure to the client

## Only One Model Rule Rejected by California

- ABA Model Rule 1.14, “Clients with Diminished Capacity,” was rejected in its entirety, without explanation

**Cross-Reference Chart of the Current Rules to the New Rules**  
(Sorted by Current Rule)

Current Rules of Professional Conduct <i>Effective on October 1, 2015</i> (Rule Number and Title)	New Rules of Professional Conduct <i>Effective on November 1, 2015</i> (Rule Number and Title)
1-100(A) [Rules of Professional Conduct, in General]	1.8 Purpose and Function of the Rules of Professional Conduct
1-100(B)	1.8.1 Terminology
1-100(D)	8.5 Disciplinary Authority; Choice of Law
1-110 Disciplinary Authority of the State Bar	8.1.1 Compliance with Conditions of Discipline and Agreements in Lieu of Discipline
1-120 Assisting, Soliciting, or Inducing Violations	8.4 Misconduct
1-200 False Statement Regarding Admission to the State Bar	8.1 False Statement Regarding Application for Admission to Practice Law
1-300 Unauthorized Practice of Law	8.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law
1-310 Forming a Partnership With a Non-Lawyer	5.4 Financial and Similar Arrangements with Nonlawyers
1-311 Employment of Disabled, Suspended, Resigned, or Involuntarily Inactive Members	5.3.1 Employment of Disabled, Suspended, Resigned, or Involuntarily Inactive Lawyer
1-320(A)	5.4 Financial and Similar Arrangements with Nonlawyers
1-320(A)(4), (B)-(C) [Financial Arrangements With Non-Lawyer]	7.2(b) Advertising
1-400 Advertising and Solicitation	7.1 Communications Concerning a Lawyer's Services
	7.2 Advertising
	7.3 Solicitation of Clients
	7.4 Communications of Firms of Practice and Specialization
	7.5 Firm Names and Trade Names
1-600 Agreements Restraining a Member's Practice	5.4 Restrictions on a Lawyer's Right to Practice
1-600 Legal Service Programs	5.4 Financial and Similar Arrangements with Nonlawyers
1-600 Limited Legal Service Programs	6.5 Limited Legal Service Programs
1-700 Member as Candidate for Judicial Office	8.2 Judicial Officers
1-710 Member as Temporary Judge, Referee, or Court-Appointed Arbitrator	2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator
2-100 Communications With a Represented Party	4.2 Communications with a Represented Person
2-200(A) Financial Arrangements Among Lawyers	1.5.1 Fee Divisions Among Lawyers
2-300(B)	7.2(b) Advertising
2-300 Sale or Purchase of a Law Practice of a Member, Living or Deceased	1.17 Sale of a Law Practice
2-400 Prohibited Disciplinary Conduct in a Law Practice	8.4.3 Prohibited Discrimination, Harassment and Retaliation
3-100 Confidential Information of a Client	1.6 Confidential Information of a Client
3-110 Failing to Act Competently	1.1 Competence
3-110(D)	1.3 Diligence
3-116, Discussion 4.1	Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers Rule 5.2 Responsibilities of a Subordinate Lawyer Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

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**Cross-Reference Chart of the Current Rules to the New Rules**  
(Sorted by Current Rule)

Current Rules of Professional Conduct <i>Effective on October 1, 2015</i> (Rule Number and Title)	New Rules of Professional Conduct <i>Effective on November 1, 2015</i> (Rule Number and Title)
3-120 Sexual Relations With Client	1.8.18 Sexual Relations with Current Client
3-200 Prohibited Objectives of Employment	3.1 Methodical Character and Competence
3-210 Advising the Violation of Law	1.3.1 Advising or Assisting the Violation of Law
3-300 Avoiding Interest Adversity to a Client	1.8.1 Business Transactions with a Client and Fiduciary Interest Adversity to the Client
3-310(B), (C) Avoiding the Representation of Adversely Interests	1.7 Conflict of Interest: Current Clients
3-310(D)	1.8.7 Aggregate Settlements
3-310(E)	1.9 Duties to Former Clients
3-310(F)	1.8.6 Compensation from One Other than Client
3-330 Relationship With Other Party's Lawyer	1.7(c)(3) Conflict of Interest: Current Clients
3-400 Limiting Liability to Client	1.8.8 Limiting Liability to Client
3-410 Disclosure of Professional Liability Insurance	1.4.2 Disclosure of Professional Liability Insurance
3-500 Communication	1.4 Communications with Clients
3-510 Communication of Settlement Offer	1.4.1 Communication of Settlement Offer
3-600 Organization as Client	1.13 Organization as Client
3-700 Termination of Employment	1.16 Declining or Terminating Representation
4-100 Preserving Identity of Funds and Property of a Client	1.15 Safeguarding Funds and Property of Clients and Other Persons
4-200 Fees for Legal Services	1.5 Fees for Legal Services
4-210 Payment of Demand or Business Expenses Incurred by or for a Client	1.8.5 Payment of Demand or Business Expenses Incurred by or for a Client
4-300 Purchasing Property as a Fiduciary or a Sale Subject to Judicial Review	1.8.9 Purchasing Property as a Fiduciary or a Sale Subject to Judicial Review
4-400 Gifts From Client	1.8.3 Gifts from Client
4-500 Removing Criminal, Administrative, or Disciplinary Charges	2.10 Removing Criminal, Administrative, or Disciplinary Charges
4-510 Performing the Duty of Member in Government Service <i>(Old Rule 4-510 recently was revised effective November 2, 2017.)</i>	3.8 Special Responsibilities of a Prosecutor
5-120 Trial Publicity	3.6 Trial Publicity
5-200(A)(8) Trial Conduct	3.3 Candor Toward the Tribunal
5-200(B) Trial Conduct	3.4 Fairness to Opposing Party and Counsel
5-210 Member as Witness	3.7 Lawyer as Witness
5-220 Suppression of Evidence <i>(Old Rule 5-220 recently was revised effective May 1, 2017.)</i>	3.4 Fairness to Opposing Party and Counsel <i>(Note: See also Rule 3.6(b) regarding the duties of a prosecutor.)</i>
5-300 Contact With Officials	3.5 Contact with Judges, Officials, Employees, and Jurors
5-310 Prohibited Contact With Witnesses	3.4 Fairness to Opposing Party and Counsel
5-320 Contact With Jurors	3.5 Contact with Judges, Officials, Employees, and Jurors

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**Cross-Reference Chart of the Current Rules to the New Rules**  
(Sorted by Current Rule)

**New Rules With No California Counterpart**

- Rule 1.2 Scope of Representation and Allocation of Authority
- Rule 1.8.2 Use of Current Client's Information<sup>1</sup>
- Rule 1.8.11 Impairment of Prohibitions Under Rules 1.8.1 to 1.8.9
- Rule 1.10 Impairment of Coefficients of Interest: General Rule
- Rule 1.11 Special Coefficients of Interest for Former and Current Government Officials and Employees
- Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
- Rule 1.18 Duties to Prospective Client
- Rule 2.1 Adviser
- Rule 2.4 Lawyer as Third-Party Neutral
- Rule 3.2 Delay of Litigation
- Rule 3.9 Advocate in Non-adversive Proceedings
- Rule 4.1 Truthfulness in Statements to Others
- Rule 4.3 Communicating with an Unrepresented Person<sup>2</sup>
- Rule 4.4 Duties Concerning Inherently Transmitted Writings
- Rule 5.7 Responsibilities of a Substitute Lawyer
- Rule 6.5 Membership in Legal Services Organizations

<sup>1</sup> But see Disc. & Prof. Code § 6069(c).  
<sup>2</sup> But see current rule 3-003(2) regarding similar duties in an organizational context.

**Cross-Reference Chart of the New Rules to the Current Rules**  
(Sorted by New Rule)

New Rules of Professional Conduct (Effective November 1, 2018) (Rule Number(s) (N))	Current Rules of Professional Conduct (Effective and in force 12/31/2017) (Rule Number(s) (C))
1.0 Purpose and Function of the Rules of Professional Conduct	1-1000 Rules of Professional Conduct, in General
1.0.1 Terminology	1-1000(B)
1.1 Competence	3-110 Failing to Act Competently
1.2 Scope of Representation and Allocation of Authority	No California Rule Counterpart
1.2.1 Advising or Assisting the Violation of Law	3-210 Advising the Violation of Law
1.3 Diligence	3-110(F)
1.4 Communication with Clients	3-106 Communication
1.4.1 Communication of Settlement Offers	3-510 Communication of Settlement Offer
1.4.2 Disclosure of Professional Liability Insurance	3-410 Disclosure of Professional Liability Insurance
1.5 Fees for Legal Services	6-200 Fees for Legal Services
1.5.1 Fee Division Among Lawyers	3-300 Financial Arrangements Among Lawyers
1.6 Confidential Information of a Client	3-106 Confidential Information of a Client
1.7 Conflict of Interest: Current Clients	3-110(B)(3) [Avoiding the Representation of Adverse Interests] 3-200 Relationship With Other Party's Lawyer
1.7.1	3-300 Avoiding Interests Adverse to a Client
1.8.1 Business Transactions with a Client and Preexisting Interests Adverse to the Client	No California Rule Counterpart <sup>3</sup>
1.8.2 Use of Current Client's Information	No California Rule Counterpart <sup>4</sup>
1.8.3 Gifts from Client	4-400 Gifts from Client
1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client	4-210 Payment of Personal or Business Expenses Incurred by or for a Client
1.8.6 Compensation from One Other than Client	3-310(F)
1.8.7 Aggregate Settlements	3-310(B)
1.8.8 Lending Liability to Client	3-400 Lending Liability to Client
1.8.9 Purchasing Property of a Foreclosure or a Sale Subject to Judicial Review	4-300 Purchasing Property of a Foreclosure or a Sale Subject to Judicial Review
1.8.10 Sexual Relations with Current Client	3-220 Sexual Relations With Client
1.8.11 Impairment of Prohibitions Under Rules 1.8.1 to 1.8.9	No California Rule Counterpart
1.9 Influx To Former Clients	3-100(C)
1.10 Impairment of Coefficients of Interest: General Rule	No California Rule Counterpart
1.11 Special Coefficients of Interest for Former and Current Government Officials and Employees	No California Rule Counterpart
1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral	No California Rule Counterpart
1.13 Organization as Client	3-400 Organization as Client
1.14 [Reserved]	

<sup>3</sup> Rule 3-110(F) provides:  
 (D) For purposes of this rule, "settlement" in any legal service shall mean to apply the D-Alliance, D-1 Award and shall, and (3) mental, emotional, and physical ability reasonably necessary for the performance of such service. (Emphasis added).  
<sup>4</sup> But see Cal. Bus. & Prof. Code § 60069(f).  
<sup>5</sup> ABA Model Rule 1.14 ("Client With Diminished Capacity") has not been adopted in California.

**Cross-Reference Chart of the New Rules to the Current Rules  
(Sorted by New Rule)**

<b>New Rules of Professional Conduct (Effective November 1, 2018 (Rule Number not 18))</b>	<b>Current Rules of Professional Conduct (Effective October 1, 2007 (Rule Number not 18))</b>
1.15 Subkeeping Funds and Property of Clients and Other Persons	4-100 Preserving Identity of Funds and Property of a Client
1.16 Declining or Terminating Representation	5-700 Termination of Employment
1.17 Sale of a Law Practice	2-300 Sale or Purchase of a Law Practice of a Member, Living or Deceased
1.18 Duties to Prospective Client	No California Rule Counterpart
2.1 Advisor	No California Rule Counterpart
2.3 (Reserved) <sup>6</sup>	
2.4 Lawyer as Third-Party Neutral	No California Rule Counterpart
2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator	1-710 Member as Temporary Judge, Referee, or Court-Appointed Arbitrator
2.1 Meritless Claims and Contentions	5-300 Prohibited Objectives of Employment
3.2 Delay of Litigation	No California Rule Counterpart
3.3 Candor Toward the Tribunal	5-200(A)-(D) Trial Conduct
3.4 Fairness to Opposing Party and Counsel	5-200(E) [Trial Conduct] 5-220 Suppression of Evidence [Rule 5-220 recently was revised effective May 1, 2017.] 5-310 Prohibited Contact With Witnesses [Rule 5-310 recently was revised effective November 2, 2017.]
3.5 Contact with Judges, Officials, Employees, and Jurors	5-300 Contact With Officials 5-320 Contact With Jurors
3.6 Trial Publicity	5-120 Trial Publicity
3.7 Lawyer as Witness	5-210 Member as Witness
3.8 Special Responsibilities of a Prosecutor	5-110 Performing the Duty of Member in Government Service [Rule 5-110 recently was revised effective November 2, 2017.]
3.9 Advocate in Non-Adversative Proceedings	No California Rule Counterpart
3.10 Thinking Criminal, Administrative, or Disciplinary Charges	5-100 Prosecuting Criminal, Administrative, or Disciplinary Charges
4.1 Testimony in Statements to Others	No California Rule Counterpart
4.2 Communication with a Represented Person	2-400 Communication With a Represented Party
4.3 Communicating with an Unrepresented Person	No California Rule Counterpart
4.4 Duties Concerning Inadvertently Transmitted Writings	No California Rule Counterpart
5.1 Responsibilities of Managerial and Supervisory Lawyers	No California Rule Counterpart <sup>7</sup>
5.2 Responsibilities of a Subordinate Lawyer	No California Rule Counterpart
5.3 Responsibilities Regarding Nonlawyer Assistants	No California Rule Counterpart <sup>8</sup>

<sup>6</sup> ABA Model Rule 2.3 ("Evaluation For Use By Third Persons") has not been adopted in California.  
<sup>7</sup> See rule 5-110, Discussion ¶ 1.  
<sup>8</sup> See rule 5-110, Discussion ¶ 1.

**Cross-Reference Chart of the New Rules to the Current Rules  
(Sorted by New Rule)**

<b>New Rules of Professional Conduct (Effective November 1, 2018 (Rule Number not 18))</b>	<b>Current Rules of Professional Conduct (Effective October 1, 2007 (Rule Number not 18))</b>
4.1.1 Employment of Disbarred, Suspended, Revoked, or Involuntarily Inactive Lawyer	5-111 Employment of Disbarred, Suspended, Revoked, or Involuntarily Inactive Members
5.4 Financial and Similar Arrangements with Nonlawyers	1-310 Fostering a Partnership With a Non-Lawyer 1-320 Financial Arrangements With Non-Lawyer 1-400 Legal Service Programs
5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law	1-300 Unauthorized Practice of Law
5.6 Restrictions on a Lawyer's Right to Practice	1-500 Agreements Restricting a Member's Practice
6.3 Membership in Legal Services Organizations	No California Rule Counterpart
6.5 Limited Legal Service Programs	1-400 Limited Legal Service Programs
7.1 Communications Concerning a Lawyer's Services	1-400 Advertising and Solicitation
7.2 Advertising	1-320(B)-(C) & (A)(4) (Financial Arrangements With Non-Lawyer) 1-400 Advertising and Solicitation 2-200 Financial Arrangements Among Lawyers
7.3 Solicitation of Clients	1-400 Advertising and Solicitation
7.4 Communications of Field of Practice and Specialization	1-400 Advertising and Solicitation
7.5 Fees, Taxes and Trade Names	1-400 Advertising and Solicitation
7.6 (Reserved) <sup>9</sup>	
8.1 False Statement Regarding Application for Admission to Practice	1-200 False Statement Regarding Admission to the State Bar
8.1.1 Compliance with Conditions of Discipline and Agreements in Lieu of Discipline	1-110 Disciplinary Authority of the State Bar
8.2 Judicial Officers	5-500 Member or Candidate for Judicial Office
8.3 (Reserved) <sup>10</sup>	
8.4 Misconduct	1-220 Avoiding, Soliciting, or Inducing Violations
8.4.1 Prohibited Disciplinary, Humane and Retaliatory	2-400 Prohibited Disciplinary Conduct in a Law Practice
8.5 Disciplinary Authority; Choice of Law	2-400(D) Rules of Professional Conduct, in General

<sup>9</sup> See rule 5-110, Discussion ¶ 1.  
<sup>10</sup> ABA Model Rule 7.6 ("Prohibited Contributions To Obtain Legal Engagements Or Appointments By Judges") has not been adopted in California.  
<sup>11</sup> ABA Model Rule 8.3 ("Reporting Professional Misconduct") has not been adopted in California.

# Thank you!



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