

# Legal Ethics: Rules, Statutes, and Comparisons



# Legal Ethics: Rules, Statutes, and Comparisons

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2019 EDITION

Includes ABA and California changes through 2018, a Substantive Rule-by-Rule Comparison of the ABA Model Rules and Both New and Former California Rules, and the ABA and California Judicial Codes

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# Legal Ethics: Rules, Statutes and Comparisons 2019 Edition

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Including the 2002 ABA Model Rules (as amended through 2018), both the 1989 and 2018 California Rules, a “red-lined” comparison of the 2002 and 1983 Model Rules, a “red-lined” comparison of the 2002 ABA Model Rules and the 2018 California Rules, a Substantive Rule-by-Rule Comparison of the 2002 ABA Model Rules with both the former (1989) and new (2018) California Rules, and the ABA and California Judicial Codes, as amended through 2018.



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# Introduction and Use Note

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This Rules Book has evolved since it was first published in 1995, being updated to reflect significant rule changes related to the law of lawyering.

In 2002, with the assistance of retired California State Bar Court judge Ellen R. Peck, we updated this Rules Book to account for the work of the ABA “Ethics 2000” Commission, which was charged with reviewing the American Bar Association’s Model Rules of Professional Conduct and making any necessary revisions. This volume incorporates not only all the changes to the Model Rules adopted by the ABA House of Delegates in August 2001 and February 2002 after its receipt of the “Ethics 2000” Commission’s report, but also all substantive changes made to the Model Rules since that time. Most recently, these changes include those proposed by the ABA’s “Ethics 20/20” Commission and approved by the House of Delegates in August 2012 and February 2013, the adoption in August 2016 of Model Rule 8.4(g) and associated comments regarding discrimination in the practice of law, and the comprehensive changes made to the advertising and solicitation Model Rules in August 2018.

With this edition, we include the comprehensive changes made to the California Rules of Professional Conduct, effective November 1, 2018, and to selected sections of the California Business & Professions and Evidence Codes. Our treatment of the new California Rules includes a completely revamped and comprehensive substantive comparison of the ABA Model Rules and both the former (1989) and new (2018) California Rules. We expect that this comparison will become a valuable resource for the book’s users.

Further, this book includes sections that feature the ABA Model Court Rule on Insurance Disclosure, the ABA Model Rule for Admission by Motion, the ABA Model Rule on Practice Pending Admission, the California Rules of Court adopted to address multijurisdictional concerns, State Bar of California Resolutions concerning the delivery of pro bono and limited scope legal services, and the SEC Attorney Regulations promulgated pursuant to the Sarbanes-Oxley Act.

Beginning with the 2014 Edition, we have included the **ABA Model Code of Judicial Conduct (2010)** and the **California Code of Judicial Ethics (2018)**. We continue to include those resources. In this edition, we have also included the California statutes governing lawyers’ work product.

To summarize, this volume contains the following:

- The Model Rules adopted by the ABA House of Delegates in 2001-2002, as amended in February 2002, August 2003, February 2008, February 2009, August 2009, August 2012, February 2013, February 2016, August 2016, and August 2018. We have designated these Rules the **2002 ABA Model Rules**. They are in Part I.
- A “**red-lined**” or legislative style copy of the **2002 Rules** (as amended) showing the changes from the 1983 rules, so that the differences between the two sets of rules may be easily reviewed. This “red-lined” version has been updated periodically as the Model Rules have been amended, the latest revisions reflecting the aforementioned 2018 amendments to the advertising and solicitation rules. They are also in Part I, and follow the “clean” copy of the 2002 Model Rules.
- **The 2004 ABA Model Court Rule on Insurance Disclosure** in Part I.
- **The 2012 ABA Model Rule for Admission by Motion** in Part I.
- **The 2012 ABA Model Rule on Practice Pending Admission** in Part I.
- A substantive **California—Model Rules Comparison** that compares the ABA Model Rules to both the former (1989) and new (2018) California Rules. In this comparison, the 2002 Rules (as revised through 2018) are compared with both the former (1989) and new (2018) California Rules and relevant California statutes. This can be found in Part II.
- Also in Part II is (i) A “redlined” legislative comparison between the blackletter text of the 2002 Model Rules and the 2018 California rules and (ii) a table that cross-references both the new and former California rule numbers to the rule numbers in the Model Rules.
- **The California Rules of Professional Conduct**, both the new rules as approved by the California Supreme Court effective 2018, and the former rules, as originally adopted in 1989 and 1992 and periodically amended, together with selected provisions of the California State Bar Act in the **California Business & Professions Code**,\* are all included in Part III, together with selected statutes from the California Code of Civil Procedure on Work Product Protection and the California Evidence Code, State Bar Resolutions on Pro Bono and Limited Scope Legal Services, and Selected California Rules of Court Regarding Multijurisdictional Practice.

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\* California, unique among states, has lawyer conduct standards that emanate from both the state legislative process and the state Supreme Court. The Rules of Professional Conduct are proposed and adopted by the State Bar of California and then approved by the California Supreme Court. The legislature, however, also has plenary power to regulate lawyers’ conduct, memorialized in the State Bar Act, codified at California Business & Professions Code §§ 6000 et seq. There is, however, no codified plan for the court and legislature to work in concert. As a result, as to those issues that are dealt with directly by legislation, including most significantly confidentiality, the court has historically been reluctant to intrude or impose itself on the legislative process, and has tended to leave modifications up to the legislature.

- ABA Model Code of Judicial Conduct and California Code of Judicial Ethics, the latter as modified effective October 15, 2018.
- SEC Final Standards of Professional Conduct in Part V.

In particular, we hope the substantive **Rules Comparison** will be of value not only in comparing the 2002 ABA Model Rules (as amended) with the 2018 California Rules, *but also* in comparing significant differences between the former (1989) California Rules and the 2018 California Rules. This Rules Comparison has been completely reorganized to focus on the differences between the 2002 ABA Model Rules on the one hand, and the 1989 and 2018 California Rules on the other. It is intended to provide both professors and students with an understanding of the major differences between the Model Rules and the California Rules and other ethical standards. This is important because although the 2018 California Rules have to a large extent incorporated the ABA Model Rules' organization, style and formatting, their substance in many instances differs markedly from the substance of the Model Rules.

## Changes Since 2002 to the ABA Model Rules and to Other Rules and Standards Related to the Law of Lawyering, including California Rules and Statutes

Since the ABA's adoption of the 2002 Model Rules, there have been a number of changes not only to the Model Rules, but also to other rules and regulations governing lawyer conduct. We highlight significant changes below.

### Changes to the Model Rules Since 2002

*2018 Changes to the Model Rules.* In August 2018, the ABA House of Delegates adopted a proposal that extensively revised and streamlined Model Rules 7.1 through 7.5, deleting Model Rules 7.4 (Communication of Fields of Practice and Specialization) and 7.5 (Firm Names and Letterheads) and moving their substance into Model Rules 7.2 and 7.1, respectively. In addition, the title of Model Rule 7.2 was changed from "Advertising" to "Communications Concerning A Lawyer's Services: Specific Rules" to better reflect the rule's content, which addresses not only the advertisement of legal services but also a lawyer's payment to others for recommendations of the lawyer's services. Further, substantive changes were made to Model Rule 7.3, the most significant of which was exempting from the prohibition against solicitation by any "live person-to-person" communication any such communication with a "person who routinely uses for business purposes the type of legal services offered by the lawyer." In addition, rather than include a laundry-list of prohibited contact (i.e., former rule 7.3's prohibition against solicitations "by in-person, live telephone or real-time electronic contact"), revised Model Rule 7.3 focuses on the core concept being regulated: "live person-to-person contact" that can enable a lawyer to engage in overreaching in seeking legal employment. A full

explanation of the changes can be found in Resolution 101, as approved by the House of Delegates. See <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/101.pdf>

The changes are also comprehensively discussed in the substantive comparison of the Model Rules and California Rules in Part II of this book.

*2016 Changes to the Model Rules.* In February 2016, the ABA House of Delegates adopted a proposal to amend paragraph (e) of Model Rule 5.5 to include a new subparagraph (1) to expand the scope of the rule's coverage of foreign lawyers. As previously drafted, paragraph (e) had covered only about 30% of foreign lawyers who actually provide legal advice to clients in the United States. A full explanation of the change can be found in Resolution 103, as adopted by the House of Delegates. See [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2016\\_hod\\_midyear\\_rr\\_103\\_adopted.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2016_hod_midyear_rr_103_adopted.authcheckdam.pdf)

In addition to the foregoing change, in August 2016, the House adopted a proposal to add new paragraph (g) and several Comments to Model Rule 8.4. Paragraph (g) prohibits a lawyer from engaging in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination against persons in enumerated protected classes. The comments provide guidance on the scope and applicability of the new paragraph. A full explanation of the changes can be found in Resolution 109, as submitted to the House of Delegates. See [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/final\\_revised\\_resolution\\_and\\_report\\_109.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf)

*2012-2013 Changes to the Model Rules proposed by the Ethics 20/20 Commission.* The ABA Ethics 20/20 Commission was created in 2009 by then-ABA President Carolyn B. Lamm to engage in a thorough review of the Model Rules and the U.S. system of lawyer governance and regulation in light of technological advances and developments in the global practice of law. The Commission completed its work in February 2013.

In August 2012 and again in February 2013, the Commission presented proposals to the ABA House of Delegates that were adopted with only minor revisions. All of the revisions have been included in Part I, in both the 2002 Model Rules, and also in the redline version comparing the 2002 Model Rules to the 1983 Model Rules and in Part II, which contains the comparison of the Model Rules to the new (2018) and former (1989) California Rules. Although detailed descriptions of the changes are included in that section, it is appropriate to highlight some of the changes here:

- *Rule 1.1 (Competence).* Two new comments, Comments [6] and [7], were added to provide guidance concerning a lawyer's responsibilities with respect to outsourcing work to lawyers outside of the firm in which the lawyer works. Perhaps the most publicized Ethics 20/20 revision to the Rules is a clause added to Comment [8] (formerly numbered [6]), which states that to maintain the requisite knowledge and skill, a lawyer should stay current with changes in the

law and its practice, “including the benefits and risks associated with relevant technology.” Time will tell whether this provision will be viewed as imposing a duty on lawyers to stay current with technology changes or will be seen primarily as a recommended best practice.

- *Rule 1.4 (Communication)*. In acknowledgement that clients and lawyers use a variety of technologies to communicate, a comment urging lawyers to return telephone calls now more broadly urges them to “promptly respond to or acknowledge client communications.” Such communications include emails and would also appear to include texting and similar methods of communication.
- *Rule 1.6 (Confidentiality)*. Two new sections were added to the black letter of the rule. Paragraph (b)(7) creates an exception to permit disclosure of confidential information for the limited purpose of clearing law firm conflicts of interest. Paragraph (c) requires that a lawyer “make reasonable efforts” to avoid inadvertent or unauthorized disclosure of, or inappropriate access to, confidential client information. New comments have been added to elaborate on the duties imposed by these new sections.
- *Rule 1.18 (Duties to Prospective Clients)*. The definition of “prospective client” was clarified and an important sentence was added to Comment [2] to clarify that a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a “prospective client.”
- *Rule 4.4 (Respect for Rights of Third Persons)*. Rule 4.4(b) was revised to expand its application not only to physical “documents” but also to “electronically stored information.” The comments to the Rule were similarly expanded to provide more guidance to lawyers on handling electronic information.
- *Rule 5.3 (Responsibilities Regarding Nonlawyer Assistance)*. In addition to a change to the title (“assistants” has been changed to “assistance”), the Comment to Rule 5.3 was substantially revised and supplemented to address a lawyer’s responsibilities regarding work that is outsourced to nonlawyers.
- *Rule 5.5 (Unauthorized Practice of Law Multijurisdictional Practice of Law)*. Several revisions were made to the rule to conform it to the Model Rule for Admission by Motion and the Model Rule on Practice Pending Admission, which are also the work product of the Ethics 20/20 Commission. In addition, several more revisions were made to the rule that, if adopted in a jurisdiction, would grant foreign lawyers the same kinds of privileges accorded domestic lawyers who work as in-house counsel and who are licensed in United States jurisdictions other than the jurisdiction in which they work.
- *Rules 7.1 (Communications Concerning a Lawyer’s Services), 7.2 (Advertising) and 7.3 (Solicitation of Clients)*. Each of these rules underwent a number of revisions to address issues raised by the various technologies lawyers use to market their legal services. Of particular note was the inclusion of a definition for “solicitation” in Comment [1] to Model Rule 7.3, which was moved into the rule text in 2018.

- *Rule 8.5 (Disciplinary Authority; Choice of Law)*. A comment revision provided that, in determining a lawyer's reasonable belief as to controlling law under paragraph (b)(2), a choice of law agreement, i.e., a written agreement between client and lawyer that specifies a particular jurisdiction, could be considered if the agreement was obtained with the client's informed consent, confirmed in the agreement.

There were also relatively modest revisions to the definition of "writing" in *Rule 1.0 (Terminology)* and to *Model Rule 1.17 (Sale of Law Practice)*. Please refer to the Substantive Comparison in Part II for details on these changes.

*2009 Revisions to the Model Rules: Model Rule 1.10 (imputation and screening)*. The big news in 2009 was the ABA's adoption, in February and August of 2009, of amendments to Model Rule 1.10 that broadly permit non-consented screening of lawyers who move from one *private* firm to another *private* firm. In effect, the Model Rule provision places private lawyers more or less on an equal footing with government lawyers, who are governed under MR 1.11, in their ability to be screened without the informed consent of the affected client or clients. Model Rule 1.10 allows such screening even if the screened lawyer had a substantial and direct involvement in the former client's case, and even if the former and current clients' cases were the same or "substantially related." The rule, in effect, changes the presumption that a laterally-moving lawyer would share confidential information with his or her new firm. Please refer to the Substantive Comparison, ABA Model Rule 1.10, in Part II for details on the changes to this rule and the extent to which jurisdictions have conformed their rules to the ABA approach on ethical screens.

*2008 Revisions to Model Rule 3.8*. After 2003 no further amendments were made to the Model Rules until February 2008, when the House of Delegates adopted Model Rule 3.8, paragraphs (g) and (h). Based on provisions adopted by the New York State Bar Association in November 2007, MR 3.8(g) and (h) codify the duties of prosecutors when they learn of possible false convictions. Paragraph (g) sets forth a prosecutor's minimal duties when the prosecutor "knows of new, credible and material evidence" indicating a defendant was wrongfully convicted. Where the conviction took place in a prosecutor's jurisdiction, paragraph (h) requires the prosecutor "to remedy the conviction."

*2003 Revisions to Model Rules 1.6 and 1.13*. In August 2003, ABA Model Rules 1.6 (Confidentiality) and 1.13 (Organization as Client), among the most important, underwent material revision following the corporate responsibility debacles in the early part of this decade. Both rules were modified to increase the permissible scope of attorney whistleblowing.

*2002 Revisions to Model Rules 5.5 and 8.5 (Multijurisdictional Practice)*. In August 2002, the ABA House of Delegates adopted substantial revisions to Model Rules 5.5 and 8.5 that the ABA's MJP Commission had recommended in order to address the issues presented by multijurisdictional practice.

## The ABA Model Court Rule on Insurance Disclosure

In August 2004, the ABA House of Delegates adopted a model court rule on malpractice insurance disclosure. This rule requires a lawyer licensed in the jurisdiction to certify on his or her annual registration form whether the lawyer has and intends to maintain professional liability insurance. This model rule can be found at the end of Part I. A total of 23 jurisdictions now have some form of regulation for insurance disclosures. As we note in our introduction to that rule, a number of jurisdictions require lawyers to disclose the fact they do not have malpractice insurance directly to their clients, while still others require attorney disclosure as part of the lawyers' annual dues registration. In 2009, the California Supreme Court adopted a rule of professional conduct, effective January 1, 2010, that requires lawyers to disclose to their clients the fact they do *not* have liability insurance. That rule was carried forward nearly verbatim in the new California Rules that became effective on November 1, 2018. See Cal. R. Prof. C. 1.4.2 (formerly rule 3-410) in Part III below.

## 2002 Sarbanes-Oxley Act & SEC Regulations

The 2002 Sarbanes-Oxley legislation required the SEC to create regulations addressing the duties of attorneys who are confronted by wrongdoing on the part of their “issuer client.” While the “Final Standards of Professional Conduct” eventually adopted by the SEC are limited to reporting duties in matters overseen by the SEC, the impact of these regulations has been far broader, and warrants their inclusion in this volume. We direct particular attention to section 205.3, directly addressing reporting, and section 205.2, which contains the definitions used in the SEC standards. See Part V.

Also of note is a provision in the SEC's proposed draft that the SEC did not include in the Final Standards—the so-called “noisy withdrawal” requirement. That proposal would have required a lawyer to (1) withdraw from the representation if the “issuer client” did not take appropriate action to correct violations of the securities laws; (2) notify the SEC in writing that the lawyer's withdrawal was based on “professional considerations”; and (3) affirmatively disavow any opinions, documents, etc. that the lawyer might have submitted and that the lawyer had discovered were materially misleading. This broad and rather controversial “noisy withdrawal” language still has not, as of this writing, been added to the SEC “Final Standards.”

## Changes to the California Rules of Professional Conduct, California Rules of Court, Business & Professions Code, and Evidence Code Since 2002

*New (2018) California Rules of Professional Conduct.* The big news in 2018 is the State Bar's adoption and the California Supreme Court's approval of the first comprehensive revision in nearly three decades of the California Rules of Professional

Conduct. These new California Rules became effective on November 1, 2018. These rules represent a major change for California. For the first time, the California Rules incorporate the organization, style and format of the ABA Model Rules.

Despite the organization and format similarities, however, it is important to appreciate that the new California Rules are not the same as the ABA Model Rules. The substance of the new California Rules will retain nearly all of the unique California rule provisions, particularly in relation to the duties of confidentiality (1.6, former rule 3-100) and competence (1.1, former rule 3-110), and the rules relating to fees, Cal. Rules 1.5 and 1.5.1 (former rules 4-200 and 2-200, respectively). In addition, although California has now incorporated several rules to address conflicts of interest that in most instances are substantially similar to their ABA Model Rule counterparts, (Cal. Rules 1.7, 1.9, 1.10, 1.11 and 1.12), there are some significant differences between the California and ABA rule counterparts. Moreover, given California's rich body of decisional law addressing conflicts and the fact that the California Rules are intended primarily as disciplinary rules, it remains uncertain how this new conflicts rules framework will affect, if at all, courts' decisions regarding disqualification motions. In addition, rather than track the organization of Model Rule 1.8 with its 10 substantive paragraphs under a single rule number, the new California Rules retain its counterpart provisions as standalone rules with their own, individual rule numbers, just as was done in the former California Rules. Cal. Rule 1.15 (former rule 4-100) now explicitly requires that advanced legal fees be placed in a trust account.

The new California Rules also include several rules whose substance is not addressed in the Model Rules, e.g., 1.4.2, 1.8.9, 2.4.1, 5.3.1, 8.1.1. Further, they do not include certain Model Rules, e.g., 1.14, 2.3, 5.7, 7.6 and 8.3.

The differences between the ABA Model Rules and both the former (1989) and new (2018) California are comprehensively described and discussed in the Substantive Rules Comparison in Part II.

*Changes to California Professional Conduct Standards from 2002 to 2018.* Prior to the 2018 California Rules implementation, there were a number of changes to California Professional Conduct Standards, some in response to changes in ABA standards, some in response to events that were transpiring in California. Although some of these changes might at first glance appear only to be of historical interest, we believe they provide important context for some of the changes that were made to the new California Rules and have included them here. Where relevant, we also provide an update of any changes to the 1989 Rule that were carried forward in the new (2018) California Rules

Effective July 1, 2004, Section 6068(e) of the California Business & Professions Code, California's statutory duty of confidentiality, was amended to allow for the first time a California lawyer to disclose confidential information to prevent a criminal act reasonably likely to result in death or substantial bodily harm. California Rule of Professional Conduct 3-100, which tracks and elaborates upon the statutory exception, was approved by the California Supreme Court, effective the same



date. (See footnote above for a discussion of the dual role of legislature and court in drafting California ethics rules.) New Cal. Rule 1.6 (eff. 11/1/18) carries forward former rule 3-100 with only a few non-substantive changes. We have described how rule 1.6 differs from Model Rule 1.6 in our Model Rules—California Rules Comparison in Part II.

In 2004, the California Supreme Court also approved California Rules of Court 964-967 [subsequently renumbered Rules 9.45 to 9.48], addressing Multijurisdictional Practice (“MJP”). California’s approach to regulating MJP thus differs markedly from the ABA, which has addressed MJP in the Model Rules. These rules, together with several other rules of court that address MJP situations, as well as the rule regulating the conduct of certified law students, may be found in the section titled “Selected California Rules of Court Regarding Multijurisdictional Practice” in Part III. Our Model Rules—California Rules Comparison includes a comparison of these rules of court to ABA Model Rule 5.5.

In 2005, the California legislature reorganized and revised the California statute governing attorney work product, now found at Code Civ. Proc. §§ 2018.01 to 2018.08 (formerly Code Civ. Proc. § 2018). The revisions became effective on July 1, 2005. These provisions can be found in Part III.

Effective January 1, 2007, the California Supreme Court implemented a major restructuring, reordering, and renumbering of over 1000 Rules of Court to make them clearer, better organized and easier to read. All of California’s rules concerning multijurisdictional practice (“MJP”) were given new numbers. We made those changes to those rules but kept the old numbers in brackets for ease of reference. These Rules of Court can be found at the end of Part III.

In 2008, substantive amendments were made to Bus. & Prof. Code §§ 6211-6213, which govern IOLTA deposit accounts. In addition, a new subdivision (c) was added to Bus. & Prof. Code § 6155, which governs Internet attorney referral services.

In July 2009, the California Supreme Court approved two new rules of professional conduct, one rule that became effective immediately and a second rule that became operative on January 1, 2010. The first rule was California Rule 1-650 (now rule 6.5), which was based on Model Rule 6.5, and was intended to facilitate private firm lawyers’ participation in limited legal services programs. The driving force behind this rule adoption in advance of an expected major overhaul of the California Rules was the provision of legal services to the hundreds of thousands of California homeowners who were being pressured to enter into loan modifications to preserve ownership. The second rule, which became operative on January 1, 2010, is the aforementioned rule 3-410 (now rule 1.4.2), and required lawyers to disclose to their clients the fact they do not have liability insurance. Both rules can be found in both the new and former California Rules of Professional Conduct, in Part III.

In 2014, several new provisions of the California State Bar Act were enacted, most notably those included in Article 16, Bus. & Prof. Code §§ 6240–6242, which are intended to regulate lawyers who provide services under the proposed federal

Immigration Reform Act. Although the Act has not yet been passed or signed into law, Article 16 set forth provisions that would govern lawyer conduct in California once federal legislation becomes operative. Further changes were made to these provisions, effective June 17, 2015. By its terms, Article 16 will apply to both members of the California Bar and any other lawyer providing legal services under the Act in California. (Bus. & Prof. Code § 6241.) We have included Article 16 in this volume.

Cal. Rule 5-110, based on ABA Model Rule 3.8, became effective on November 2, 2017. At the suggestion of California's Chief Justice (in response to a request from the Innocence Project), rule 3.8 was considered by the State Bar's Rules Revision Commission on an expedited basis. It significantly expanded the regulated scope of prosecutors' conduct that had been addressed by former California rules 5-110 and 5-220. On May 1, 2017, the Court largely accepted the Commission's original proposal but did not initially approve paragraphs (D) and (E) [based on Model Rule 3.8(d) and (e), respectively] to allow the Commission to consider several clarifying revisions suggested by the Court. After consideration of the Supreme Court's comments, the State Bar submitted proposed revisions to paragraph (D) as recommended by the Commission. On November 2, 2017, the Court issued an order approving in its entirety the State Bar's recommendation regarding paragraph (D). Paragraph (E) regarding subpoenas of lawyers was rejected.

Former Cal. Rule 5-110 has been carried forward as new rule 3.8 with only non-substantive style and format changes.

*Changes to California Evidence Code.* California is one of the few jurisdictions in which evidentiary privileges are governed by statute rather than common law. California courts can neither create new privileges nor add to or abrogate existing privileges. Since 2014, important revisions to the California Evidence Code were enacted, including recognition of two new privileges: a human trafficking caseworker-victim privilege (Evid. Code §§ 1038 et seq.) and a lawyer referral service-client privilege (Evid. Code § 965 et seq.) Further, new Evid. Code § 956(b), which provides that the crime-fraud exception to the privilege in § 956(a) does *not* apply to "legal services rendered in compliance with state and local laws on medicinal cannabis or adult-use cannabis," became effective January 1, 2018. *See also* new Cal. Rule 1.2.1, Comment [6] (eff. 11/1/18), which clarifies that a lawyer is permitted under that rule to advise or assist a client to comply with California laws even if they conflict with federal law. Such laws would include California laws relating to medicinal and adult use marijuana, and California sanctuary laws. We have included all of the foregoing, together with the Evidence Code sections relevant to the lawyer-client privilege, in Part III.

## Further Notes on the Materials in This Book

*Ethics 2000 Commission Adoptions.* Every jurisdiction empaneled a committee or task force to review the Ethics 2000 Commission's recommended changes to the

Model Rules. With California's implementation of its new Rules of Professional Conduct, forty-nine jurisdictions have now adopted new rules that incorporate at least to some extent post-Ethics 2000 revisions (Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming). Of particular note, five of those jurisdictions represent the last of the Code jurisdictions: Iowa, New York, Nebraska, Ohio and Oregon. Thus, there is no jurisdiction that still uses the Model Code as its source of lawyer regulation. One state (Georgia) has a committee that is studying the Ethics 2000 changes. The Supreme Court of Texas submitted proposed Rules of Professional Conduct that incorporated Ethics 2000 revisions for a referendum by members of the Texas State Bar, who rejected the proposal. It is not certain when or if new rules might be submitted again for a vote, or if the Texas Supreme Court might act to implement post-Ethics 2000 revisions despite the rejection by referendum.

*Multijurisdictional practice* ("MJP") is here to stay. As set out in more detail in the introduction to California's MJP rules, at the time of writing, 46 jurisdictions had adopted a rule either identical to, or similar to Model Rule 5.5, while the review committee in one jurisdiction has recommended the adoption of a form of the rule. The rule is under study in one other jurisdiction. The same is true for Rule 8.5, the other MJP-adopted Model Rule of Professional Conduct, with 46 jurisdictions having adopted some form of the rule, one recommending its adoption, and two having it under study.

While we expect further Model Rule adoptions to occur, two points should be noted. *First*, two jurisdictions continue to operate with rules based on the pre-Ethics 2000 Model Rules (Georgia and Texas). The ABA's Center for Professional Responsibility Policy Implementation Committee provides updates on rules adoptions in the states at [https://www.americanbar.org/groups/professional\\_responsibility/policy/rule\\_charts/](https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/) [last visited 10/26/2018].

*Second*, and perhaps more important, even those jurisdictions that have adopted post-Ethics 2000 versions of the Model Rules have not adopted the Model Rules verbatim. We mention this so that users of this book will not rely on the Model Rules in their practices without also consulting their own jurisdiction's rules. Even Delaware, the only jurisdiction we are aware of that has implemented the Model Rules nearly verbatim, has adopted at least three provisions that vary from the Model Rules. One is a rule that permits a lawyer to divide a fee with another lawyer even if the lawyer provides no legal services or does not assume responsibility for the matter (Del. Rule of Prof. Conduct 1.5(e)). Moreover, although Delaware's rule on screening of private lawyers, Delaware Rule 1.10(c), broadly permits screening,

it differs in significant respects from Model Rule 1.10(a)(2). Finally, Delaware Rule 1.15 regarding trust accounts and safekeeping property diverges markedly from the “no frills” Model Rule 1.15.

As might be expected, some of the former Code states have also diverged significantly from the Model Rules, retaining provisions from their former codes. For example, Oregon rejected the 2003 changes to Model Rule 1.6, used its existing standards on lawyer mediators instead of adopting Model Rule 2.4, and kept a number of its other existing rules, including those addressing screening, sales of law practices, and covert activity. New York has also retained a great number of its former Code provisions in its new rules, and has not officially adopted the Model Rule comments. Divergence from the substance of the Model Rules, however, is not limited to former Code states. For example, both New Jersey and Pennsylvania, Model Rules states of long standing, continue to have rules that depart markedly from the Model Rules in many respects. Finally, as noted below, California has joined with other jurisdictions by adopting rules that conform to the organization, style and formatting of the ABA Model Rules, but which diverge in significant ways from the Model Rules.

*The Substantive Comparison between the ABA Model Rules and both the former (1989) and new (2018) California Rules*, in Part II of this book, represents our effort to capture in depth the extent to which the California Rules depart from the substance of the Model Rules. Professor Kevin E. Mohr of Western State College of Law, who continues as co-author of this rules volume, served as the Consultant, or “reporter,” to both the first and second California Rule Revision Commissions that were responsible for drafting the new rules. He has brought his insights from those experiences to updating the California materials in this volume, as well as the substantive comparison in Part II. In addition, he recently was appointed as a member of the State Bar of California Task Force on Access Through Innovation of Legal Services. This Task Force has been charged with “identifying possible regulatory changes to enhance the delivery of, and access to, legal services through the use of technology, including artificial intelligence and online legal service delivery models.” As such, he is well-placed to monitor and report on future rule changes that might be made to rules or statutes regulating lawyer conduct and the legal profession.

In future editions of this rules book, we will continue identify any trends in lawyer regulation as they develop throughout our 50 states and the District of Columbia.

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Kevin E. Mohr

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