

**Legal Ethics:
Rules, Statutes, and Comparisons**

Legal Ethics: Rules, Statutes, and Comparisons

2023 EDITION

Includes ABA and California Changes through 2023,
a Substantive Rule-by-Rule Comparison of the ABA Model Rules
and Both Current and Former California Rules,
and the ABA and California Judicial Codes

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CAROLINA ACADEMIC PRESS

Durham, North Carolina

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See catalog.loc.gov for complete
Library of Congress Cataloging-in-Publication Data

ISBN 978-1-5310-2062-0
eISBN 978-1-5310-2063-7

Carolina Academic Press LLC
700 Kent Street
Durham, North Carolina 27701
(919) 489-7486
www.cap-press.com

Printed in the United States of America

Legal Ethics: Rules, Statutes, and Comparisons 2023 Edition

Including the 2002 ABA Model Rules (as amended through 2023), both the 1989 and 2018 California Rules (the latter as amended through 2023), 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 current (2018) California Rules, and the ABA and California Judicial Codes, as amended through 2023.

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Introduction and Use Note

The 2023 edition of this book includes numerous updates of rules and statutes regulating the conduct of lawyers. It builds upon the work of the 2019 edition, where we included the top-to-bottom revision of the California Rules of Professional Conduct that became effective in November 2018, and revisions to the State Bar Act, reflecting the bifurcation of the functions of the State Bar of California into a primarily regulatory function residing in the State Bar and what might be called a trade association function that was delegated to a new entity, the California Lawyers Association. As discussed more fully below, this first edition since the 2019 edition includes important changes to the ABA Model Rules and the California Rules, as well as changes to the California State Bar Act, Bus. & Prof. Code §§6000 et seq., California Rules of Court addressing multijurisdictional practice, and the California Code of Judicial Ethics. This edition also updates the legislative blackline rules comparisons between the 1983 and 2002 ABA Model Rules, and between the 2002 Model Rules and the updated 2018 California Rules. Of particular importance to users of this book, the Substantive Comparison between the 2002 Model Rules, on the one hand, and the 1989 and 2018 California Rules on the other, has been revised to reflect the above changes. What follows is a detailed summary of how 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, the comprehensive changes

made to the advertising and solicitation Model Rules in August 2018, and a further change to rule 1.8(e) in 2020.

In the previous 2019 edition, we included 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 included a completely revamped and comprehensive substantive comparison of the ABA Model Rules and both the former (1989) and current (2018) California Rules. We understand that this comparison has become a valuable resource for the book's users. With this edition, we have updated that substantive comparison to reflect the important changes that have been made to the California Rules since 2018. Those changes include the addition of new California rule 8.3 (Reporting Professional Misconduct), revisions to the black letter of rules 1.15 and 5.4, as well as changes to the comments to rules 1.1, 1.4, 1.15, 1.16, 3.8 and 5.4.

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 (with updates since the 2018 edition), 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, and in this edition include changes effective July 1, 2020 to the California Code regarding a judge's use of social media and conduct during an election. With the 2018 edition, we 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, August 2018, and August 2020. 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 2020 amendment to Model Rule 1.8(e). 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 2002 ABA Model Rules to both the former (1989) and current (2018) California Rules. In this comparison, the 2002 Rules (as revised through 2022) are compared with both the former (1989) and current (2018) California Rules, as amended, 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, as amended through 2023, and (ii) a table that cross-references both the current and former California rule numbers to the rule numbers in the Model Rules.
- The California Rules of Professional Conduct, both the current rules as approved by the California Supreme Court effective 2018, as amended through 2023, 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.
- ABA Model Code of Judicial Conduct and California Code of Judicial Ethics, the latter as modified effective July 1, 2020 are in Part IV.
- 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, as amended, *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.

* 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.

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

2020 Changes to the Model Rules. In August 2020, the ABA House of Delegates adopted a proposal to add a subparagraph to Model Rule 1.8(e) that permits a lawyer representing an indigent client pro bono to provide “modest gifts” to the client for “basic living expenses” so long as certain conditions are satisfied.

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/administrative/professional_responsibility/final_clean_for_posting_rules_7_1_to_7_3.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.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.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 current (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 informa-

tion. 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 current 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

Effective August 1, 2023, the California Supreme Court approved new rule 8.3 (Reporting Professional Misconduct). Although Model Rule 8.3 was first adopted in 1983, this is the first time the Court has incorporated a similar rule in the California Rules. The rule is in many respects substantially different from Model Rule 8.3. Our legislative (“Redlined”) style comparison of Model Rule 8.3 to the California Rule effectively demonstrates how the California rule diverges from the model rule. Further, we explain the differences in detail in the Substantive Rule Comparison section. Both can be found in Part II.

Effective January 1, 2023, as part of the State Bar’s Client Trust Account Protection Program (“CTAPP”), major revisions were made to Cal. Rule 1.15 and its comments. These changes, together with the adoption of a new rule of court, rule 9.8.5 (requiring annual trust account certification and registration), were designed to address a number of highly-publicized misuses of client trust accounts.

Effective March 22, 2021, a comment was added to Cal. Rule 1.1 that parallels comment [8] to Model Rule 1.1, i.e., requiring a lawyer to keep abreast of changes in the law, “including the risks and benefits associated with relevant technology.” Also effective March 22, 2021, an amendment added paragraph (a)(6) to Cal. Rule 5.4, which permits a lawyer (or firm) to share legal fees that arise from a settlement or other resolution of a matter with a nonprofit organization that employed, retained, recommended, or facilitated the lawyer’s representation so long as certain requirements are satisfied, in-

cluding disclosure to, and consent of the client. Clarifying changes were also made to the rule's comment.

Effective June 1, 2020, revisions were made to the comments to rules 1.16 and 3.8, clarifying certain duties in criminal matters of criminal defense lawyers and prosecutors, respectively.

Current (2018) California Rules of Professional Conduct. The big news in 2018 was 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 California Rules became effective on November 1, 2018. For the first time, the California Rules incorporated the organization, style and format of the ABA Model Rules.

Despite the organization and format similarities, however, it remains important to appreciate that these current California Rules are not the same as the ABA Model Rules. The substance of the current rules 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 was uncertain how the new conflicts rules framework would affect, if at all, courts' decisions regarding disqualification motions. Although we have not conducted a formal study, our review of court decisions since the current rules became effective suggests that the courts have seamlessly incorporated the new framework into their analysis and decisions. In addition, rather than track the organization of Model Rule 1.8 with its 10 substantive paragraphs under a single rule number, the current 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, as well including the expansive new trust account requirements described above and in greater detail in the Substantive Comparison.

The current 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, and one rule, rule 8.4.1, that goes into substantially more detail than Model Rule 8.4(g) regarding discrimination and harassment. Further, the California Rules 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 current (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 current California Rules and have included them here. Where relevant, we also provide an update of any changes to the 1989 Rules that were carried forward in the current (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.) Current 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 multi-jurisdictional 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, 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* current 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 current Rules of Professional Conduct, forty-nine jurisdictions have now adopted 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/ [last visited 1/12/2023].

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 discussed in more detail 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 current (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 current 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. As a founding member of the ethics committee of the California Lawyers Association, 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.

We note a current initiative to revise the California Rules of Professional Conduct that has not yet been adopted but is the subject of serious consideration as this book goes to press. A California Civility Task Force has proposed revisions to the Rules of

Professional Conduct and the Rules of Court to address incivility. The proposals are still out for public comment, but it is possible that California may have disciplinable rules regarding civility in the near future.

In addition, in December 2022, Senate Bill 42 was introduced in the California Legislature. SB 42 would add section 6090.8 to the California Business and Professions Code requiring a lawyer to report to the State Bar professional misconduct of another lawyer that raises a substantial question as to that the other lawyer's honesty, trustworthiness, or fitness as a lawyer. In effect, section 6090.8 would impose a duty on California lawyers similar to the duty in Model Rule 8.3. As we have already noted above, the State Bar adopted and the California Supreme Court approved a rule counterpart to Model Rule 8.3, effective August 1, 2023. It remains uncertain whether the California legislature will continue to pursue the proposed statute, which appears somewhat broader in scope and includes significantly fewer exceptions than the California rule. However, we note that the principal sponsor of SB 42 is on record as stating the rule is "an important step forward for consumer protection" and that "Maintaining the integrity of the legal profession is not a weight that should fall solely on the public, and this action finally brings California into the ranks of all other 49 states." See Harriet Ryan and Matt Hamilton, *In major reform, California attorneys must report misconduct by their peers*, L.A. Times, page 1 (June 22, 2023). We will continue to monitor these two situations and alert you of any future changes.

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

July 2023