

SEP 26 2018

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Jorge Navarrete Clerk

ADMINISTRATIVE ORDER 2018-09-26-01

Deputy

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**IN THE SUPREME COURT OF CALIFORNIA**

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ORDER RE REQUEST FOR APPROVAL OF PROPOSED RULE 1.2.1 AND OTHER  
AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF  
THE STATE BAR OF CALIFORNIA.

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On August 24, 2018, the Board of Trustees of the State Bar of California filed a supplemental request for approval of proposed rule 1.2.1 of the California Rules of Professional Conduct and certain minor revisions to other Rules of Professional Conduct approved by the court on May 10, 2018. (Bus. & Prof. Code, § 6076.) The request is granted. The text of rule 1.2.1 and its related Comments [1] through [6] is set forth in Attachment 1 to this order. The approved revisions to other Rules of Professional Conduct are summarized in Attachment 2 to this order. Rule 1.2.1 and these rules revisions are effective November 1, 2018.

It is so ordered.

**CANTIL-SAKAUYE**

*Chief Justice*

**CHIN, J.**

*Associate Justice*

**CORRIGAN, J.**

*Associate Justice*

**LIU, J.**

*Associate Justice*

**CUÉLLAR, J.**

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*Associate Justice*

**KRUGER, J.**

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*Associate Justice*

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*Associate Justice*

## ATTACHMENT 1

### **Rule 1.2.1 Advising or Assisting the Violation of Law**

- (a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows\* is criminal, fraudulent,\* or a violation of any law, rule, or ruling of a tribunal.\*
- (b) Notwithstanding paragraph (a), a lawyer may:
  - (1) discuss the legal consequences of any proposed course of conduct with a client; and
  - (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.\*

#### **Comment**

[1] There is a critical distinction under this rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud\* might be committed with impunity. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent\* does not of itself make a lawyer a party to the course of action.

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this rule, a lawyer shall not violate the lawyer's duty under Business and Professions Code section 6068, subdivision (a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with rules 1.13 and 1.16.

[3] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal\* or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal\* that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

[4] Paragraph (b) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal\* that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences

of blocking the entrance to a public building as a means of protesting a law or policy the client believes\* to be unjust or invalid.

[5] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by these rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must advise the client regarding the limitations on the lawyer's conduct. (See rule 1.4(a)(4).)

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law. In the event of such a conflict, the lawyer may assist a client in drafting or administering, or interpreting or complying with California laws, including statutes, regulations, orders, and other state or local provisions, even if the client's actions might violate the conflicting federal or tribal law. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict. (See rules 1.1 and 1.4.).

**ATTACHMENT 2**

**Summary of Approved Amendments to the Rules of Professional Conduct**

**Rule 1.0 Purpose and Function of the Rules of Professional Conduct**

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**Rule 1.0.1 Terminology**

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**CHAPTER 1. LAWYER-CLIENT RELATIONSHIP**

**Rule 1.1 Competence**

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**Rule 1.2 Scope of Representation and Allocation of Authority**

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**Rule 1.2.1 Advising or Assisting the Violations of Law**

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**Rule 1.3 Diligence**

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**Rule 1.4 Communication with Clients**

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**Rule 1.4.1 Communication of Settlement Offers**

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**Rule 1.4.2 Disclosure of Professional Liability Insurance**

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## **Rule 1.5 Fees for Legal Services**

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### **Rule 1.5.1 Fee Divisions Among Lawyers**

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## **Rule 1.6 Confidential Information of a Client**

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### **Comment**

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*Whether to counsel client or third person\* not to commit a criminal act reasonably\* likely to result in death or substantial\* bodily harm*

[7] Paragraph (c)(1) provides that before a lawyer may reveal information protected by Business and Professions Code section 6068, subdivision (e)(1), the lawyer must, if reasonable\* under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial\* bodily harm, including persuading the client to take action to prevent a third person\* from committing or continuing a criminal act. If necessary, the client may be persuaded to do both. The interests protected by such counseling are the client's interests in limiting disclosure of information protected by section 6068, subdivision (e) and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the lawyer's counseling or otherwise, takes corrective action — such as by ceasing the client's own criminal act or by dissuading a third person\* from committing or continuing a criminal act before harm is caused — the option for permissive disclosure by the lawyer would cease because the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the lawyer who contemplates making adverse disclosure of protected information may reasonably\* conclude that the compelling interests of the lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the lawyer should, if reasonable\* under the circumstances, first advise the client of the lawyer's intended course of action. If a client or another person\* has already acted but the intended harm has not yet occurred, the lawyer should consider, if reasonable\* under the circumstances, efforts to persuade the client or third person\* to warn the victim or consider other appropriate action to prevent the harm. E ven when the lawyer has concluded that paragraph (b) does not permit the lawyer to reveal information protected

by section 6068, subdivision (e)(1), the lawyer nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

\* \* \* \* \*

*Informing client pursuant to paragraph (c)(2) of lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1)*

[9] A lawyer is required to keep a client reasonably\* informed about significant developments regarding the representation. (See rule 1.4; Bus. & Prof. Code, § 6068, subd. (m).) Paragraph (c)(2), however, recognizes that under certain circumstances, informing a client of the lawyer's ability or decision to reveal information protected by section 6068, subdivision (e)(1) as permitted in paragraph (b) would likely increase the risk of death or substantial\* bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the lawyer or the lawyer's family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal information protected by section 6068, subdivision (e)(1) as permitted in paragraph (b) only if it is reasonable\* to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the lawyer to inform the client may vary depending upon the circumstances. (See Comment [10] of this rule.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

- (1) whether the client is an experienced user of legal services;
- (2) the frequency of the lawyer's contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the lawyer and client have discussed the lawyer's duty of confidentiality or any exceptions to that duty;
- (5) the likelihood that the client's matter will involve information within paragraph (b);
- (6) the lawyer's belief,\* if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial\* bodily harm to, an individual; and
- (7) the lawyer's belief,\* if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

\* \* \* \* \*

*Other consequences of the lawyer's disclosure*

[12] Depending upon the circumstances of a lawyer's disclosure of information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted

by this rule, there may be other important issues that a lawyer must address. For example, a lawyer who is likely to testify as a witness in a matter involving a client must comply with rule 3.7. Similarly, the lawyer must also consider his or her duties of loyalty and competence. (See rules 1.7 and 1.1.)

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**Rule 1.7 Conflict of Interest: Current Clients**

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**Comment**

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[3] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that paragraph (C)(3) of predecessor rule 3-310 was violated when a lawyer, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer’s consent. Notwithstanding *State Farm*, paragraph (a) does not apply with respect to the relationship between an insurer and a lawyer when, in each matter, the insurer’s interest is only as an indemnity provider and not as a direct party to the action.

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**Rule 1.8.1 Business Transactions with a Client and Pecuniary Interests Adverse to a Client**

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**Rule 1.8.2 Use of Current Client’s Information**

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**Rule 1.8.3 Gifts From Client**

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**Rule 1.8.4 [Reserved]**

**Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client**

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**Rule 1.8.6 Compensation from One Other Than Client**

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**Rule 1.8.7 Aggregate Settlements**

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**Rule 1.8.8 Limiting Liability to Client**

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**Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review**

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**Rule 1.8.10 Sexual Relations With Current Client**

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**Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9**

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**Rule 1.9 Duties to Former Clients**

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**Rule 1.10 Imputation Of Conflicts Of Interest: General Rule**

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**Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees**

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**Rule 1.12 Former Judge, Arbitrator, Mediator, Or Other Third-Party Neutral**

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**Rule 1.13 Organization as Client**

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**Rule 1.14 [Reserved]**

**Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons\***

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- (e) The Board of Trustees of the State Bar shall have the authority to formulate and adopt standards as to what “records” shall be maintained by lawyers and law firms\* in accordance with paragraph (d)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

*Standards:*

Pursuant to this rule, the Board of Trustees of the State Bar adopted the following standards, effective November 1, 2018, as to what “records” shall be maintained by lawyers and law firms\* in accordance with paragraph (d)(3).

- (1) A lawyer shall, from the date of receipt of funds of the client or other person\* through the period ending five years from the date of appropriate disbursement of such funds, maintain:

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**Rule 1.16 Declining Or Terminating Representation**

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**Rule 1.17 Sale of a Law Practice**

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**Rule 1.18 Duties To Prospective Client**

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**CHAPTER 2. COUNSELOR**

**Rule 2.1 Advisor**

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**Rule 2.2 [Reserved]**

**Rule 2.3 [Reserved]**

**Rule 2.4 Lawyer as Third-Party Neutral**

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**Rule 2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator**

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**CHAPTER 3. ADVOCATE**

**Rule 3.1 Meritorious Claims and Contentions**

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**Rule 3.2 Delay of Litigation**

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**Rule 3.3 Candor Toward The Tribunal\***

(a) A lawyer shall not:

- (1) knowingly\* make a false statement of fact or law to a tribunal\* or fail to correct a false statement of material fact or law previously made to the tribunal\* by the lawyer;
- (2) fail to disclose to the tribunal\* legal authority in the controlling jurisdiction known\* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly\* misquote to a tribunal\* the language of a book, statute, decision or other authority; or

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**Rule 3.4 Fairness to Opposing Party and Counsel**

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**Rule 3.5 Contact With Judges, Officials, Employees, and Jurors**

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**Rule 3.6 Trial Publicity**

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(b) Notwithstanding paragraph (a), but only to the extent permitted by Business and Professions Code section 6068, subdivision (e) and rule 1.6, lawyer may state:

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- (7) in a criminal case, in addition to paragraphs (1) through (6):
  - (i) the identity, general area of residence, and occupation of the accused;
  - (ii) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;\*
  - (iii) the fact, time, and place of arrest; and
  - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

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**Rule 3.7 Lawyer as Witness**

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**Rule 3.8 Special Responsibilities of a Prosecutor**

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**Rule 3.9 Advocate in Nonadjudicative Proceedings**

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**Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges**

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**CHAPTER 4. TRANSACTIONS WITH PERSONS\* OTHER THAN CLIENTS**

**Rule 4.1 Truthfulness in Statements to Others**

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**Rule 4.2 Communication With a Represented Person\***

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(b) In the case of a represented corporation, partnership, association, or other private or governmental organization, this rule prohibits communications with:

- (1) A current officer, director, partner,\*or managing agent of the organization;  
or
- (2) A current employee, member, agent, or other constituent of the organization, if the subject of the communication is any act or omission of such person\* in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability.

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**Rule 4.3 Communicating with an Unrepresented Person\***

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**Rule 4.4 Duties Concerning Inadvertently Transmitted Writings\***

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**CHAPTER 5. LAW FIRMS\* AND ASSOCIATIONS**

**Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers**

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**Rule 5.2 Responsibilities of a Subordinate Lawyer**

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**Rule 5.3 Responsibilities Regarding Nonlawyer Assistants**

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**Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Lawyer**

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**Rule 5.4 Financial and Similar Arrangements with Nonlawyers**

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**Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law**

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**Rule 5.6 Restrictions on a Lawyer's Right to Practice**

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**Rule 5.7 [Reserved]**

**CHAPTER 6. PUBLIC SERVICE**

**Rule 6.1 [Reserved]**

**Rule 6.2 [Reserved]**

**Rule 6.3 Membership In Legal Services Organization**

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**Comment**

Lawyers should support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a lawyer-client relationship with persons\* served by the organization. However, there is potential conflict between the interests of such persons\* and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

**Rule 6.4 [Reserved]**

**Rule 6.5 Limited Legal Services Programs**

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**CHAPTER 7. INFORMATION ABOUT LEGAL SERVICES**

**Rule 7.1 Communications Concerning a Lawyer's Services**

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**Rule 7.2 Advertising**

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**Rule 7.3 Solicitation of Clients**

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**Rule 7.4 Communication of Fields of Practice and Specialization**

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**Rule 7.5 Firm\* Names and Trade Names**

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**CHAPTER 8. MAINTAINING THE INTEGRITY OF THE PROFESSION**

**Rule 8.1 False Statement Regarding Application for Admission to Practice Law**

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**Rule 8.1.1 Compliance with Conditions of Discipline and Agreements in Lieu of Discipline**

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**Rule 8.2 Judicial Officials**

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**Rule 8.3 [Reserved]**

**Rule 8.4 Misconduct**

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**Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation**

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**Rule 8.5 Disciplinary Authority; Choice of Law**

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