



THE STATE BAR OF CALIFORNIA

OFFICE OF PROFESSIONAL COMPETENCE,
PLANNING & DEVELOPMENT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2167

MEMORANDUM

DATE: June 13, 2008

TO: Members of the Board's Regulation, Admissions & Discipline Oversight Committee

FROM: Randall Difuntorum, Director, Professional Competence Programs

SUBJECT: RAD Meeting on July 10, 2008 – Status of the Professional Competence Unit

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This memorandum provides an update on the activities of the Professional Competence Unit for the month of April 2008. In addition to this memorandum, provided are the following: (1) Professional Competence Staff List; (2) Ethics Hotline Activity Statistics; (3) Volume of Ethics Hotline Calls by Paralegal, (4) Professional Competence Budget Summary – Authorized vs. Actuals; and (5) Memorandum on Public Comments/Testimony. Board members with questions may contact me at (415) 538-2161 or Lauren McCurdy at (415) 538-2107.

1. ETHICS HOTLINE

- As of April 30, 2008, 4934 member inquiries were received with a completion rate of 83%. This completion rate includes distribution of 230 copies of published ethics opinions and other written materials requested by inquirers and 1,945 referrals to information posted at the Bar's website. (As all of the published State Bar Formal Opinions are posted in the Ethics Information Area of the website, there is a decreasing need for distribution by mail.) Of the total calls, 126 were courtesy follow-up calls to members who placed a call to the Hotline, received a call back from Hotline staff but were not available at that time to take the call from the Hotline staff person. These members receive instructions on how to call-in and receive priority handling when they choose to return the Hotline's call at their convenience. However, sometimes they do not call and in those circumstances the Hotline initiates a courtesy follow-up call.
- For the period of April 1, 2008 through April 30, 2008, 1 voluntary satisfaction survey was received from a member who utilized the Ethics Hotline service. Each survey asks for a rating on several specified categories of service, including: satisfaction with the system for handling the calls; helpfulness of receptionist; helpfulness of paralegal; usefulness of materials sent; whether the inquirer would recommend the Hotline to others; and whether they received the assistance they needed. The survey received gave the Hotline the highest possible mark in each survey category. (A copy of the survey received is attached.)

2. COPRAC

- Since the last Professional Competence status report submitted for the Board Committee's May 15, 2008 meeting, COPRAC met on May 2, 2008 in San Francisco. COPRAC approved the publication of an article on rule 3-100 (Confidential Information of Client). In addition, COPRAC continued its work to reassess its closed session meeting policy on which Board liaison Michael Marcus' participation has been helpful.
- The following opinion was approved by the Board Committee and published on May 14, 2008:

Formal Opinion No. 2008-175 (Interim No. 05-0005)

ISSUE: What are a successor attorney's ethical obligations when her client in a contingency fee matter instructs her not to notify prior counsel, who has a valid lien against the recovery, of the fact or the amount of a settlement?

DIGEST: 1. When a client instructs successor counsel not to disclose a settlement to a prior counsel with a valid lien, successor counsel must advise the client of the adverse ramifications of concealing the settlement, including a potential claim by prior counsel against the client. Should the client persist, successor counsel must nevertheless disclose the settlement to prior counsel.

2. A lawyer may not reveal confidential client information except with the consent of the client or as authorized or required by the State Bar Act, the Rules of Professional Conduct, or other law. Disclosure is required by law to fulfill the attorney's fiduciary duties to prior counsel. Disclosure is also authorized by law to enable both attorneys to protect their right to recover fees.

3. While the successor attorney is both obligated and permitted to disclose the fact and the amount of the settlement to the prior attorney, successor counsel may not disclose anything more to the prior attorney, without the client's consent, including the client's demand that the fact and the amount of the settlement be concealed from the prior attorney.

4. Once prior counsel is notified, both attorneys must remain mindful of their duty of confidentiality to the client in attempting to reach an accord, amicably or through legal process, on the proper allocation of fees. Moreover, should the attorneys resort to legal process to resolve any dispute over allocation of the fee, successor counsel should provide the client with notice and an opportunity to participate. In any legal proceeding, the presiding officer will be in a position to limit the disclosure of confidential information appropriately.

- The following opinion was tentatively approved by COPRAC for a 90-day public comment circulation ending on August 1, 2008:

Formal Opinion Interim No. 05-0001

ISSUE: What are the ethical ramifications associated with a modification of an attorney fee agreement?

DIGEST: Rule 3-300 of the Rules of Professional Conduct¹ does not apply to a modification of a fee agreement unless the agreement confers on the attorney an ownership, security, possessory, or other pecuniary interest adverse to the client. While rule 3-300 does not per se apply to a modification of a fee agreement after the attorney-client relationship has commenced, any modification of an existing fee agreement must be fair, reasonable, fully explained, and consented to by the client. A number of factors will determine whether modification of a fee agreement meets this standard.

- COPRAC's 12th Annual Statewide Ethics Symposium was held on May 3, 2008 at the University of San Francisco School of Law. The theme of the Symposium was "NOTORIETY – When the Spotlight Is on Ethics." The panels presented included the following: "Public Lawyers In The Political Maelstrom;" "Ethical Issues in Class Actions and Derivative Litigation;" "Prosecutorial Misconduct: Epidemic or Aberration?;" and "[In]Advertent Disclosure: For Whose Eyes Only?" State Bar President Jeff Bleich, and USF School of Law Dean Jeffrey Brand provided welcoming remarks, and the keynote speaker was Professor Geoffrey Hazard. A copy of the activity evaluation form summarizing the attendees' rankings on various criteria is attached.
- On June 6, 2008, COPRAC submitted comment letters to the Rules Revision Commission on 11 of the 13 proposed rules in response to the current public comment request.
- COPRAC's next meeting is scheduled for June 20, 2008 and will be held at the San Francisco State Bar office.

3. RULES REVISION COMMISSION

- The Commission has not conducted a meeting since the last Professional Competence status report submitted for the Board Committee's May 15, 2008 meeting. The Commission's next meeting is scheduled for June 13, 2008 and will be held at the Los Angeles State Bar office. Among the items anticipated to be considered at that meeting are ABA Model Rule 1.18 concerning a lawyer's duties to prospective clients and current rule 5-120 regarding trial publicity.
- The 90-day public comment period on the Commission's third group of draft rules ended on June 6, 2008. In addition, a public hearing on the thirteen draft rules included in this group was held on May 22, 2008 in Sacramento. A staff report to the Commission members providing an overview of the written comments and hearing testimony is enclosed. The Commission has not yet scheduled its consideration of the comments and the earliest time for such consideration would be the Commission's July 25, 2008 meeting. The Commission has a two-day meeting scheduled for August 29 & 30, 2008 and that meeting might be the most practical opportunity for the Commission to begin its consideration of the comments and testimony.
- The Commission presented an educational panel at the 12th Annual Statewide Ethics Symposium on May 3, 2008 at the University of San Francisco School of Law. The representatives of the Commission were Co-Vice Chairs Mark Tuft and Paul Vapnek. Among the topics covered by the panel were the Commission's proposed Rule 1.7 (re current client conflicts of interest) and proposed Rule 4.2 (re communication with a represented person).

- Three articles were published covering the Commission's third batch of public comment rules: "Rule Changes Bring Up Issues for Both Lawyers and the Public" by Mark Tuft (March 24, 2008 *Daily Journal, Forum Column* at p. 6); "Proposed Bar Rule Change Drawing Ire" by Robert Iafolla (June 4, 2008 *Daily Journal* at p.1); and "State Bar Should Propose a Prohibition of Redundant Rules" by Rafael Chodos (June 9, 2008 *Daily Journal, Forum Column* at p. 6). Copies of these articles are on file with staff and available on request.

4. COMPETENCE PUBLICATIONS

- Handbook on Client Trust Accounting for CA Attorneys:
As of April 30, 2008, 5 copies have been sold. The online version of the handbook posted at the Bar's website was downloaded 61,301 times.
- California Compendium on Professional Responsibility:
As of April 30, 2008, 201 copies of the Compendium updates were sold. The production of the 2008 Compendium update is in progress.
- CA Rules of Professional Conduct & State Bar (a.k.a Publication No. 250):
As of April 30, 2008, 19 copies of the 2007 Publication 250 were sold and an online PDF version of the Rules of Professional Conduct posted at the Bar's website was downloaded 4,948 times. The production of the 2008 Publication 250 is in progress.

5. COMPETENCE RESOURCES AT CALBAR.CA.GOV

- The public hearing notice and registration form for the Commission's May 22, 2008 public hearing was posted to the Ethics Information page of the Bar's website.
- The meeting materials for the Rules Revision Commission's June 13, 2008 meeting was posted at the Commission's Meeting Materials page of the website.
- COPRAC's recent article entitled: "The New Limited Exception to the Professional Duty to Protect Client Confidences and Secret" was posted at the Bar's website.
- COPRAC's Formal Opinion No. 2008-175 (Client Instructions re Prior Attorney's Lien) was posted at the Ethics Opinions page of the Bar's website.
- COPRAC's Proposed Formal Opinion Interim No. 05-0001 (Modification of an Attorney Fee Agreement) was posted at the Public Comment area of the website.
- The Ethics News page of the website was updated to reflect the recent ethics opinions and article mentioned above.

cc: Marie M. Moffat
Robert A. Hawley
Doug Hull

Professional Competence Staff List

Professional Competence Staff Positions as of April 30, 2008	
Number of Positions Authorized	14.5
Number of Positions Filled	13.5

Professional Competence Employees as of April 30, 2008	
	Grade & Classification
	56EA – Director
VACANT	17A – Sr. Attorney
	16A – Attorney
	40C – Sr. Administrative Specialist
	9 – Program/Court Systems Analyst (P/CSA)
	8 - Sr. Administrative Assistant
	8 – Paralegal
	8 – Paralegal
	8 – Paralegal
	8 – Paralegal
	8 – Paralegal
	8 – Paralegal
	8 – Paralegal
	6 – Administrative Secretary
	4 – Data Analyst III
<p>NOTES: The P/CSA is a shared position between the Office of General Counsel and the Office of Professional Competence. In addition, though not represented in the above chart, casual hourly law clerks are used from time to time.</p>	

ETHICS HOTLINE ACTIVITY STATISTICS - 2008

Month	Work Days	Incoming Calls	Completed Calls	Left Messages	Percentage of Incoming Calls that are Completed Calls	Percentage of Incoming Calls that are Left Messages	Resources Mailed/Faxed	Internet Resource Referrals
January	21	1241	1036	205	83%	17%	51	456
February	19	1092	857	235	78%	22%	33	445
March	20	1224	1041	183	85%	15%	68	486
April	22	1377	1139	238	83%	17%	78	558
Cumulative Totals	82	4,934	4,073	861	83%	17%	230	1,945

EXPLANATIONS

Incoming Calls: Total member inquiries to the Hotline received during that month.

Completed Calls: Member inquiries received in that month which were handled and resolved by staff during that month.

Left Messages: Member inquiries received that month where staff left an initial message or courtesy follow-up message, but did not reach the member to resolve the inquiry.

Percentage of Incoming Calls that are Completed Calls: Proportion of Incoming Calls that were Completed Calls handled and resolved by the staff.

Percentage of Incoming Calls that are Left Messages: Proportion of Incoming Calls where staff left a message but the member did not return the call.

Key Hotline Activity Averaged by Day and Month

(through April 30, 2008)

Daily: Incoming Calls: 60
Completed Calls: 50

Monthly: Incoming Calls: 1,234
Completed Calls: 1,018

Aggregate Outgoing Calls

Current Month: 1,932

Cumulative to Date: 6,828

This figure accounts for all calls placed by staff, including: Completed Calls, Left Messages and courtesy follow-up messages. Due to "telephone tag" with members, staff may place multiple calls and leave multiple messages prior to completing a call.

**Ethics Hotline
2008 Monthly and Cumulative
Individual Paralegal Call Statistics**

JAN					
Paralegal	Total Calls	Left Msg.	Completed Calls	Return Calls	Call Backs
1	222	100	122	76	0
2	241	98	143	47	0
3	379	151	228	74	0
4	508	240	268	84	0
5	227	55	172	110	0
6	39	18	21	0	30
JAN TOTALS	1,616	662	954	391	30

FEB					
Paralegal	Total Calls	Left Msg.	Completed Calls	Return Calls	Call Backs
1	226	82	144	78	0
2	229	89	140	49	0
3	397	154	243	85	0
4	488	216	272	78	0
5	206	75	131	80	0
6	25	14	11	8	5
FEB TOTALS	1,571	630	941	378	5

MAR					
Paralegal	Total Calls	Left Msg.	Completed Calls	Return Calls	Call Backs
1	316	125	191	111	0
2	0	0	0	0	0
3	546	243	303	94	0
4	530	229	301	94	0
5	304	101	203	131	0
6	13	8	5	0	13
MAR TOTALS	1,709	706	1,003	430	13

APR					
Paralegal	Total Calls	Left Msg.	Completed Calls	Return Calls	Call Backs
1	355	140	215	111	22
2	12	5	7	1	0
3	457	176	281	103	1
4	663	283	380	121	0
5	374	128	246	127	0
6	16	7	9	5	0
7	55	32	23	9	55
APR TOTALS	1,932	771	1,161	477	78

Y-T-D					
Paralegal	Total Calls	Left Msg.	Completed Calls	Return Calls	Call Backs
1	1,119	447	672	376	22
2	482	192	290	97	0
3	1,779	724	1,055	356	1
4	2,189	968	1,221	377	0
5	1,111	359	752	448	0
6	93	47	46	13	48
7	55	32	23	9	55
Y-T-D TOTALS	6,828	2,769	4,059	1,676	126

NOTE: The entry for paralegal 6 & 7 reflects statistics for Ethics Hotline call work performed by paralegal in training.

Professional Competence Budget Summary Authorized vs. Actual

Year-to-Date as of April 30, 2008	
Budget (Actual)	\$722,427
Budget (Authorized)	\$844,118
Savings	\$121,691

Monthly as of April 30, 2008						
	<u>January</u>	<u>February</u>	<u>March</u>	<u>April</u>	<u>May</u>	<u>June</u>
Budget (Actual)	\$151,353	\$185,468	\$201,991	\$183,615		
Budget (Authorized)	\$204,141	\$205,110	\$228,931	\$205,936		
Savings	\$52,788	\$19,642	\$26,940	\$22,321	\$0	\$0
	<u>July</u>	<u>August</u>	<u>September</u>	<u>October</u>	<u>November</u>	<u>December</u>
Budget (Actual)						
Budget (Authorized)						
Savings	\$0	\$0	\$0	\$0	\$0	\$0

NOTE: In part, year-to-date savings are attributed to salary savings from vacant budgeted positions that are not filled or have not been approved for filling by the Executive Director.



Ethics Hotline Customer Satisfaction Survey

RECEIVED
By Ethics Hotline at 2:44 pm, Apr 24, 2008

Thank you for taking the Customer Satisfaction Survey. Fax completed survey to (415) 538-2171 or click the "Submit by Email" button

Please rate your satisfaction level with each of the following statements.

- 1 = very dissatisfied
- 2 = somewhat dissatisfied
- 3 = neutral
- 4 = somewhat satisfied
- 5 = very satisfied

	1	2	3	4	5
1. Rate your overall satisfaction with the hotline experience.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
2. How satisfied are you with the information our staff provided?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
3. How helpful was the paralegal?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
4. How helpful was the receptionist?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
5. How satisfied are you with our system for receiving calls?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
6. Rate your overall satisfaction with the Calbar ethics website.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
	strongly disagree			strongly agree	
7. I would recommend the Ethics Hotline to others.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

8. Comments / Suggestions:

I have spoken with several attorneys over the years on the Ethics Hotline. Each time the attorneys were more than helpful by providing me with resources to further analyze my ethics question. Recently, I spoke with Elbert Lee about a networking/marketing question that I had and he provided me with several relevant code sections and rules. I later spoke with Mark Taxy regarding the same issue who was very responsive, pleasant, and provided me with relevant law which I could obtain on my own as well as mailed me a relevant 1982 Opinion. Thank you for your great assistance!

Name of the paralegal you spoke with (optional) Elbert Lee & Mark Taxy

Your Name _____ Telephone _____

Address _____ Email _____

THANK YOU!

Fax completed survey to (415) 538-2171 or click the "Submit by Email" button

ACTIVITY EVALUATION RESULTS FROM THE 12th ANNUAL ETHICS SYMPOSIUM - May 3, 2008

On a scale of 1 - 5 (5 being the highest; 1 being the lowest)		5	4	3	2	1	Avg.
To what extent were your personal objectives satisfied?		6	6	3	0	0	4.2
To what extent did the environment contribute to the learning experience?		12	3	2	0	0	4.6
To what extent did the materials contribute to the learning experience?		9	3	3	0	0	4.4
To what extent were the objectives stated in the promotional literature or those stated at the beginning of the activity satisfied?		8	6	2	0	0	4.4
To what extent did the activity contain significant current intellectual or practical content?		11	4	0	0	0	4.7

		Overall Effectiveness						Effectiveness of Teaching Methods						Significant Current Intellectual or Practical Content					
		5	4	3	2	1	Avg.	5	4	3	2	1	Avg.	5	4	3	2	1	Avg.
Panel One:	Public Lawyers in the Political Maelstrom	8	6	2	0	1	4.2	8	5	3	0	1	4.1	11	3	2	1	0	4.4
Panel Two:	Ethical Issues in Class Actions and Derivative Litigation	8	5	3	1	0	4.2	8	4	4	1	0	4.1	10	3	4	0	0	4.4
Panel Three:	Prosecutorial Misconduct: Epidemic or Abberation?	14	2	0	1	0	4.7	14	2	0	1	0	4.7	14	1	1	1	0	4.6
Panel Four:	[In]Advertent Disclosure: For Whose Eyes Only?	12	1	1	1	0	4.6	12	1	1	1	0	4.6	12	1	1	1	0	4.6
Panel Five:	Rules Revision Update	10	2	3	0	0	4.5	10	2	3	0	0	4.5	11	1	3	0	0	4.5

NOTE: Paid Evaluations Received
 Attendees 61 18 30%



M E M O R A N D U M

DATE: June 12, 2008

TO: Members of the Rules Revision Commission

FROM: Randall Difuntorum, Staff Counsel
Mimi Lee, Paralegal

SUBJECT: Public Comments Received on the Commission's Third Batch of Proposed New and Amended Rules of Professional Conduct

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This memorandum provides a brief overview of the public comments and testimony received on the Commission's third batch of proposed rules. The full text of the written comments and the Commission Consultant's notes on the public hearing are available at the Commission's Collaboration website (<http://collab.calbar.ca.gov>).

I. The Commission's Third Batch of Proposed Rules

The Commission's third batch of proposed rules was circulated for a 90-day public comment period that ended on June 6, 2008. In addition, a public hearing was held in Sacramento on May 22, 2008.

The proposed rules included in the third batch are:

- Rule 1.5 Fees for Legal Services
- Rule 1.7 Conflicts of Interests: Current Clients
- Rule 1.8.1 Business Transactions with a Client & Acquiring Interests Adverse to the Client
- Rule 1.13 Organization as Client
- Rule 1.16 Declining or Terminating Representation
- Rule 1.17.1 Purchase and Sale of a Law Practice
- Rule 1.17.2 Purchase and Sale of Geographic Area or Substantive Field of a Law Practice
- Rule 3.4 Fairness to Opposing Party and Counsel
- Rule 3.5 Impartiality and Decorum of the Tribunal
- Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges
- Rule 4.2 Communication with a Person Represented by Counsel
- Rule 4.3 Dealing with Unrepresented Person
- Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence

An outline summarizing some of the key issues contained in the Commission's public comment proposal is attached. The outline was prepared by Mark Tuft, Co-Vice Chair of the Commission, for this year's Statewide Annual Ethics Symposium

II. Public Hearing Testimony

The May 22nd public hearing began at 10:00 am and the Commission's representatives were: Harry Sondheim (Commission Chair); Raul Martinez; Jerry Sapiro; and Kevin Mohr (Commission Consultant). The following three speakers appeared and testified.

1) Thomas Greene

Mr. Green appeared on behalf of the California Attorney General, the California District Attorneys Association, and the California Public Defenders Association. Among the topics addressed by Mr. Green was the Commission's proposed change from "party" to "person" in proposed Rule 4.2. Mr. Green stated that his constituency continues to oppose this change; however, he also indicated that they would continue to work with the Commission to develop revised language in an effort to mitigate the anticipated detrimental impact of the change, if the Commission persists in recommending it.

2) Steven Lewis

Mr. Lewis identified himself as a former Chair of COPRAC with many years of experience representing lawyers. Among the topics addressed by Mr. Lewis was proposed Rule 1.7, the Commission's proposal for governing current client conflicts. Mr. Lewis expressed concerns that the Commission's approach to regulating a lawyer's interest in the subject matter of a representation (paragraph (d) of proposed Rule 1.7) did not provide adequate client protection, in part, because it only required written disclosure. Mr. Lewis suggested that the Commission might enhance client protection by requiring that a client be informed to seek the advice of an independent lawyer.

3) Martin Martinez

Mr. Martinez identified himself as an experienced specialist in criminal law and stated that he was appearing on behalf of attorney Barry Tarlow. Mr. Tarlow submitted written comments to the Commission in advance of the public hearing but was not available to testify in person. Mr. Martinez addressed the Commission's proposal to prohibit the charging of a "non-refundable fee," proposed Rule 1.5(f). Mr. Martinez indicated that refunding unearned fees is not a problem for honest lawyers but expressed concerns about a requirement for placing advanced fees in a client trust account. In response, the Commission panelists informed Mr. Martinez that neither proposed Rule 1.5(f) nor the Commission's working draft of proposed amendments to the trust accounting rule would require placement of advance fees in a trust account.

The public hearing adjourned at 12:30 pm, after all registered speakers had testified and after waiting approximately thirty minutes for any possible additional speakers.

III. Written Comments

To date, one hundred and thirteen (115) written comments have been received. Please see the attached chart sorting the comments by commentator, by rule, and by position (agree, disagree, agree only if modified). As indicated in the chart:

- 1) The rule receiving the most comments (37 comments) is proposed Rule 1.5 Fees for Legal Services (current Rule 4-200), the rule receiving the second most comments (20 comments) is proposed Rule 4.2 Communication with a Represented Party (current Rule 2-100).
- 2) Overall, the majority of the comments take the position of either disagreeing with the Commission's proposal or agreeing only if modified.
- 3) About one third of the comments are from groups or organizations, with the rest from individuals. Among the groups or organizations submitting comments are: the Bar Association of San Francisco; California Attorneys for Criminal Justice; COPRAC; the Kern County Public Defender; the Los Angeles County Bar Association; the Los Angeles County Public Defender and Alternate Defender; the National Association of Criminal Defense Lawyers; the San Diego County Bar Association; the California Public Defenders Association; the California Attorney General; the San Diego Criminal Defense Bar Association; and the Santa Clara County Bar Association.

Staff has not had an opportunity to read and analyze all of the comments. However, an initial cursory review suggests the following two recurring themes.

- 1) The Commission's proposal in Rule 1.5(f) to prohibit a "non-refundable fee" is opposed by criminal defense practitioners who, in part, assert that the proposed prohibition is unnecessary and would impair access to counsel.
- 2) The Commission's proposal in Rule 4.2 to change "party" to "person" is opposed by both criminal prosecutors and criminal defense attorneys who, in part, assert that there is no problem with the current rule and that the proposed change would harm the public interest by frustrating longstanding investigative practices.

IV. Media Coverage

Three articles were published covering the Commission's third batch of public comment rules: "Rule Changes Bring Up Issues for Both Lawyers and the Public" by Mark Tuft (March 24, 2008 *Daily Journal, Forum Column* at p. 6); "Proposed Bar Rule Change Drawing Ire" by Robert Iafolla (June 4, 2008 *Daily Journal* at p.1); and "State Bar Should Propose a Prohibition of Redundant Rules" by Rafael Chodos (June 9, 2008 *Daily Journal, Forum Column* at p. 6). Copies of these articles are on file with staff and available on request.

For assistance with the Commission's Collaboration website or questions about the public comment chart, contact Mimi Lee at (415) 538- 2161. For other questions, contact Randall Difuntorum at (415) 538-2161.

**Some Issues To Consider In Reviewing The Current Batch Of Proposed Amendments
To The California Rules Of Professional Conduct**

By Mark L. Tuft

California State Bar Ethics Symposium
University of San Francisco School of Law
May 3, 2008

Rule 1.5 Fees for Legal Services [4-200]

- Should California continue the prohibition against making an agreement for, charging, or collecting an unconscionable fee or follow the rule in most jurisdictions that states a prohibition against unreasonable fees?
- Should California's rule prohibit the charging or collecting of unconscionable expenses or should the rule state a prohibition against unreasonable expenses?
- Is the proposed definition of what constitutes an unconscionable fee in paragraph (b) adequate; should the definition be in a comment rather than in the rule?
- Are the 11 factors in paragraph (c) appropriate in determining the conscionability of a fee if the same factors are typically used in determining the reasonableness of a fee?
- Are the prohibited fees in paragraph (e) still justified?
- Should the rule prohibit "non-refundable" fees?

Rule 1.7 Conflicts of Interest: Current Client [3-310]

- Does paragraph (a) provide a different standard for "directly adverse" conflicts than Model Rule 1.7(a)(1)?

- Should the "directly adverse" standard in paragraph (a) apply in the non-litigation context?
- Does it continue to make sense to have a separate rule on the representation of multiple clients in a single matter that distinguishes between "potential" and "actual" conflicts?
- Is there sufficient reason to carry forward the standard in rule 3-310(C)(3) in proposed paragraph (c), particularly since paragraph (c) picks up the requirement that the client in the "second matter" must be "directly adverse" to the client in the "first matter"?
- Does Comment [18] provide sufficient guidance on the distinction between paragraphs (a) and (c)?
- Does paragraph (d) provide adequate protection by carrying forward the "written disclosure" only standard in Rule 3-310(B) for conflicts based on the lawyer's relationships and personal interests that impact the representation and adversely affect the lawyer's independent professional judgment?
- Is advisable to have a rule that requires written disclosure under paragraph (d) where the lawyer's relationship is tenuous and there is no risk that the representation or the lawyer's professional judgment will be adversely affected?
- Are there circumstances where the lawyer's responsibilities to a third person or the lawyer's personal interests are so significant that the client's informed written consent should be required? See for example, Comment [17].
- Is there a valid reason for excluding from the written disclosure requirements in paragraph (d) a lawyer's present or past relationship with another person's lawyer

where the relationship may have a significant impact on the lawyer's duty of loyalty and independent judgment? See Comment [24] and proposed Rule 1.8.12.

- Is it advisable to include a comment authorizing "future" conflict waivers under this rule? See Comment [33].
- Is it appropriate to retain the situation in *State Farm Mutual Auto Ins. Co. v. Federal Ins. Co.* as an exception to both paragraphs (a) and (c)? See Comment [37].

Rule 1.8.1 Business Transactions With A Client And Acquiring Interests Adverse To The Client [3-300]

- Should the rule eliminate the requirement that the client be advised in writing of the client's right to seek the advice of independent counsel of the client's choice if the client is represented in the transaction or acquisition by independent counsel? Should the change be in the rule or in a comment? See Model Rule 1.8(a) and Model Rule Comment [4].
- If a lawyer has an interest in the subject matter of the representation because of a transaction or acquisition that occurs prior to the commencement of the relationship, it is sufficient that the lawyer comply with the written disclosure requirements under rule 1.7(d)(4) without requiring the client's informed consent? See Comment [2].
- Should the rule apply to modifications of an existing fee agreement only if the modification confers on the lawyer an adverse pecuniary interest such as a security interest in the client's property? See Comment [5]. In other words,

should modifications of existing fee agreements not be considered a business transaction between lawyer and client under any circumstances?

- Is it sufficient to tell lawyers in Comment [6] that other fiduciary principles apply to the modification of a fee agreement and that lawyers should consult case law and ethics opinions to ascertain their professional responsibilities?
- Where the lawyer has an interest in the subject matter of the representation as a result of a transaction or acquisition, is it sufficient for the lawyer to comply with the written disclosure requirements under rule 1.7(d)(4) without requiring the client's informed written consent? See Comments [11] and [12].
- Should the rule provide that the required written consent address the lawyer's role in the transaction and whether the lawyer is representing the client in the transaction? See Model Rule 1.8)(c).

Rule 1.13 Organization as Client [3-600]

- Are the mandatory internal reporting obligations in paragraph (b) necessary?
- Should the "up-the-ladder" reporting obligations in paragraph (b) be triggered by a "knows or reasonably should know" standard? Compare Model Rule 1.13(b) and see Comment [6].
- Should California adopt the discretionary provisions for reporting outside the organization under Model Rule 1.13(c)?
- Should a lawyer be required to notify the organization's highest authority of the lawyer's discharge, resignation or withdrawal under the circumstances described in paragraph (e)?

Rule 1.16 Declining or Terminating Representation [Rule 3-700]

- Should the grounds for seeking permissive withdrawal include the lawyer's good faith belief that the tribunal will find "other good cause"? See Rule 1.16(b)(10).
- Where the lawyer's services have not been used to advance a crime or fraud, must the client seek to pursue a criminal or fraudulent course of conduct or only a course of conduct that the lawyer reasonably believes is criminal or fraudulent for the lawyer to have the option to withdraw? Compare paragraph (b)(2) and Comment [5].
- Is the description in paragraph (e)(1) of "client papers and property" adequate in this age of technology?

Rule 1.17.1 Purchase and Sale of a Law Practice [2-300]

- Should California retain rule 2-300 on the purchase and sale of all or substantially all of a lawyer's law practice?
- Should California have more than one rule that deals with the purchase and sale of a law practice?
- Does the distinction in Comment [2] between the requirements in rule 1.17.1 and the sale of substantive fields of practice or geographical areas of practice make sense?
- Is it appropriate to move the requirements in current rule 2-300(D) to a comment? See Comment [9].

- Is the statement in Comment [9] regarding the purchaser having a potential or actual conflict by accepting the representation of any client of the seller consistent with proposed rule 1.7?

Rule 1.17.2 Purchase and Sale of Geographic Area or Substantive Field of Law Practice

- Should lawyers and law firms be permitted to sell and purchase geographic areas of law practice if the selling lawyer or law firm does not intend to cease to practice law?
- Should lawyers and law firms be permitted to sell and purchase substantive fields of law practice if the selling lawyer or law firm does not intend to cease practicing law?
- Should there be a one time only limitation on the sale of a substantive field of practice unless there are "extraordinary circumstances"?
- Are the "extraordinary circumstances" enumerated in paragraph (d) adequate?
- Should the seller be required to cease practice in the geographical area covered by the sale of a geographic area of law practice?
- Under what circumstances may the seller resume practice in a geographic area of a practice that has been sold?
- Does the proposed rule adequately protect the interests of clients who do not wish to be "sold"?

Rule 3.4 Fairness to Opposing Party and Counsel

- Should the rule include violations of civil or criminal discovery rules or statutes?

Rule 3.10 Threatening Criminal, Administrative or Disciplinary Charges [5-100]

- Should California continue the prohibition against a lawyer threatening criminal, administrative or disciplinary action to obtain an advantage in a civil dispute?
- Should the rule include a comment that defines what constitutes a "threat"?

Rule 4.2 Communications with a Person Represented by Counsel [2-100]

- Should the proposed rule replace the term "party" with "person" as in Model Rule 4.2 and the rule in most jurisdictions?
- Does the exception in paragraph (c)(3) which permits communications authorized by law or a court order and Comments [18]—[21] adequately address concerns relating to lawful investigative and prosecutorial practices by government lawyers?
- Should the exception in paragraph (c)(3) apply to prosecutors or to all government lawyers in civil, criminal or administrative law enforcement investigations?
- Should public defenders and retained criminal defense attorneys be afforded the same protections under paragraph (c)(3) as prosecutors and government investigators?
- Should paragraph (a) prohibit indirect as well as direct communications with a represented party? Compare Model Rule 4.2.
- How should the rule apply when the lawyer knows that a person is represented by another lawyer on a limited "task-based" basis? See Comments [9] and [10].
- Does paragraph (c)(1) provide a proper balance between the right of access protected by the First Amendment and the government client-lawyer relationship?

- Should the rule prohibit a lawyer for an organization from stating that he or she represents all employees, members, agents or other constituents of the organization unless the statement is true? See paragraph (f).
- Should a "public official" under paragraph (c)(1) be limited to a duly appointed or elected public officer or should the exemption apply to other government employees?

PROPOSED RULES OF PROFESSIONAL CONDUCT BATCH 3 (AGREE/DISAGREE/ONLY IF MODIFIED)

COMMENTATOR	1.5	1.7	1.8.1	1.13	1.16	1.17.1	1.17.2	3.4	3.5	3.1	4.2	4.3	5.4	Other	Total
<<<Anonymous>>>	✘														1
Alameda County District Attorney's Office (Thomas J. Orloff)											✘				1
Allen Bloom	✘														1
American Bar Association (Bruce Nicholson)														ext	1
Attorney General's Office, Department of Justice (Thomas Greene)											✘				1
Bar Association of San Francisco (Minkus)						✘	✘								2
Barry Tarlow	✘														1
California Attorneys for Criminal Justice (Rickard Santwier)	✘										✘				2
California Public Defender's Association (Leslie Mc Millan)											✘				1
Carol M. Langford	✘	✘	✘												3
Charles Sevilla	✘										✘				2
COPRAC - State Bar of California (Dennis Peter Maio)	+	+	+	+	+			✓	+	✓	+	✓	+		11
Daniel J. Russo	✘														1
David Harris	✘														1
David McGowan		++													2
Evan A. Jenness	✘									✘	✘				3
Florentino Garza	✘														1
Gang, Tyre, Ramer and Brown, Inc. (Bruce M. Ramer)											✘				1
Gary Lincenberg	✘														1
Hugh Anthony Levine	✘														1
Jack J. Boltax	✓														1
John G. Phillips	✘														1
Kenneth J. Troiano	✘														1
Knut Johnson	✘														1
Kurt David Hermansen	✘														1
Law Office of Matthew Lombard (Matthew Lombard)	✘											✘			2
Law Offices for Los Angeles County Alternate Public Defender (Janie Y. Fukai)											✘				1
Law Offices for Los Angeles County Public Defender (Michael P. Judge)											✘				1
Law Offices of the Deputy Public Defender, Kern County (David Kelly)											✘				1
Law Offices of the Orange County Public Defender (Deborah Kwast)											✘				1
Law Offices of the Public Defender, Kern County (Mark A. Arnold)											✘				1
Los Angeles County Bar Association (Toby A. Rothschild)				✘	+	+	+	+	+						6
Louis S. Katz	✘														1
M. Sue Talia												✓			1
Mark Borden	✘														1
Michael Stepanian	✘														1
Morrison & Foerster (Douglas Hendricks)		✓													1
Nanci Clarence	✘														1
National Association of Criminal Defense Lawyers (John Wesley Hall)	✘									✘	✘				3
Orange County Bar Association (Trudy Levindofske)	✘	✘	+	+	+	+	+		+	✓	+	✓	+		12
Peter J. Hughes	✘														1
Phillip Feldman														✘	1
Rafael Chodos	✘														1
Randy Sue Pollock	✘														1
Richard Zitrin and California Legal Ethics Educators		✘	✘												2
Robert A. Kahn	✘														1
Robert K. Sall	✘	✘	✘												3
Roger Jon Diamond	✘														1
San Diego County Bar Association (Heather L. Rosing)	✘	+	+	✓	✓	✓	✓	+	+	+	✘	✘	✓		13
San Diego Criminal Defense Bar Association (Michael L. Crowley)	✘										✘				2
Santa Clara County Bar Association (Christine Burdick)	+			+		✘	✘	+	+	✓			+		8
Stanley I. Greenberg		✘													1
Stephen A. Kolodny											✘				1
Stephen R. Brodsky	✘														1
Steve Cron	✘														1
Steven Feldman	✘														1
Steven K. Hazen											✘				1
Walter K. Pyle											✘				1
✓ = AGREE ✘ = DISAGREE + = AGREE ONLY IF MODIFIED	37	10	6	5	4	5	5	4	5	7	20	4	4	2	115