

**ASSESSMENT OF PERFORMANCE
OF
THE STANDING COMMITTEE
ON PROFESSIONAL RESPONSIBILITY AND CONDUCT
OF THE STATE BAR OF CALIFORNIA
2008 Year End**

Chair: Suzanne M. Mellard
Staff Contact: Mark Taxy (415-538-2163)

Summary of Accomplishments

The Committee on Professional Responsibility and Conduct (“COPRAC” or “the Committee”) is assigned to develop advisory ethics opinions, to conduct educational programs, and to assist the Board of Governors in matters pertaining to attorney professional responsibility. This report presents an assessment of the Committee’s 2008 activities and accomplishments.

1. Conducted 7 one-day meetings and 1 two-day meeting.
2. Published 4 proposed opinions for public comment with 1 opinion formally published by the Board of Governors and 1 placed on RAD’s March 5, 2009 agenda for action that ultimately was not formally published.
3. Published 1 Ethics Alert article on the limited exception to the ethical duty of confidentiality.
4. Administered the 12th Annual Statewide Ethics Symposium.
5. Presented 4 ethics programs at the State Bar Annual Meeting, 1 of which was selected for videotaping for use as a self-study program offering ethics credit.
6. Issued 11 public comment letters to the Rules Revision Commission regarding proposed changes to the California Rules of Professional Conduct in response to the third public comment request.
7. Issued a public comment letter on the State Bar’s proposed Rule of Professional Conduct 3-410 regarding insurance disclosure.
8. Considered an amendment to ABA Model Rule 1.10 (re imputation of conflicts of interest) prepared by the ABA Ethics and Professionalism Committee and provided informal input to a member of the California delegation to the ABA House of Delegates.
9. Participated in 12 CLE outreach programs at the request of local and specialty bar associations.

Performance Indicators and Actual Performance

1. ***[Performance Indicator from 2008 Workplan]*** Meetings - To carry out its charge, 9-10 day-long meetings will be held in FY 2008. Most of these meetings will be held in-person at the State Bar facilities in San Francisco or Los Angeles, or at an airport hotel location. Meetings scheduled later in the fiscal year will be planned as video-conference meetings. However, the Committee hopes to realize budget savings and use these savings to convert these video-conference meetings into in-person meetings. Given the nature of the Committee's work, in-person member participation is the most productive meeting format.

[Actual Performance] In FY 2008, COPRAC held 7 one-day meetings and 1 two-day meeting for a total of 9 meeting days.

2. ***[Performance Indicator from 2008 Workplan]*** Ethics Opinions - COPRAC plans to issue 3 – 5 formal ethics opinions. The Committee shall assist members of the State Bar in their desire to appreciate and adhere to ethical and professional standards of conduct, which assistance shall include, but is not limited to:
 1. Issuing to members of the bar advisory opinions on the ethical propriety of hypothetical attorney conduct at the request of members of the State Bar or on its own initiative;
 2. Responding to such inquiries from members of the bar; and
 3. Publishing its opinions.

[Actual Performance] In FY 2008, the Committee submitted 1 proposed opinion that was approved by RAD for final publication as State Bar Formal Opinion No. 2008-175. The Committee also issued 4 opinions for public comment distribution (Interim Op. Nos. 98-0001, 05-0001, 06-0001 and 06-0006) and considered the public comment received. Of the 4 opinions issued for public comment in 2008, 3 subsequently were approved by COPRAC for submission to RAD for final publication. One of these opinions (Interim Op. No. 05-0001) ultimately was placed on RAD's March 5, 2009 agenda for action but was not formally published. The other 2 are in process for RAD approval in FY 2009. A summary of the published opinions and the opinions published for public comment are attached. (Attachment A).

3. ***[Performance Indicator from 2008 Workplan]*** Rules of Professional Conduct - COPRAC plans to work closely with the State Bar Commission for the Revision of the Rules of Professional Conduct in coordinating the Board's consideration of any Rule of Professional Conduct amendments. COPRAC will review and analyze proposals to amend the Rules of Professional Conduct and monitor and comment on the work of the State Bar's Commission for the Revision of the Rules of Professional Conduct.

[Actual Performance] The COPRAC Rules Revision Commission Subcommittee members served as Committee liaison to the Rules Revision Commission. A liaison attended and monitored each meeting of the Commission and reported to the Committee on the work of the Commission. The Subcommittee reviewed the third group of 13 proposed rules submitted by the Commission for public comment and made recommendations to the Committee regarding the Committee's response to the request for public comment. In FY 2008, the Committee considered the recommendations of the Subcommittee and submitted 11 comment letters to the Commission commenting on 11 proposed rules. Of the rules on which COPRAC commented, 5 comment letters supported adoption of the rule subject to COPRAC's comments, 5 comment letters supported adoption of the rule with comments provided and 1 comment letter supported the rule without comment. (Attachment B).

4. ***[Planned Activity from 2008 Workplan]*** Legislation - As assigned by the Board, COPRAC will review and analyze bills that relate to attorney professional responsibility, serve as a technical resource to the State Bar's Office of Government Affairs. On an as needed basis, COPRAC may comment in its own name with a disclaimer indicating its comment does not reflect the view of the State Bar or the Board of Governors

[Activity Report] There was no legislation referred to the Committee by the Board in FY 2008. In FY 2008, the COPRAC California Law Revision Commission Subcommittee followed the California Law Revision Commission's Study No. K-350 (re "Attorney-Client Privilege After the Client's Death"). The California Law Revision Commission issued a tentative recommendation with a public comment deadline of January 23, 2009. COPRAC has decided to submit a comment to the State Bar Legislative Counsel for transmission to the California Law Revision Commission.

5. ***[Planned Activity from 2008 Workplan]*** Judicial Council - As assigned by the Board, COPRAC will review and analyze Rules of Court and other proposals or studies that relate to attorney professional responsibility, including proposed ethical rules for judges and arbitrators. On an as needed basis, COPRAC may comment in its own name with a disclaimer indicating its comment does not reflect the view of the State Bar or the Board of Governors.

[Activity Report] There were no Judicial Council referrals from the Board in FY 2008.

6. ***[Planned Activity from 2008 Workplan]*** Conference of Delegates of California Bar Associations - As assigned by the Board, the Committee will review and analyze Conference resolutions that relate to attorney professional responsibility.

[Activity Report] There were no resolutions referred to the Committee for consideration during FY 2008.

7. ***[Planned Activity from 2008 Workplan]*** American Bar Association House of Delegates - As assigned by the Board, the Committee will review and analyze ABA studies and proposals that relate to attorney professional responsibility (e.g., recent developments have included the ABA's study and revision of the Model Rules of Professional Conduct and the ABA's Report on Multidisciplinary Practice). On an as needed basis, COPRAC may comment in its own name with a disclaimer indicating its comment does not reflect the view of the State Bar or the Board of Governors.

[Activity Report] There were no referrals to the Committee by the Board in FY 2008. In FY 2008, COPRAC considered an amendment to ABA Model Rule 1.10 (re imputation of conflicts of interest) prepared by the ABA Ethics and Professionalism Committee and provided informal input to a member of the California delegation to the ABA House of Delegates. (Attachment C)

8. ***[Planned Activity from 2008 Workplan]*** Annual Statewide Ethics Symposium - The Committee will plan and present a day-long statewide educational program offering a high level interactive discussion of key professional responsibility issues.

[Activity Report] 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. The keynote speaker was Professor Geoffrey Hazard. There were 105 attendees registered for the Symposium of which 61 were

paid attendees. A copy of the Activity Evaluation Results is attached. (Attachment D). As indicated by the evaluation report, the Symposium received high marks in all categories from the attendees.

9. [Performance Indicator from 2008 Workplan] State Bar Annual Meeting Programs - COPRAC plans to conduct 3 – 5 CLE programs in connection with the State Bar Annual Meeting (identification and preparation of program topics and materials begin in Spring 2008 for programs presented at the Annual Meeting in the Fall of 2008).

[Actual Performance] COPRAC conducted four programs at the State Bar Annual Meeting held in Monterey in September 2008. The four programs sponsored by COPRAC were entitled "Keeping Your Client Trust Account and Collecting Your Fee," "Electronic Ethics," "Recent Significant Developments Affecting the Law of Lawyers," and "Recognizing Interests and Avoiding Conflicts." One of COPRAC's programs was selected for videotaping to be made available as part of the State Bar's online CLE resources. All COPRAC sponsored programs were well attended and received high marks in all categories from the attendees. A copy of the Activity Evaluation Results is attached. (Attachment E).

10. [Planned Activity from 2008 Workplan] Local Bar Outreach Programs - As opportunities arise, the Committee will coordinate with local and specialty bar associations in developing professional responsibility CLE programs tailored to local/specialty interests.

[Activity Report] During FY 2008, members of COPRAC participated in 12 continuing legal education programs in response to requests for speakers for CLE programs in legal ethics. Generally, at these programs the speakers' role as a member of COPRAC is to publicize the work of the Committee and to encourage members of the bar to submit opinion requests, to comment on proposed opinions and to apply to serve on the Committee. A table listing COPRAC member participation in outreach programs during FY 2008 is attached. (Attachment F).

During FY 2008, COPRAC also published 1 Ethics Alert article. "The New Limited Exception to the Professional Duty to Protect Client Confidences and Secrets" informs and educates members of the bar on an important and timely topic concerning attorneys' ethical duties and professional responsibilities. The Ethics Alert was published on the State Bar website as a front page feature and a copy is attached. (Attachment G).

11. [Planned Activity from 2008 Workplan] Coordination with other State Bar Entities - On matters of mutual interest, COPRAC will coordinate with State Bar entities.

[Activity Report] During FY 2008, members of the Committee's Rules Revision Commission Subcommittee served as liaisons to the State Bar Commission for the Revision of the Rules of Professional Conduct (see item #3, above). In response to a request for public comment, COPRAC submitted a comment letter to the State Bar regarding proposed rule 3-410 (mandatory disclosure of malpractice insurance). (Attachment H)

12. [Planned Budget from 2008 Workplan] COPRAC budgeted expenses of \$44,900 for calendar year 2008.

[Budget Report] COPRAC's approved 2008 budget was \$44,900. Based on the operating statement issued by the Office of Finance as of December 31, 2008, COPRAC's 2008 expenses were \$55,237, which is over budget by \$10,337. COPRAC's business unit also generates revenue from registration fees for the Statewide Annual Ethics Symposium. The overage was partially offset by the Ethics Symposium registration revenue. In addition, the overall Office of Professional Competence 2008 expenditures realized budget savings that were adequate to absorb the variance. Staff is considering various cost containment options for COPRAC's expenses in 2009.

SUMMARY OF PUBLISHED OPINIONS

Officially Published Opinions

FORMAL OPINION NO. 2008-175

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.

Opinions Published for Public Comment

FORMAL OPINION INTERIM NO. 98-0001

ISSUES: In a lawsuit prosecuted by Attorney A against Defendant, Client has a statutory right to seek an award of attorney's fees. Attorney B, Defendant's counsel, makes a settlement offer, conditioned on Client's waiver of his statutory right to attorney's fees, that is insufficient to compensate Attorney A for her fees. (1) May Attorney A bar the settlement notwithstanding Client's desire to accept it? (2) Does Attorney B violate any ethical obligation by recommending or conveying the fee-waiver settlement offer in this case? (3) Does Attorney B violate any ethical obligation by recommending or conveying fee-waiver settlement offers in cases generally?

- DIGEST:**
1. A lawyer must inform the client of a fee-waiver settlement offer and consummate the settlement in accordance with the client's wishes even if it reduces the likelihood of recovering some or all of his or her fees.

ATTACHMENT A

2. A lawyer does not violate any ethical obligation by recommending or conveying a fee-waiver settlement offer in a given case.
3. A lawyer does not violate any ethical obligation by recommending or conveying fee-waiver settlement offers in cases generally.

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 Conduct 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.

FORMAL OPINION INTERIM NO. 06-0001

ISSUE: In what manner may an attorney maintain her rights in a charging lien when her former client demands that the attorney endorse a settlement check jointly payable to the client and his current and former attorneys without violating the requirement of rule 4-100 of the California Rules of Professional Conduct that the attorney promptly pay or deliver funds to which the client is entitled?

DIGEST: When responding to a request to endorse a settlement check made jointly payable to a client and his or her current and former attorneys where the former attorney has asserted a valid lien on the settlement proceeds, the former attorney must take prompt steps to find a reasonable method or methods of delivering the undisputed portion of the proceeds to which the client is entitled. The former attorney does not violate rule 4-100 by refusing to use a method that would extinguish the attorney's charging lien, but has a duty to consult governing legal authorities and make a reasonable determination of the amount to which he or she is entitled under the circumstances. If the client does not agree to proposed reasonable methods for delivering the undisputed portion or does not agree with the former attorney's determination of the amount of the proceeds that undisputedly belong to the client, the attorney must promptly seek resolution of the fee dispute through arbitration or judicial determination, as appropriate.

FORMAL OPINION INTERIM NO. 06-0006

ISSUES: Is it ethically proper for an attorney who is settling a fee dispute with a client to include a general release and a Civil Code section 1542 waiver in the settlement agreement? Does the existence of a legal malpractice claim against the attorney alter the ethical propriety of including a general release and section 1542 waiver in the settlement agreement?

DIGEST: If an attorney contemplates entering into a settlement agreement with a current client that includes a general release of a legal malpractice claim or pursues a settlement agreement with a client, the terms of which are broad enough to release a legal malpractice claim, the attorney must promptly disclose to the client the facts giving rise to the legal malpractice claim. The attorney must consider whether it is necessary or appropriate to withdraw from the representation. If the attorney does not withdraw, the attorney must:

ATTACHMENT A

1. Comply with rule 3-400(B) by advising the client of the right to seek independent counsel and giving the client an opportunity to do so;
2. Advise the client that the lawyer is not representing or advising the client as to the settlement of the fee dispute or the legal malpractice claim; and
3. Fully disclose to the client the terms of the settlement agreement, in writing, including the possible effect of the general release and section 1542 waiver, unless the client is represented by independent counsel.



ATTACHMENT B

**THE STATE BAR
OF CALIFORNIA**

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

June 6, 2008

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 1.13

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.13 – Organization as Client. COPRAC supports the adoption of proposed Rule 1.13. In regard to subsection (b) (ii), COPRAC felt that it would be helpful to provide guidance on the term "substantial injury" to the organization within the civil context. It was felt that term generally means some type of physical injury on the criminal side. Guidance on the civil side would be helpful. In addition, in that same subsection, the phrase "the best lawful interest of the organization" appears to be an objective standard. If this standard is to be used to subject a member to discipline for determinations that the member made without the benefit of hindsight, COPRAC recommends further clarification regarding how this standard will be evaluated or the use of a subjective standard in its place.

COPRAC is also concerned with the elimination of the language in current Rule 3-600, with regard to urging reconsideration by the constituent with whom the lawyer is dealing. While it is referenced in Comment [7], the importance of this action before proceeding to a higher authority in most circumstances deserves mention in the Rule, especially in light of the unnecessary tension that immediately proceeding to higher authority in the organization may create in relationship and the lawyer's general duty to advise. Comments [4] and [10] note that the lawyer should not substitute his or her own decision-making or judgment for that of the organization. However, that may be the result, if the lawyer immediately refers the matter to higher authority without exploring the reasons with the constituent first by urging reconsideration.

ATTACHMENT B

Mr. Sondheim

June 6, 2008

Page 2

In regard to Comment [13], COPRAC is concerned with the implication that the proposed Rule permits disclosure of privileged information under the context of whistle blowing statutes, which the California Supreme Court has determined is not permitted. We would recommend that the comment be deleted.

In regard to Comment [14], COPRAC has a similar concern regarding permitting whistle blowing contrary to law. In addition, the Comment appears to suggest that a lower level attorney can refer a matter to higher authority in the organization. This can be problematic, as an attorney should first be required to report the issues provided in Rule 1.13(b) to his or her internal supervisor. COPRAC recommends that the language in Rule 1.13(b) be amended to provide that "the lawyer shall refer the matter to supervisory lawyers within the lawyer's office, then if warranted, to higher authority in the organization, including to the highest authority than can act on behalf of the organization as determined by applicable law." These same procedures should be applicable to attorneys in private law offices.

Thank you for your consideration of our comments.

Very truly yours,



Dennis Peter Maio, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



ATTACHMENT B
**THE STATE BAR
OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

June 6, 2008

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 1.16

Dear Mr. Sondheim:

The State Bar of California's Standing Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.16 – Declining or Terminating Representation. COPRAC supports the adoption of proposed Rule 1.16, subject to the following comments.

COPRAC suggests that 1.16(e)(1), which requires a lawyer to promptly release “all client papers and property” to the client upon request, may need to be supplemented or further explained in two respects. First, we believe that the Rule or Comments should address the question of whether “client papers and property” include electronic data and, if so, whether such data must be provided to the client in electronic format. Electronic data could include email, pleadings, discovery, depositions and transactional documents. We do not believe that Comment [9], which states that Paragraph (e) “applies to client papers and property held by a lawyer in any form or format and codifies existing case law” sufficiently addresses the issue. We note that the two 1975 cases cited at the end of that statement do not provide any guidance on this issue.

Secondly, we would ask the Commission to address either in paragraph 1.16(e)(1) or in the Comments to this rule the question whether “client papers and property” ever includes an attorney's uncommunicated work product and, if so, when. This is a subject of much debate in California, and it would be helpful if the Commission would provide further guidance on this issue.

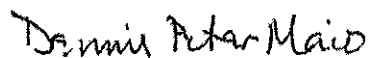
ATTACHMENT B

Mr. Sondheim
June 6, 2008
Page 2

In addition, COPRAC questions the rationale and intent of the sentence in Comment [1] that states "A lawyer has the obligation or the option to withdraw *only* in the circumstances and only in the manner described in this Rule." (Emphasis added.) This comment appears inconsistent with the Court of Appeal's opinion in *Ramirez v. Superior Court*, 21 Cal. App. 4th 904, 915 (1994), in which the court "saw no basis in the law, or in logic, for a conclusion that an attorney may never withdraw except for cause." To the contrary, the *Ramirez* court concluded that, where a representation agreement provides that the lawyer, upon notice, can withdraw at any time, there is no authority preventing the lawyer from withdrawing, as long as withdrawal can be accomplished without undue prejudice to the client. *Id.* Is the intent of the Comment to preclude an attorney from withdrawing – or to make it a disciplinable offense for an attorney to withdraw – in any circumstances that do not fall within the provisions of 1.16(a) or (b)? If so, COPRAC objects to this Comment.

Thank you for your consideration of our comments.

Very truly yours,



Dennis Peter Maio, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



ATTACHMENT B
**THE STATE BAR
OF CALIFORNIA**

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

June 6, 2008

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 1.5

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.5 -- Fees For Legal Services. COPRAC supports the adoption of proposed Rule 1.5. As for subsection (f) of the proposed rule, however, COPRAC is concerned that some practitioners may not be familiar with the distinction between a "non-refundable fee" and a "true retainer" and suggests that the Commission considering adding reference to case law which would provide additional guidance in Comment [2], including possible citation to some or all of the following cases: *Baranowski v. State Bar*, 24 Cal. 3d 153 (1979); *In the Matter of Fonte*, 2 Cal. St. Bar Ct. Rptr. 752, 757 (Rev. Dept. 1994); *S.E.C. v. Interlink Data Network of Los Angeles, Inc.*, 77 F. 3d 1201 (9th Cir. 1996); *Matter of Lais* (Rev. Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 923; *Matter of Brockway* (Rev. Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 950-951.

Thank you for your consideration of our comments.

Very truly yours,

Dennis Peter Maio, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



ATTACHMENT B

**THE STATE BAR
OF CALIFORNIA**

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

June 6, 2008

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 1.7

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.7 – Conflict of Interest: Current Clients. COPRAC supports the adoption of proposed Rule 1.7, with the following comments. COPRAC is particularly appreciative of the extensive comments which provide tremendous guidance to the profession.

COPRAC has some concerns with a few of the Comments. First, COPRAC is uncertain regarding the language of Comment [9] and Comment [18]. Comment [9] says that a lawyer “must in all events protect confidentiality.” Comment 18 seems to contradict this by indicating that when a lawyer is representing a client’s adversary the lawyer has an obligation to disclose to the lawyer’s client “all information that is material to the representation of the client, including otherwise confidential information of the lawyer’s other client.” COPRAC is concerned that a disclosure of one client’s confidential information to another client without the first client’s informed written consent constitutes a breach of the lawyer’s duty of confidentiality. Also, perhaps a cross-reference to the rule on confidentiality could be helpful to the practitioner in one or both of these Comments.

COPRAC is uncertain of the significance of Comment [17]. The placement of Comment [17] within the comments related to paragraph (b) does not seem correct. The Comment, and the case of *William H. Raley Co., Inc. v. Superior Court* (1983) 149 Cal.App3d 1042, do not seem to relate to the “representation of multiple **clients**” and do not seem to be resolved by “informed written consent of each **client**.” The Comment, and the *Raley*

ATTACHMENT B

Harry Sondheim
June 6, 2008
Page 2

case, relate to a conflict arising from a lawyer's fiduciary duties to a **non-client**. Including this concept under the "representation of a client" section of the rule, which requires informed consent of both "clients," creates confusion, since the use of the term "client" ordinarily implies an attorney client relationship.

If the Commission intends to convey that paragraph (b) of the rule applies in this scenario, perhaps the Comment should be re-worded to state:

The term "representation of a client" is not limited to a lawyer's legal representation of a client in an attorney client relationship, but may also include a lawyer's fiduciary relationship with a non-client. Where a lawyer's fiduciary duties to a non-client conflict with the lawyer's representation of or fiduciary duties to a client, a current client conflict exists. Fiduciary duties to non-clients, including the duty of confidentiality, may arise when a lawyer acts as a trustee, executor, or corporate director. (See, e.g., *William H. Raley Co., Inc. v. Superior Court* (1983) 149 Cal.App.3d 1042).

The Comment will then need to address whether informed written consent is required of the non-client who is in a fiduciary relationship with a lawyer.

Alternatively, perhaps this scenario fits better with paragraph (d)(1) of the rule. The fiduciary relationship might be described as a legal, financial and business relationship. If so, Comment [17] should be placed with the comments regarding paragraph (d). In this scenario, under section (d), no informed written consent would be required.

Finally, COPRAC has two concerns regarding Comment [27], specifically with the provision that a lawyer cannot obtain effective client consent where the lawyer cannot provide competent representation to each affected client. This seems like a significant limitation, which could potentially be missed given its placement. In addition, the meaning of this limitation could perhaps be explained or illustrated in a manner similar to the other sub-paragraphs. Lastly, the reference to 1.8.8(a), the proposed rule on limiting liability to a client, does not strike COPRAC as the appropriate reference.

Thank you for your consideration of our comments.

Very truly yours,



Dennis Peter Maio, Chair
Committee on Professional
Responsibility and Conduct



ATTACHMENT B

**THE STATE BAR
OF CALIFORNIA**

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

June 6, 2008

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 1.8.1

Dear Mr. Sondheim:

The State Bar of California's Standing Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.8.1 - Business Transactions with a Client and Acquiring Interests Adverse to the Client. COPRAC supports the adoption of proposed Rule 1.8.1 and the Comments to the rule, subject to the following comments and suggestions.

COPRAC agrees with Comment 5, which states that this Rule is not intended to apply to the modification of an agreement by which a lawyer is retained by a client, unless the agreement or modification confers on the lawyer an ownership, possessory, security or other pecuniary interest adverse to the client. We are concerned however that Comment 7, which attempts to define "adverse pecuniary interest" needs further refinement. For example, the statement in Comment 7 that "an adverse pecuniary interest arises, for example, when the lawyer's personal financial interest conflicts with the client's interest in the property" is overly broad and ambiguous, since it could arguably be interpreted to mean an attorney acquires an adverse pecuniary interest anytime he or she modifies a fee agreement to increase his hourly rate. COPRAC believes that the key to this provision is recognizing that its application is dependent upon the attorney actually acquiring a tangible interest in the client's property, as opposed to simply having the right to collect a debt or seek to enforce a contractual obligation. We request that the RRC define what the rule means by a "pecuniary interest" that is subject to acquisition instead of merely, and unhelpfully, describing when such an interest may arise.

COPRAC also believes that Comment 13, which provides that "in some cases, the lawyer's interest will preclude the lawyer from obtaining the client's consent to the transaction or acquisition" would benefit from case citations or a more detailed description of potential factual scenarios explaining when this type of conflict would be nonwaivable, as was done, for example, in Comment 27 to Proposed Rule 1.7.

Thank you for your consideration of our comments.

Very truly yours,

Dennis Peter Maio

Dennis Peter Maio, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



ATTACHMENT B
**THE STATE BAR
OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

June 6, 2008

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 3.10

Dear Mr. Sondheim:

The State Bar of California's Standing Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 3.10 – Threatening Criminal, Administrative or Disciplinary Charges. COPRAC supports the adoption of proposed Rule 3.10 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Dennis Peter Maio

Dennis Peter Maio, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



ATTACHMENT B
**THE STATE BAR
OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

June 6, 2008

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 3.4

Dear Mr. Sondheim:

The State Bar of California's Standing Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 3.4 – Fairness to Opposing Party and Counsel. COPRAC supports the adoption of proposed Rule 3.4 and the Comments to the proposed Rule, subject to one comment. There is a typo in subparagraph (d); the introductory phrase “a lawyer shall not” should be deleted since it is redundant.

Thank you for your consideration of our comments.

Very truly yours,

Dennis Peter Maio

Dennis Peter Maio, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



ATTACHMENT B
**THE STATE BAR
OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

June 6, 2008

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 4.3

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 4.3 - Dealing With Unrepresented Person. COPRAC supports the adoption of proposed Rule 4.3. In regard to Comment [6], it is a concern that it states that the Rule is not intended to apply to situations where the lawyer is supervising an investigator or other person where the lawyer reasonably believes that a violation of intellectual property rights exists. COPRAC could see no reasonable basis for excluding the intellectual property situation from the rule.

Thank you for your consideration of our comments.

Very truly yours,

Dennis Peter Maio

Dennis Peter Maio, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



ATTACHMENT B
**THE STATE BAR
OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

June 6, 2008

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 5.4

Dear Mr. Sondheim:

The State Bar of California's Standing Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 5.4 — Duty To Avoid Interference with a Lawyer's Professional Independence. COPRAC supports the adoption of proposed Rule 5.4, subject to the following comments.

First, proposed Rule 5.4(a) provides that it is unethical for a lawyer or law firm to "share fees directly or indirectly with a person who is not a lawyer or with an organization that is not authorized to practice law." COPRAC believes that the word "indirectly" creates ambiguity that should be addressed in a comment. Lawyers and law firms generate revenue by collecting "fees." Lawyers and law firms compensate their staff and some third party vendors¹ from the revenues they generate. Therefore, proposed Rule 5.4(a) could be interpreted, for example, to prohibit lawyers and law firms from paying a salary or bonus to a legal secretary or paralegal or from compensating a vendor for providing administrative services to the law firm — because this compensation is derived from fees for legal services.

¹ It is not unusual for law firms to hire outside vendors to handle their administrative operations such as reception, photocopying, distribution of mail, delivery of faxes, etc.

ATTACHMENT B

Mr. Sondheim
June 6, 2008
Page 2

To eliminate this ambiguity, COPRAC recommends that the following language be inserted at the end of Comment [1] to proposed Rule 5.4:

“The phrase ‘share legal fees directly or indirectly’ is not intended to prohibit lawyers or law firms from paying to employees who are not lawyers salaries, hourly wages, employee benefits, or periodic bonuses even though such compensation is paid out of revenues generated by collecting fees for legal services. Similarly, this phrase is not intended to prohibit lawyers or law firms from compensating third parties for providing administrative services to the lawyer or law firm even though such compensation is paid out of revenues generated by collecting fees for legal services. This is the case whether or not the fees are attributable to a specific matter or matters. The lawyer and law firm, however, may not agree with a non-lawyer employee or third party to calculate such person’s compensation as a percentage of revenues.”

Second, although proposed Rule 5.4 is intended to replace current Rule of Professional Conduct 1-320, entitled Financial Arrangements with Non-Lawyers, proposed Rule 5.4 does not incorporate the prohibitions contained in Rule of Professional Conduct 1-320(B) and (C). Rule 1-320(B) and (C) generally make it unethical for a lawyer to give a gift to another for recommending or securing an engagement and to pay the media for media attention. COPRAC recommends that a comment be added to proposed Rule 5.4 to clarify that these prohibitions are addressed in other proposed rules. Thus, lawyers comparing proposed Rule 5.4 to Rule of Professional Conduct 1-320 will not erroneously conclude that the conduct once prohibited by 1-320(B) and (C) is no longer prohibited.

Subject to these objections, COPRAC supports adoption of proposed Rule 5.4.

Thank you for your consideration of our comments.

Very truly yours,



Dennis Peter Maio, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



ATTACHMENT B
**THE STATE BAR
OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

June 6, 2008

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 3.5

Dear Mr. Sondheim:

The State Bar of California's Standing Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 3.5 — Impartiality and Decorum of the Tribunal. COPRAC supports the adoption of proposed Rule 3.5, subject to the following comment.

Proposed Rule 3.5(b) provides that it is generally unethical for a lawyer to communicate with a judicial officer upon the merits of a contested matter pending before him or her. Proposed Rule 3.5(b) identifies five exceptions including "in ex parte confidential matters as permitted by law." Proposed Rule 3.5(b)(5). COPRAC believes that the word "confidential" should be deleted from proposed Rule 3.5(b)(5). It may be that the applicable procedural rules only permit a litigant's lawyer to communicate unilaterally with a judicial officer in ex parte matters that are confidential. If so, the word "confidential" is unnecessary. But if the applicable procedural rules permit a lawyer to communicate unilaterally with a judge or judicial officer in an ex parte matter that is not confidential, in COPRAC's view, it is inappropriate to subject a lawyer to discipline for doing so. Therefore, COPRAC requests that the word "confidential" be deleted from proposed Rule 3.5(b)(5).

Subject to this objection, COPRAC supports adoption of proposed Rule 3.5.

Thank you for your consideration of our comments.

Very truly yours,

Dennis Peter Maio

Dennis Peter Maio, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



**THE STATE BAR
OF CALIFORNIA**

ATTACHMENT B

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

June 6, 2008

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 4.2

Dear Mr. Sondheim:

The State Bar of California's Standing Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions and Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 4.2 - Communication With a Person Represented by Counsel. COPRAC supports the adoption of proposed Rule 4.2, subject to the following comment.

Excepting public officials from the rule is overbroad. The definition of public official as a "duly appointed public officer" does nothing to limit the breadth of this exception. Every employee in a public entity is generally "duly appointed" by the particular appointing authority. Public officer is defined in Government Code section 82048 as "every member, officer, employee or consultant of a state or local government agency." Permitting such a broad exception places a public agency at a disadvantage, and is not consistent with the rationale for the exception, which is the right of the public to seek redress from or communicate with their elected official, or high ranking members of the public body, notwithstanding the fact that they are represented by counsel in a particular matter. The mitigation provided in the rule is not sufficient to remedy the disadvantage that is placed on a public entity in litigation or other matters by the scope of this exception to the Rule.

COPRAC suggests that rather than defining public official, the rule should except "elected public officials and executive managers of a public agency, boards, committees or bodies."

Thank you for your consideration of our comments.

Very truly yours,

Dennis Peter Maio

Dennis Peter Maio, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



**THE STATE BAR
OF CALIFORNIA**

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

DATE: August 7, 2008
TO: Diane Karpman
FROM: The Standing Committee on Professional Responsibility and Conduct of the State Bar of California
SUBJECT: ABA Standing Committee on Ethics and Professional Responsibility Recommendation on Lateral Screening

=====

INTRODUCTION:

To facilitate the consideration of proposed amendments to ABA Model Rule of Professional Conduct 1.10 "Imputation of Conflicts of Interest: General Rule" (Report No. 114) submitted by the ABA Standing Committee on Ethics and Professional Responsibility, the Standing Committee on Professional Responsibility and Conduct of the State Bar of California ("COPRAC") provides the following background information and commentary.¹ COPRAC appreciates your interest in this information and your willingness to share this memorandum with any other interested members of the State Bar's delegation.

BACKGROUND:

COPRAC assists the Board of Governors in considering proposed changes to laws governing the conduct of lawyers. Although the Board of Governors has not assigned Report No. 114 to COPRAC for action, COPRAC acts as a liaison to the Board's Special Commission for the Revision of the Rules of Professional Conduct ("the Commission"), which is charged with conducting a thorough review of the California Rules of Professional Conduct and developing comprehensive amendments. Among the issues that the Commission is studying is the question of whether a California version of ABA Model Rule 1.10 should be adopted. As a liaison to the Commission, COPRAC is preparing a written comment letter to the Commission providing its analysis of the proposed amendment to ABA Model Rule 1.10. COPRAC is corresponding with you because it believes that sharing the substance of its analysis may be of interest to you in evaluating Report No. 114. COPRAC understands that the State Bar's delegates exercise independent discretion in voting on House of Delegates proposals and that this process involves working with various

¹ This position is only that of the State Bar of California's Standing Committee on Professional Responsibility and Conduct. This position has not been adopted by the State Bar's Board of Governors or overall membership and should not be construed as representing the position of the State Bar of California.

ATTACHMENT C

caucuses. COPRAC's objective in communicating with you is simply to provide information that might be helpful in considering the technical aspects of this particular ABA Model Rule proposal.

ANALYSIS AND COMMENTARY:

In Report No. 114, the ABA Standing Committee on Ethics and Professional Responsibility proposes to add a subsection (e) to Model Rule 1.10, which would provide as follows:

When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

- (1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

The recommendation also proposes the addition of three comments to the Model Rule related to this issue.

COPRAC is generally in favor of clarifying that screening of lateral attorneys in the private practice context is permitted under specified circumstances. Because the California Rules of Professional Conduct do not currently address imputation or screening, such an amendment would not be inconsistent with California's existing rules. Such an amendment also could provide much needed guidance to practitioners who are presently encountering difficulty in reconciling divergent case law on the issue of screening, while trying to determine whether they would be in compliance with their duties under the applicable rules. Many practitioners do not appreciate the different obligations and ramifications arising from case law on disqualification where ethical screens are employed as distinguished from what is required of them under the applicable rules of professional responsibility. Additional language in proposed Comment [9] would be beneficial in this regard.

COPRAC agrees with the assessment that supporting ethical screens for former government lawyers, judges, judicial law clerks, paraprofessionals, arbitrators, mediators and other third-party neutrals moving into private practice, but rejecting the use of such screens for lateral attorneys moving between law firms or private organizations, sends the wrong message about the legal profession. On one hand, this type of disparate treatment diminishes the public's confidence in the integrity and professionalism of attorneys in private practice, suggesting that only publicly employed attorneys can be trusted to abide by their professional responsibilities. On the other hand, this treatment suggests that the duties owed to governmental entities and those whose matters were addressed by judicial officers, clerks and dispute resolution professionals are less of a concern than the duties of confidentiality and loyalty owed to clients of private law firms and organizations.

Differing rules between jurisdictions on this issue also present difficulties for private law firms with offices in multiple states and countries. In practice, many private law firms have adopted effective

ATTACHMENT C

procedures for ethical screens. The argument that such procedures are flawed and cannot be trusted logically and necessarily requires rejection of the premise for allowing use of screens for lawyers transitioning from public to private practice, despite years of successful use of such screens across the country.

COPRAC also generally agrees with the proposed condition that written notice be provided to the affected former client,² but disagrees with including the phrase “to enable it to ascertain compliance with the provisions of this Rule.” This language is far too broad and ambiguous to provide any meaningful protections to the former client and to ensure protection of the confidentiality of the firm’s present client.

It should be noted, however, that notice may not be possible if either the matter that the new firm is undertaking for its client or the matter that the lateral attorney worked on at his or her prior firm or organization for a former client is or was confidential and may not be disclosed, such as the evaluation of possible patent infringement or an internal investigation. Requiring notice in all situations would effectively prevent certain types of lawyers whose practices focus on confidential matters from making lateral moves to large firms which may represent the potential adverse parties.³ As a result, this situation should be addressed in the proposed amendment.

COPRAC understands that the Board of Governors of the State Bar of California recently recommended disapproval of proposed Resolution 01-06-2008 of the Conference of Delegates of California Bar Associations, which proposed the addition of a subsection (G) to Rule 3-310 of the California Rules of Professional Conduct. That resolution proposed requiring disqualification of a law firm employing or otherwise associating with a member who is disqualified under the rule and provided that disqualification shall not be avoided by use of an ethical screen unless informed written consent is obtained from all affected present and former clients. The Board of Governors noted that the Commission is currently charged with considering amendments to Rule 3-310 and was concerned that Resolution 01-06-2008 would “prejudge controversial substantive and policy issues that are already in process.”

The concern expressed by the Board of Governors is well taken because Conference Resolution 01-06-2008 seeks a change in the California rules. In contrast, the ABA House of Delegates action

² COPRAC observed in State Bar Formal Opinion No. 1993-128 that “notice is not required by California law nor is it required by the California Rules of Professional Conduct.” This observation was made in the context of an opinion that considered the possible screening of a former deputy district attorney who moved to a private firm, where breach of the screen would have exposed the former deputy district attorney and the attorney associated with the matter at the private firm to the risk of misdemeanor charges under Section 6131 of the Business and Professions Code. Section 6131 provides a strong deterrent to breaching a screen, but only applies where a district attorney or other public prosecutor is or has been involved. Where Section 6131 does not apply, such as in purely civil matters involving attorneys in private practice, notice to the affected former clients would provide an alternate deterrent.

³ While these types of conflicts would and should prevent lawyers from “side-switching” or representing the potential adverse party on a substantially related matter without informed written consent under current rules and case law, such circumstances would not be affected by an amendment permitting the use of ethical screens where the focus is on keeping the attorney with potential information segregated from matters involving the adverse parties.

ATTACHMENT C

on Report No. 114 would not effectuate any change to the California rules. Accordingly, COPRAC believes that the ABA's proposed amendment to Model Rule 1.10 would not interfere with the Commission's pending review of amendments to Rule 3-310 and that the debate leading to passage of an ABA Model Rule amendment could provide additional clarity to the Commission's own deliberations. The Commission's work will likely require a few additional years to complete. During that time, the Model Rules may be subject to further changes, which the Commission may be expected to consider in its deliberations over the California Rules of Professional Conduct.

CONCLUSION:

To summarize, COPRAC's analysis of Model Rule 1.10 is supportive of the ABA Standing Committee on Ethics and Professional Responsibility's resolution to amend Model Rule 1.10, but COPRAC recommends deletion of the portion of subsection (2) of the proposed amendment that references ascertaining compliance.

ATTACHMENT D

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.	
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 Attendees 61 Evaluations Received 18 30%

ATTACHMENT E

#114 - Electronic Ethics

(68 attendees - 19 responses)

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?						14	4	1	0	0	4.7
To what extent did the environment contribute to the learning experience?						12	5	1	0	1	4.7
To what extent did the materials contribute to the learning experience?						13	6	0	0	0	4.7
To what extent were the objectives stated in the promotional literature or those stated at the beginning of the activity satisfied?						14	3	1	0	0	4.7
To what extent did the activity contain significant current intellectual or practical content?						15	2	2	0	0	4.7

<u>Instructor</u>	Overall Teaching 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.
John Steele	12	3	0	0	0	4.8	9	2	1	0	0	4.7	9	3	0	0	0	4.8
Wendy Mazzarella	13	2	0	0	0	4.9	10	2	0	0	0	4.8	9	3	0	0	0	4.8
Shawn Harpen	12	3	0	0	0	4.8	9	3	0	2	0	4.4	10	2	0	0	0	4.8

ATTACHMENT E

#99 - Keeping Your client Trust Account and Collecting Your Fee

(36 attendees - 16 responses)

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?						5	7	1	0	0	4.3
To what extent did the environment contribute to the learning experience?						2	7	4	0	0	3.8
To what extent did the materials contribute to the learning experience?						7	4	2	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?						4	6	2	0	0	4.2
To what extent did the activity contain significant current intellectual or practical content?						4	7	1	0	0	4.3

<u>Instructor</u>	Overall Teaching 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.
Wendy Mazzarella	10	3	1	0	0	4.6	8	2	1	0	0	4.6	4	2	3	0	0	4.1
John Steele	7	4	1	0	0	4.5	7	3	1	0	0	4.5	8	1	2	0	0	4.5
Diane McLean	5	2	4	1	0	3.9	4	1	3	2	0	3.7	5	1	4	0	0	4.1

ATTACHMENT E

#141 - Recent Developments Affecting the Law of Lawyers

(50 attendees - 22 responses)

	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?	18	4	0	0	0	4.8
To what extent did the environment contribute to the learning experience?	14	7	1	0	0	4.6
To what extent did the materials contribute to the learning experience?	17	4	1	0	0	4.7
To what extent were the objectives stated in the promotional literature or those stated at the beginning of the activity satisfied?	18	3	0	0	0	4.6
To what extent did the activity contain significant current intellectual or practical content?	19	3	0	0	0	4.9

<u>Instructor</u>	Overall Teaching 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.
Suzanne Mellard	11	4	0	0	0	4.7	10	3	0	0	0	4.8	11	2	0	0	0	4.8
John Amberg	12	3	0	0	0	4.8	11	2	0	0	0	4.8	11	2	0	0	0	4.8
Dennis Maio	12	3	0	0	0	4.8	11	2	0	0	0	4.8	11	2	0	0	0	4.8
Carole Buckner	11	3	1	0	0	4.7	10	2	1	0	0	4.7	10	2	0	0	0	4.8

ATTACHMENT E

#152 - Recognizing Interests and Avoiding Conflicts

(36 attendees - 15 responses)

	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?	8	7	0	0	0	4.5
To what extent did the environment contribute to the learning experience?	9	4	1	0	0	4.6
To what extent did the materials contribute to the learning experience?	12	3	0	0	0	4.8
To what extent were the objectives stated in the promotional literature or those stated at the beginning of the activity satisfied?	12	1	2	0	0	4.7
To what extent did the activity contain significant current intellectual or practical content?	12	2	1	0	0	4.7

<u>Instructor</u>	Overall Teaching 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.
Dan Carroll	9	4	0	1	0	4.5	8	4	0	1	0	4.5	10	3	0	0	0	4.8
Brian Forbes	8	5	0	1	0	4.4	7	5	1	0	0	4.5	9	4	0	0	0	4.7
David Parker	10	4	0	0	0	4.7	9	4	0	0	0	4.7	11	1	0	0	0	4.9

ATTACHMENT F

**COPRAC - 2008 Accomplishments Report
Member Outreach Programs**

	Date	Name	Sponsor	Location
1.	1/24/2008	Brian Forbes	San Diego Co. Bar Association	San Diego
2.	5/9/2008	Shawn Harpen	CLE International	Los Angeles
3.	5/12/2008 5/13/2008	John Amberg	International Franchise Assoc.	Washington, D.C.
4.	6/3/2008	Wendy Mazarella	CA District Attorneys Assoc.	Pacific Grove
5.	6/26/2008	Wendy Mazarella	San Diego Co. Bar Assoc.	San Diego
6.	9/25/2008	Wendy Mazarella	Public Law Section of the State Bar of CA	Monterey
7.	11/2008	Suzanne Mellard	CEB	Sacramento
8.	11/5/2008	Carole Buckner & Shawn Harpen	Orange Co. Bar Assoc.	Santa Ana
9.	12/2008	Carole Buckner	Orange Co. Bar Assoc.	Santa Ana
10.	12/2008	Suzanne Mellard	CEB	San Francisco
11.	12/13/2008	Wendy Mazarella	San Diego City Attorney's Office	San Diego
12.	12/16/2008	Wendy Mazarella	San Diego Co. Bar Assoc.	San Diego

ETHICS ALERT

**The New Limited Exception to
the Professional Duty to Protect Client Confidences and Secrets**

Committee on Professional Responsibility and Conduct

(May, 2008)

It can happen to any lawyer. While counseling a client, the client tells the lawyer a disturbing fact – for example, that the client’s spouse has been physically abusing their child. Immediately after this disclosure, the client tells the lawyer that no one should ever know what the client just disclosed. What should the lawyer do?

For much of California’s history, the answer was to preserve the client’s secret and to abide by the client’s instruction.^{1/} Unlike the attorney-client privilege, which is an evidentiary privilege subject to exceptions, and long after other jurisdictions had allowed lawyers to disclose client secrets under specified circumstances, California continued to treat the ethical duty of confidentiality as virtually absolute. The ethical duty traditionally has been understood to be broader than the attorney-client privilege and to preclude lawyer disclosure of client information when disclosure would be embarrassing or would likely be harmful to the client, absent client consent.^{2/}

The duty of confidentiality is often misunderstood. Lawyers are criticized for withholding information that the layman believes should have been disclosed in the interests of discovering the truth or preventing the possibility of harm. Yet, the lawyer’s duty of confidentiality is first and foremost a duty owed to the client, not the general public. And from this vantage point, the protection of client confidential information recognizes and serves several important values. The protection of confidentiality serves the public interest by encouraging client disclosures, which enables lawyers to better advise and assist their clients in complying with the law. *In re Jordan* (1972) 7 Cal.3d 930, 940-941 [103 Cal.Rptr. 849]. Protecting client confidential information also respects the autonomy and personal integrity of the

^{1/} California Business and Professions Code section 6068(e)(1): “It is the duty of an attorney . . . [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”

^{2/} The terms “confidence” and “secrets” have developed their own usage. California State Bar Formal Opn. No. 1981-58:

In the context of Business and Professions Code section 6068, subdivision (e), “secrets” is not limited to attorney-client communications. “This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.” Any “information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client” is a secret which must be preserved. (Citations omitted.)

This Ethics Alert uses the term “client confidential information” to refer to the lawyer’s professional obligations under Business and Professions Code section 6068(e) and the California Rules of Professional Conduct.

ATTACHMENT G

client, and recognizes that the client retains the right to make ultimate decisions regarding the outcome of the engagement. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 403-405 [212 Cal.Rptr. 151]; Restatement (Third) of the Law Governing Lawyers (2000) § 21, cmt. e. Traditionally, the client reposed his or her trust in the lawyer, and in return the lawyer held inviolate the secrets of the client. This duty of confidentiality has its costs, however, and most other American jurisdictions have recognized exceptions to permit disclosures of client information, if only to prevent harm to another.^{3/}

In 2004, California followed suit when our legislature adopted Business and Professions Code section 6068(e)(2) and our Supreme Court approved a new Rule of Professional Conduct, rule 3-100, that expressly recognize an exception to the duty of California lawyers to preserve their clients' secrets. How does rule 3-100 affect this duty?

Rule 3-100 is organized into separate statements. Rule 3-100(A) sets forth the lawyer's fundamental obligation to preserve client secrets:

A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

Rule 3-100(B) states the limited exception to the absolute duty:

A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

Rule 3-100(C) describes how and when the lawyer should inform the client that client confidential information may be disclosed:

Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:

- (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and
- (2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

Rule 3-100(D) emphasizes that any permitted disclosure should be limited:

^{3/} The American Bar Association approved such an exception in 1983. Model Rules of Professional Conduct, Rule 1.6(b)(1) (1983). Rule 1.6(b)(1) was, and remains in its current form, a rule of permissive disclosure. Many states have, however, adopted rules that require disclosure in this setting. See, John S. Dzienkowski, *Professional Responsibility Standards, Rules & Statutes* (Abr. ed. 2005-2006), pp. 107-114 (identifying twelve states requiring lawyers to disclose client's intent to engage in conduct that would likely result in death or infliction of serious bodily injury to third person).

ATTACHMENT G

In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

Finally, rule 3-100(E) states that even when all of the elements of rule 3-100(B) have been satisfied, the decision to reveal client secrets is discretionary and the lawyer has no duty under the rule to make such disclosure:

A member who does not reveal information permitted by paragraph (B) does not violate this rule.

The fundamental point about rule 3-100(B) is that it is permissive – it creates a right to disclose, not a duty to disclose. If a lawyer finds that the elements of rule 3-100(B) have been met, the lawyer may disclose the client's secrets. However, the lawyer need not. Even if other lawyers under the facts of the particular case would disagree, the lawyer's decision not to disclose is not subject to challenge as violative of rule 3-100.

How does the lawyer conclude that disclosure is permissible? Rule 3-100(B) contains several elements, each of which must be satisfied. The lawyer must "reasonably believe" that "disclosure is necessary" to prevent a "criminal act" that the lawyer "reasonably believes" is "likely" to result in death or substantial bodily harm to an individual. First, the lawyer must "reasonably believe." A reasonable belief is one that is well grounded in fact.

Second, the lawyer must reasonably believe disclosure is necessary to prevent a criminal act. The lawyer must have a well-founded belief that disclosure will be effective in preventing the conduct and that the conduct is criminal. Confidential client information about conduct that has occurred, or will occur before the lawyer can effectively prevent its occurrence, may not be disclosed.^{4/}

Third, the lawyer must reasonably believe that the criminal conduct, if not disclosed, is likely to result in death or substantial bodily harm. Rule 3-100 does not impose an "imminency" requirement (i.e., the time between the conduct and the harm need not be short), but there must be a clear causal link between the conduct and the apprehended harm. More importantly, it is not just any harm that permits disclosure under rule 3-100(B), but grave harm – death or substantial bodily injury.

Lawyers must address the question whether the apprehended harm would satisfy the "substantial bodily harm" requirement of rule 3-100(B) on a case-by-case basis. The use of the term "substantial bodily harm" in rule 3-100(B) parallels the use of the same term as an exception to the attorney-client privilege.^{5/} The drafters of rule 3-100 did not define the term, nor is it defined in the Evidence Code. A

^{4/} Cf. *McClure v. Thompson* (9th Cir. (Oregon) 2003) 323 F.3d 1233, cert. denied, *sub nom. McClure v. Belleque* (2003) 540 U.S. 1051 [124 S.Ct. 804]; New York City Bar Formal Opinion 2002-01:

[A] lawyer may not ethically disclose client confidential information based upon her mere suspicion that a client intends to commit a future crime, ... but that she must have a reasonable basis for believing that the client intends to commit a crime before she is permitted to make disclosure (holding that disclosure of client's confidential information as to burial location was necessary because of lawyer's reasonable belief that children were still alive and could be rescued).

^{5/} Evidence Code section 956.5.

ATTACHMENT G

California jury instruction defines the analogous term “great bodily injury” as “significant or substantial bodily injury” which is “greater than minor or moderate harm.” CALCRIM 821 (Child Abuse Likely to Produce Great Bodily Harm or Death).^{6/} While general, that definition provides some guidance for lawyers to consider if confronted with the issue.

Assuming the lawyer has formed a reasonable belief that a crime will be committed that is likely to result in death or substantial bodily harm, what should the lawyer do? The comments to rule 3-100 state that “disclosure is a last resort, when no other available action is reasonably likely” to prevent the apprehended harm.^{7/} A lawyer’s duties to the client include the duty to advise and counsel. Although this is not an option in every case, the lawyer should consider discussing the situation with the client. Did the client mean what was said? Was the client angry or concerned? Is the client fearful that the situation will be disclosed? Discussion with the client will not only give the lawyer a clearer understanding of the situation, it will provide an opportunity for the lawyer and the client to reason together to a peaceful resolution. If the information disclosed by the client in our hypothetical is true, the lawyer may be able to advise the client how to resolve the situation in a way that protects both the client and the child.

The lawyer may find that while the assertion of abuse is true, the client is fearful and will not authorize the lawyer to disclose the facts. What should the lawyer do next? Contemplating disclosure without the client’s consent puts the lawyer at odds with the client’s self-defined interests.^{8/} Rule 3-100 states that the lawyer “shall, if reasonable under the circumstances,” “inform the client . . . of the lawyer’s ability or decision” to disclose. How and when a lawyer discharges that obligation is left to the lawyer. A lawyer may consider not only the possibility of harm to others but also the potential for harm to the lawyer. For example, when the client is threatening another person, the lawyer may delay informing the client of the lawyer’s intent to disclose if the lawyer reasonably believes that disclosure to the client may place the physical safety of others in jeopardy.^{9/}

^{6/} See also Penal Code section 12022.7(f) (great bodily injury); Penal Code section 243(f)(4) (serious bodily injury); CALCRIM 925 (serious bodily injury).

^{7/} Rule 3-100, comment 6.

^{8/} Rule 3-100, comment 11 (when a lawyer has disclosed client confidential information as permitted by rule 3-100(B), the attorney-client relationship will usually have deteriorated such that the lawyer should withdraw from the representation).

^{9/} Disclosure of the client’s secret under rule 3-100(B) will not automatically make the lawyer a witness against the client because the professional duty of confidentiality is distinct from the attorney-client privilege. If the client’s disclosures were not made for the purpose of a crime or fraud, they would still be protected by the attorney-client privilege. If the information qualifies as an exception to the attorney-client privilege, however, the information may be admitted. See, *People v. Dang* (2001) 93 Cal.App.4th 1293, 1298 [113 Cal.Rptr.2d 763] (holding that threats to inflict death or substantial bodily harm are not protected under the attorney-client privilege pursuant to Evid. Code § 956.5). Moreover, disclosed client confidential information may be used against the client in subsequent or pending legal proceedings. *People v. Navarro* (2006) 138 Cal.App.4th 146 [41 Cal.Rptr.3d 164] (holding that violation of lawyer’s duty to protect client confidential information did not preclude law enforcement from using disclosures to obtain search warrant that led to seizure of incriminating evidence).

ATTACHMENT G

CONCLUSION

It is not uncommon for lawyers, especially those who practice in the criminal or family law areas, to obtain confidential information from clients about threatened conduct that could result in bodily harm or even death. The lawyer is faced with the dilemma of preserving the client's secrets or of disclosing the information to prevent harm to another. Until recently, the lawyer could not act to protect innocent victims without breaching the duty of confidentiality, but now rule 3-100 permits the lawyer to disclose such information under specified circumstances. The rule and its extensive comments provide a helpful guide to lawyers faced with this dilemma.

ATTACHMENT H



**THE STATE BAR
OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2163

March 17, 2008

Saul Bercovitch, Staff Attorney
The State Bar of California
180 Howard Street, Sixth Floor
San Francisco, CA 94105

Re: Public Comment to Proposed New Rule of Professional Conduct 3-410
(Revised) on Insurance Disclosure

Dear Mr. Bercovitch:

The State Bar's Standing Committee on Professional Responsibility and Conduct ("COPRAC") appreciates this opportunity to comment regarding proposed new rule 3-410 of the Rules of Professional Conduct as revised.

By letter dated October 5, 2006, COPRAC commented publicly on an earlier version of proposed new rule 3-410. As reflected in that comment letter, at that time COPRAC generally supported the proposed new rule with the view that clients and prospective clients should be informed whether or not an attorney practices without malpractice insurance coverage. As noted in the October 5, 2006 letter, not all members of COPRAC agreed. With the invitation for public comments on the proposed new rule as revised, COPRAC has revisited the issue, and expresses its opposition.

COPRAC opposes proposed new rule 3-410 as revised for a variety of reasons, not all of which are embraced by all members of COPRAC.

As an initial matter, COPRAC is unaware of any other profession that requires a member to disclose to his or her clients that the member lacks malpractice insurance. It does not know of any rational basis for creating an exception for attorneys.

Unlike companies issuing securities, an attorney does not have a legal or ethical obligation to disclose material facts about him or herself to a prospective client. In COPRAC's view, it is inappropriate to create such a rule, including proposed new rule 3-410 as revised, on this basis. Also, if such a duty did exist, there are other types of information that are probably more important to a potential client than lack of malpractice insurance—*e.g.*, the attorney's experience handling the potential client's type of matter, the attorney's trial experience (if the client has a litigation matter), any history of malpractice claims against the attorney, any history of discipline against the attorney, any history of substance abuse, etc. There is no rational basis for mandating a disclosure of lack of malpractice coverage, but not mandating disclosures on other arguably more important types of information.

ATTACHMENT H

Saul Bercovitch

March 17, 2008

Page 2

COPRAC believes that it is inappropriate to single out the lack of malpractice insurance coverage for mandatory disclosure. The Rules of Professional Conduct are designed “to protect the public and to promote respect and confidence in the legal profession.” Rules of Prof. Conduct, rule 1-100(A). In COPRAC’s view, proposed new rule 3-410 as revised does not “protect the public” because the disclosure is limited and potentially misleading. The proposed new rule requires certain attorneys to advise clients, “Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance.” A client may erroneously conclude, based on the proposed disclosure, that he or she is better protected by retaining an attorney with malpractice insurance coverage or that malpractice insurance coverage will somehow protect the client from a bad result. Neither is necessarily the case. Malpractice insurance coverage is principally designed to protect the attorney. It protects the attorney on a claims-made basis by making available the policy limits for the defense of any covered claim, subject to any applicable deductible or self-insured retention. It benefits the client secondarily by providing a fund from which damages may be paid or a settlement made, if it is not otherwise exhausted by defense costs. Whether malpractice insurance coverage might ultimately be a source of malpractice recovery by the client is speculative, turning on such contingencies as whether the attorney continues to maintain such coverage in the future, whether the claim is covered, and whether the limits are exhausted prior to judgment. Thus, in COPRAC’s view, the proposed new rule fails to provide information that would serve to protect the public.¹

If an attorney’s malpractice insurance coverage is deemed important enough to single out for disclosure, proposed new rule 3-410 as revised does not go far enough. For example, as noted above, it does not mandate disclosure of the existence, substance, and extent of malpractice insurance coverage.

For these reasons, COPRAC does not support proposed new rule 3-410 as revised or any similar rule requiring an attorney to disclose to a client that he or she lacks malpractice insurance coverage.

But if proposed new rule 3-410 as revised or any similar rule is approved, COPRAC recommends that the language used to create two exceptions to the disclosure requirement—for short term matters and for services rendered in an emergency—be modified to mirror language used in Business & Professions Code section 6148 creating similar exceptions.

Proposed new rule 3-410(A) as revised provides that an attorney must disclose to a client in writing that he or she does not have malpractice insurance coverage “whenever it is reasonably

¹ COPRAC is aware that the State Bar’s Insurance Task Force has concluded that a disclosure rule would “advance the important goal of consumer protection and that the benefits outweighed the concerns expressed against adopting any such requirement.” See September 14, 2007 Agenda Item for Board of Governor Meeting, at page 21. COPRAC respectfully disagrees with this conclusion.

ATTACHMENT H

Saul Bercovitch

March 17, 2008

Page 3

foreseeable that the total amount of the [attorney's] legal representation of the client in the matter will exceed four hours." Business & Professions Code section 6148, subdivision (a), requires an attorney to send a client who is a natural person a written fee agreement in hourly engagements in any case "in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars (\$1,000)." Both the proposed new rule and the statutory provision create exceptions from written disclosure requirements for short term engagements not involving substantial time and therefore expense. Given the shared objective, and the existing statutory requirement that has been in existence now for nearly a decade, if the proposed new rule or any similar rule is approved, COPRAC recommends that it follow the same approach.²

Similarly, proposed new rule 3-410(D) as revised provides that the rule "does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the right or interests of a client." Business & Professions Code section 6148, subdivision (d)(1), exempts from the requirement to memorialize a fee agreement in hourly engagements for "[s]ervices rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or where a writing is otherwise impractical." Because there may be legitimate circumstances where a written fee agreement is "otherwise impractical," COPRAC recommends that if the proposed new rule or any similar rule is adopted, the clause "or where a writing is otherwise impractical" be added to the rule.

Thank you for your consideration of COPRAC's comments and concerns.

Respectfully submitted,



Dennis Peter Maio, Chair
Committee on Professional
Responsibility and Conduct

² COPRAC recommends a consistent approach be taken even though the dollar threshold of Business & Professions Code section 6148, subdivision (a), which was enacted nearly a decade ago, is probably now outdated.