ATTACHMENT 2

Full Text of the Public Comments Received
on Proposed Rules in Batches 1, 2 & 3

THE STATE BAR
OF CALIFORNIA

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

October 5, 2006

Ms. Audrey Hollins
Commission for the Revision for
the Revision of the Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rules 1.0, 1.1 and 1.2.1

Dear Members:

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 1.0 – Purpose and Scope of the Rules of Professional Conduct, and supports the adoption of proposed Rule 1.0 as drafted.

COPRAC also has reviewed the provisions of proposed Rule 1.1 – Competence, and supports the adoption of the proposed rule. However, COPRAC calls upon the Commission to re-consider whether string citations to case law in the comments to rules are helpful to the practitioner.

COPRAC also has reviewed the provisions of proposed rule 1.2.1 – Counseling or Assisting the Violation of Law, and supports the adoption of this rule.

Thank you for consideration of our opinions.

Sincerely,

Steven Lewis, Chair
Committee on Professional
Responsibility and Conduct

Rule 1.0

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 1.0 Purpose and Scope of the Rules of Professional Conduct [1-100]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

We would ask that 1.0(a) be appended with the following, additional subsections:

(5) To provide guidance to lawyers; and
(6) To provide a basis for the discipline of lawyers.

Rationale for Comment 1:

We believe this expansion better describes the purposes of the rules.

Dissent 1:

The dissent believes that 1.0(b) should be deleted in its entirety.

Rationale for Dissent 1:

As written, the dissent believes it is not really accurate (e.g., what does "binding" mean and what happens when different state rules conflict?). Alternatively, the dissent proposes the following language: "These rules are intended to regulate the conduct of members of the State Bar and all other lawyers practicing in this state."

Dissent 2:

The dissent believes that 1.0(b)(2)-(3) should be deleted in its entirety.

Rationale for Dissent 2:

The drafters cannot predict the effect or impact of the rules. In addition, the willfulness requirement may be too narrow.

31 Kinross Drive
San Rafael, CA 94901-2419
(415) 457-2730
RichardFalk@comcast.net
October 13, 2006

Audrey Hollins
Professional Competence
State Bar of California
180 Howard Street
San Francisco, CA 94105-1614

Please forward this document to members of the committee reviewing the Rules of Professional Conduct including the Chairman Harry Sondheim, Honorable Ignazio Ruvolo, Stanley Lamport, and Mark Tuft.

Thank you very much for giving me the opportunity to speak about my thoughts and suggestions regarding the rules of competence. As I indicated to you in Monterey, I would think more about these issues and give you more information. That is the purpose of this letter.

Criminal Trial Lawyers

At the meeting, it became very evident to me that there are many different kinds of law that attorneys practice and that criminal trial lawyers (for both defense and prosecution) are just one subset of the general attorney population. So my comments may not have "rang true" to you if you primarily deal with, say, real estate law. Though I do not have broad personal experience in this matter, I strongly suspect that the vast majority of ethical violations or questionable conduct is associated with criminal law, especially when the stakes (possible punishment) are significant (some civil cases might also show some questionable conduct). In any event, please keep in mind that my perspectives as a former juror and my discussions with attorneys and lay people alike have almost exclusively concerned criminal law with trial lawyers before a jury. Also, the comments from lay people are primarily from those who have witnessed trials as jurors or in some cases through the media and are not people who were defendants at trial (since I would discount such perceptions due to the strong potential for bias).

Duties and the Paradigm of Winning

Stanley Lamport told me about the duties a lawyer owes to the client – namely, confidentiality, loyalty, fiduciary responsibilities and competence (thank you, Mr. Lamport, for pointing me in the right direction to the duties of attorneys). In addition to these duties, I have also looked at duties owed to others including candor/truthfulness, fairness, dignity/decorum. I have also examined other duties including diligence, communication, stating law truthfully, presenting evidence truthfully, producing

evidence, upholding the law, preserving decorum of tribunal and dealing fairly with others. I also looked at the duties of the prosecutor to seek justice, not necessarily to win cases, to have probable cause, to protect the accused's Constitutional right to counsel and to disclose exculpatory evidence.

I cannot find in any of these duties where an attorney should focus on winning a case in terms of obtaining a desired verdict. In fact, it seems to me that a focus on winning at the exclusion of finding the truth is a violation of the duties of competence and loyalty. If an attorney considers that winning a case by obtaining the verdict that they want is important, then the attorney may be more loyal to themselves than to their client. Winning a case can make an attorney feel accomplished and proud (if their ethics are distorted towards personal gain rather than following their heart and being truly loyal to their client) and, when publicized, allow them to charge more and gain a reputation as an attorney who can get a not guilty verdict (or have charges dismissed) for almost anyone. To the contrary, a proper defense requires a defense attorney to plan for contingencies and fully understand exactly what occurred during a crime and to understand why the prosecutor and jurors could potentially believe that their client is guilty beyond a reasonable doubt. An attorney is not competent unless they ask the sometimes difficult questions of their client to find out exactly what happened and furthermore what the intentions, motivations and values were for their client at the time of the crime (and currently). Without such clarity, a proper defense cannot be made and furthermore without preparing for contingencies (including a guilty verdict) the client will be ill-prepared emotionally and psychologically for sentencing. It is not only disloyal and not competent to the client, but is also unfair to people that the client may have hurt to not at least have a frank discussion with the client on what the client believes in their heart is the right thing to do.

A defense attorney cannot and should not force a client to do what is right or just, but a competent and loyal attorney will at least broach the subject and not use their client's fear as an excuse for the attorney to take power and make decisions (or give advice) because the attorney believes their decades of experience has them know what is right for their client (obviously, no one knows what is right for the client except the client herself). Even when the evidence of guilt is weak or when the client proclaims innocence, it is still critically important for an attorney to play "devil's advocate" in order to prepare a competent defense. The attorney can explain this reasoning to the client and assure the client that the attorney is loyal to the client, but an attorney's personal point of view regarding guilt or innocence is irrelevant. A competent and loyal attorney should tell their client that it is the jury that determines guilt through examination of the evidence and that the prosecutor is trying to prove guilt beyond a reasonable doubt so preparing a "defense" means understanding every possible detail of the client's life relevant to the crime no matter what it may be. This process has absolutely nothing to do with the client's nor attorney's belief in guilt or innocence.

It is interesting that an explicit duty for the prosecution is" to seek justice, not necessarily to win cases" while such a duty is not specified for the defense. Perhaps this asymmetry has led to some defense attorneys to believe that they should focus on winning cases.

One defense attorney I spoke with actually told me that he thought only the prosecution couldn't lie in court, with the implication that is was OK for the defense to do so!

The Case of O.J. Simpson

Though it has been many years since the murder trial of O.J. Simpson has taken place, the majority of the laypeople I spoke with brought up one or another example from that trial as illustrating what they despised about the legal system (in addition to their own personal experiences, if they were ever jurors). Though there were many specific incidents that were distasteful, the one that seemed to distill the primary issue was not the goading by the defense to have the prosecution ask O.J. to try on the blood-soaked-and-dried glove, but rather the reaction by the legal media and press to this tactic.

It is quite obvious to nearly everyone that lawyers dislike surprises and tend to be risk-averse so they will not generally ask questions for which they do not already know the answers and they will not generally goad the prosecution to do something unless they are absolutely certain of the outcome. People speculated about why the glove did not fit: whether it was the dried blood that shrank the glove, or the extra latex glove used over O.J.'s hand, or O.J's acting ability, or the fact that his face was blown up like a pufferfish the day before and the day of the "glove incident" (indicating some sort of allergic reaction to a drug, such as prednisone, that will swell extremities such as one's face, feet and hands). However, the legal commentators in the press, most of whom were lawyers, all commented on how foolish the prosecution was to "take the bait" and how the judge was not in control of his courtroom (including defense attorney behavior), but they all praised the defense attorneys for such a clever tactic, saying that this was why they were called "the Dream Team" and why they were the best lawyers in America. Since fellow attorneys considered such deception to not only be an effective tactic, but something to be admired, this single event seems to have been a significant turning point away from the public's earlier belief that though some attorneys may not have integrity, that most did.

The current rules of conduct do not have any rule against tarnishing the reputation of the legal system and its practitioners by admiring behavior that, at a minimum, comes to the edge of the rules of conduct (in this case, deceit). Perhaps if fellow attorneys publicly demonstrated their revulsion and embarrassment when their fellow attorneys treat the rules of conduct like traffic laws and attempt to manipulate the jury in any way, then not only would public perception start to turn, but peer pressure may influence the behavior of attorneys acting out-of-integrity.

The Meaning of Silence

During my speaking in Monterey, I did not recall hearing from all panel members even though most asked several questions of other speakers (all of whom were attorneys). If anyone has objections to what I have been suggesting regarding changes or additions to the rules of conduct (or to a preamble), then I encourage you to speak up. Your

objections are likely to be the same ones that many other attorneys might have to any tough changes that are made, so it is vitally important to address any concerns up-front.

Who's Responsibility

I have read the preamble of the ABA Model Rules of Professional Conduct (http://www.abanet.org/cpr/mrpc/preamble.html) and believe it is a good start in defining the context for California's rules of conduct. However, even the ABA preamble does not make clear that "shall not" rules are not traffic law. I won't repeat the arguments I made during my presentation, but such ideas need to be incorporated into the California preamble.

As you can probably tell from my written and oral communications to you, I am an engineer, not a lawyer, and writing clear and concise arguments is not my forte. This is part of the reason I do not want to simply write some sample rules or a preamble. The other reason is that this really has to come from you since changes in the rules of conduct will only be respected by attorneys if they believe such changes come from highly intelligent members of the bar who understand what it means to be an attorney. I am very willing to review whatever text is written and apply my own "litmus test of the heart", but the words themselves should come from the most respected and esteemed attorneys, namely you.

Sincerely yours,

(sent as E-mail so not signed)

Richard A. Falk

THE STATE BAR OF CALIFORNIA
PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

This form allows you to submit your comments by entering them in the text box below and/or by uploading files as attachments. You should discuss only **one** Rule per comment submission form. Select the proposed Rule from the drop down list.

Comments submitted are regarded as public record.

DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Peter H. Liederman

Professional Affiliation

*** City** San Francisco

*** State** California

*** email address** lawfirmberkeley@yahoo.com

A copy of your response will be sent to this email addr

Rule 1.0

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 1.0 Purpose and Scope of the Rules of Professional Conduct [1-100]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

Enter your comments here. To upload files proceed to the ATTACHMENTS section below.

Re: Comment B:
"Although not binding,opinion of ethics committees in California should be consulted for guidance on proper profession conduct". This is more a trap than a help. When should a lawyer consult such a committee? Of his own county or others, or all of them? How often should she consult them? Hourly? This guidance is so vague as to suggest it has not really been thought out.

Attachments

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Rule 1.0

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OCBA

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MEMORANDUM

Date: December 1, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct The State Bar of California

From: Orange County Bar Association ("OCBA")

Re: Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California Developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

Subj: Proposed Rule 1.0 Purpose and Scope of the Rules of Professional Conduct [1-100]

Founded over 100 years ago, the Orange County Bar Association has over 9,800 members, making it the second largest voluntary bar association in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared jointly by the Professionalism & Ethics and Administration of Justice Committees.

The OCBA respectfully submits the following concerning the subject proposed Rule:

*****

Comment:

Agree Only If Modified.

While the Orange County Bar Association agrees generally with the proposed changes. The Commission appropriately identified a policy issue presented by the proposed deletion of the current rule 1-100 language stating the rules shall not be "deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty." The Orange County Bar Association favors retaining the existing language, which is consistent with current case law. While a lawyers' conduct may be used as evidence against him or her where warranted by existing codes and case law, the violation of a Rule of Professional Conduct should not be the basis for such liability.

P.O. BOX 17777
IRVINE, CA 92623-7777
TELEPHONE 949/ 440-6700
FACSIMILE 949/440-6710
WWW.OCBAR.ORG

SD CBA SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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Audry Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Response to Request for Comments
Discussion Draft: Proposed Amendments to the Rules of Professional Conduct of the State Bar of California

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association, I respectfully submit the enclosed with respect to the pending Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California, developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We have also included separate comments (approvals) of the proposed Global Changes related thereto. This is in response to the State Bar of California's request for comments thereon distributed in June, 2006.

Please note that although the comments reflect the position of the San Diego County Bar Association, we have also included dissenting views offered by members of its Legal Ethics Committee. Given the tentative state of the proposed new and amended rules, we wished to provide as much input to the Special Commission as possible, with which to assist them in their efforts.

Thank you for providing our Association the opportunity to participate in this process.

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

● 1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 1.0.1 Definition of Law Firm [1-100(B)(1)]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

We approve the new/proposed rule in its entirety.

THE STATE BAR OF CALIFORNIA
PROPOSED RULES OF PROFESSIONAL CONDUCT
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DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Gerald G. Knapton

Professional Affiliation CA Bar; L.A. County Bar

*** City** Los Angeles

*** State** California

*** email address** gknapton@ropers.com

A copy of your response will be sent to this email address

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 1.0.1 Definition of the term "Law Firm" as used in the Rules [1-100(B)(1)]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

Enter your comments here. To upload files proceed to the ATTACHMENTS section below.

Is "of counsel" included or excluded in the definition of "Law firm"?
Please clarify this in the Comments.
If you cannot or will not indicate how to treat "of counsel" then at least specifically include this category of relationship by a parenthetical comment in the third sentence of Comment [1]: "However, if they present themselves to the public in a way that they are a firm (such as by an "of counsel" designation) or conduct themselves as a firm..."

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THE STATE BAR
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RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

October 5, 2006

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180 Howard Street
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Thank you for consideration of our opinions.

Sincerely,

Steven Lewis, Chair
Committee on Professional
Responsibility and Conduct

SD CBA SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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Thank you for providing our Association the opportunity to participate in this process.

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

● 1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 1.1 Competence [3-110]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

We approve the new/proposed rule in its entirety.

Dissent 1:

The dissent believes that 1.1(a) should be deleted.

Rationale for Dissent 1:

There is more to competence than contained in subdivision (a) and 1.1(b) covers the matter.

Dissent 2:

The dissent further believes that the word "loyalty" should be added to 1.1(b)(1).

RICHARD DIEBOLD LEE
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RICHARDDLEE@EARTHLINK.NET

October 15, 2006

Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
By Fax: (415) 538-2171

Re: **State Bar Rules Revision Commission**
Proposed CA Rule 1.1

Dear Ms. Hollins:

By attachment to this letter I am sending you my comments on the Commission's **Proposed California Rule of Professional Conduct 1.1**. Please note that I am submitting these comments in my individual capacity, not on behalf of any group or organization. Thank you for your consideration of my comments.

For the guidance of the Commission, a short biography may be appropriate. I have spent much of my professional life dealing with issues of ethics and professional responsibility. As a law professor for twenty years at UC Davis and Temple University, I regularly taught the course in professional responsibility. As Director of Professional Development at two major international law firms, I taught legal ethics and risk management to law firm members and firm clients' general counsel. I was a part of the Members Consultative Group of the American Law Institute Restatement of the Law Governing Lawyers. I currently serve on the Legal Ethics Committee of the Bar Association of San Francisco.

I participate regularly in national and international programs on legal ethics and risk management for ALI-ABA, PLI, and others. I pioneered the use in California of the University of Pennsylvania Center on Professionalism's materials on Professional Responsibility through an innovative series of statewide ethics programs for California Continuing Education of the Bar (CEB) when I was CEB's Director. For the past 15 years I have presented the ethics portions of the annual symposium held in London for American expatriate lawyers practicing in Europe, held under the auspices of CLE Europe, LTD (the Consortium for Continuing Legal Education in Europe) of which I am a co-founder).

Sincerely,

Richard Diebold Lee
Encl.

Proposed Rule 1.1: Competence
Richard D. Lee, San Francisco, as an individual

This proposed Rule 1.1 amends current rule 3-110 and continues the California prohibitions on failing to act competently. However, the Commission imports only a small portion of the language of ABA Rule 1.1 and, surprisingly, continues the much narrower California standard which requires a finding that an attorney's lack of competence be an intentional, reckless, or repeated act. As a result, the proposed Rule 1.1 imports only Comments [4] and [5] of the ABA Rule 1.1.

It is difficult to understand the Commission's reluctance to adopt the much clearer basic language of ABA Rule 1.1: "A lawyer shall provide competence representation to a client. Competence representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

This duty of competence goes back to 19th Century cases, including *Gambert v. Hart*, 44 Cal 542 (I872). Nothing in the duty's early case law formulation, nor in subsequent explicit iterations in the ABA Model Code of Professional Responsibility, DR 6-101(A) (1969) (Failure to Act Competently, nor in the earliest versions of the ABA Model Code Rule 1.1 (1980 through 1983), would suggest the highly restrictive language of current California rule 3-110.

Indeed, The Restatement of the Law Governing Lawyers, in its discussion of the standard of care owed by an attorney to the client (Sections 48 to 54, especially Section 52, The Standard of Care), makes clear the attorney's duty of competence is exactly that of any professional, that is "the skill and knowledge normally possessed by members of that profession or trade in good standing ..." citing the Restatement Second, Torts). In the words of Section 52, Comment b.:

> "Informed clients expect services of this kind; it is practical for lawyers to provide them; and the practice of the professional will most often be evidence of what clients need. As is generally true for professions, the legal duty refers to normal professional practice to define the ordinary standard of care for lawyers, rather than referring to that standard as simply evidence of reasonableness."

Thus nothing in the case law, nor in the development of the Model Code and Model Rules, that would support the narrow California competence standards. In this era of increased criticism of the role of attorneys in major corporate misdealings and of the increased demands by federal agencies and the public for attorneys to take on increased monitoring roles in legal matters, it is surprising that California remains without a universal rule of competence. **We urge the Commission to adopt the full competence standard of ABA Rule 1.1 and restore all the related ABA Comments.**

THE STATE BAR OF CALIFORNIA
PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

This form allows you to submit your comments by entering them in the text box below and/or by uploading files as attachments. You should discuss only **one** Rule per comment submission form. Select the proposed Rule from the drop down list.

Comments submitted are regarded as public record.

DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Peter H. Liederman

Professional Affiliation

*** City** San Francisco

*** State** California

*** email address** lawfirmberkeley@yahoo.com

A copy of your response will be sent to this email address

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 1.1 Competence [3-110]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

Enter your comments here. To upload files proceed to the ATTACHMENTS section below.

Discussion [3] should reflect the ABA model rule in that sometimes a small or pro bono practitioner must decide if it is more ethical to continue representation without certainty as to one's competence or withdraw knowing certainly that a client will then be unrepresented and helpless to secure his rights. Circumstances and the damage of abandoning a client are important to consider in evaluating what is professional ethics.

Attachments

You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the next to **Attachment**.

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Comments submitted are regarded as public record.

DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Phillip Feldman

Professional Affiliation Multiple but independent views

*** City** Sherman Oaks

*** State** California

*** email address** StateBarDefense@aol.com

A copy of your response will be sent to this email address

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 1.1 Competence [3-110]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

Enter your comments here. To upload files proceed to the ATTACHMENTS section below.

The Commission's tweaking of ABA 1.1 created needless loopholes and safe-harbors for incompetent lawyers. This decreases public protection and encourages law schools and the CA State Bar to tolerate incompetence in the legal profession.

The succinct ABA rule "A lawyer shall provide competent reprentation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonabley necessary for the representation", without more does not place an undue burden on the legal profession nationally and would not do so in CA.

Specifically, compromising the universal, national concept and definitions by harking back to present Rule 3-110's built in loopholes decreases professional competence in the legal profession. Well intentioned lawyers never intend to lack competence, they simply lack the insight or ability to understand the difference. Absence of repetitious conduct may be an important mitigating circumstance but CA ought not follow its own drummer to make it a requisite of the definition. Unlike other rules of professional responsibility a professional lacking in competence is always below the community standard even if the majority of his/her peers tolerate it.

Succinct rules with explanatory comments have worked well in 46 states so the Commission need not expand rules for explanatory purposes. Existing ABA comments

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Succinct rules with explanatory comments have worked well in 46 states so the Commission need not expand rules for explanatory purposes. Existing ABA comments appear to be broad enough to cover all pertinent aspects of the rule.

Perhaps part of the Commission's general approach explains repeated verbosity in proposed rule changes and deviation from greater acceptance of the national standard. The commission's charter did not appear to require it to concentrate on its take on California's common law approach to lawyer relations in general. Attempts to harmonize holdings in sui generis appellate decisions with proposed rules of professional responsibility is misguided. The reasons for decisions in particular reported decisions on unique fact/equity/law patterns may be a very pertinent factor in considering many things. They were not intended to, nor should they, reduce public protection, public respect for the rule of law, the profession which practices it and lawyer's self-respect.

In addition undue concentration on the fact that the rules are part of the basis of discipline for errant lawyers appears to have driven the commission off course. Professional responsibility's policy goals include the same public protection goals of discipline and pragmatic goals of the courts in implementing tort and contract policies. Doesn't professional responsibility have a third and different leg? To wit: to train, educate, re-educate, and guide lawyers into being true professionals.

The trend in favor of distrusting professionals with broad concepts of morality and ethics in favor of long-winded laundry lists did not originate in CA but our state has gone further in this regard than any other in the U.S. Present Rule 3-100 is a classic example of the antithesis of professionalism (development of the ability to exercise independent judgment) in favor of verbiage that convinces the average reasonable lawyer that it really doesn't matter (to them, their clients , the profession or societywhat they decide to do or recommend.

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October 23, 2006

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Amendments to the Rules of Professional Conduct
Comment On Proposed Revisions to Rule 3-110 (proposed Rule 1.1)

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed the proposed amendments to Rule 3-110 of the Rules of Professional Conduct (proposed Rule 1.1).

Rule 3-110 (Competence) requires lawyers to act competently, and to be able to handle the matters they accept. The revised Rule 1.1 is very close to the current California rule. Our Committee is not concerned about the language of the proposed rule, but is concerned about Comment [1]. The comment notes that the rule requires a lawyer to act with reasonable diligence **and promptness** in representing a client. This concept of promptness is not stated anywhere in the rule. It introduces a new concept into the rule which can invade the attorney-client relationship by subjecting the attorney to discipline for actions which the attorney and the client agree are in the best interests of the client. There are many circumstances where pursuing a matter promptly is to the disadvantage of the client. The rule should not impose a "promptness" requirement. Therefore, our Committee recommends that the words "and promptness" be deleted from Comment [1].

Sincerely yours,

Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

THIS IS A CONFIRMATION
COPY OF A DOCUMENT
SENT BY FACSIMILE

December 1, 2006

Audrey Hollins
Office of Professional Competence
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Via Fax: 415.538.2171

Re: Response to Request for Comments
Discussion Draft: Proposed Amendments to the Rules of Professional Conduct of the State Bar of California

Dear Ms. Hollins:

On behalf of the Orange County Bar Association, enclosed are comment forms in connection with the pending Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California, developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. This is in response to the State Bar of California's request for comments distributed in June, 2006 with an extended comment period of December 1, 2006.

Thank you for providing our Association the opportunity to participate in this process. Please contact me if you need any additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Julie M. McCoy
President

Enclosures

OCBA

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OC WOMEN LAWYERS ASSOC.

MEMORANDUM

Date: December 1, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct The State Bar of California

From: Orange County Bar Association ("OCBA")

Re: Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California Developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

Subj: Proposed Rule 1.1 Competence

Founded over 100 years ago, the Orange County Bar Association has over 9,800 members, making it the second largest voluntary bar association in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared jointly by the Professionalism & Ethics and Administration of Justice Committees.

The OCBA respectfully submits the following concerning the subject proposed Rule:

*****

Comment:

The OCBA supports this rule as written. Although the ABA Model Rule is more rigorous, it creates a risk that discipline could be imposed for relatively minor acts of negligence. A malpractice claim is a sufficient remedy and deterrent for such acts.

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THE STATE BAR
OF CALIFORNIA

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

October 5, 2006

Ms. Audrey Hollins
Commission for the Revision for
the Revision of the Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rules 1.0, 1.1 and 1.2.1

Dear Members:

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 1.0 – Purpose and Scope of the Rules of Professional Conduct, and supports the adoption of proposed Rule 1.0 as drafted.

COPRAC also has reviewed the provisions of proposed Rule 1.1 – Competence, and supports the adoption of the proposed rule. However, COPRAC calls upon the Commission to re-consider whether string citations to case law in the comments to rules are helpful to the practitioner.

COPRAC also has reviewed the provisions of proposed rule 1.2.1 – Counseling or Assisting the Violation of Law, and supports the adoption of this rule.

Thank you for consideration of our opinions.

Sincerely,

Steven Lewis, Chair
Committee on Professional
Responsibility and Conduct

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 1.2.1 Counseling or Assisting the Violation of Law [3-210]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

We propose modifying the two instances of the phrase "...any law, rule, or ruling of a tribunal..." to remove the word "rule," specifically to read "law or ruling of a tribunal."

Rationale for Comment 1:

There are many non-legally binding "rules" that should not control a lawyer's advice.

Comment 2:

The term "tribunal" requires definition.

Rationale for Comment 2:

The modified rule perpetuates the ambiguous term "tribunal" that exists in present CRPC 3-210. We would ask that it be defined akin to Model Rule 1.0(m) in the appropriate context.

Dissent 1:

The dissent would remove the phrase "or violation of any law, rule, or ruling of a tribunal,"

Rationale for Dissent 1:

As their might be limited circumstances where a client would, or even should be willing to do so, so long as the client is willing to suffer the consequences. In seems inapposite to permit an attorney to discuss the legal consequences of a proposed course of conduct toward that end, without permitting an attorney to counsel as to whether or not to so proceed.

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Los Angeles County Bar Association

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October 11, 2006

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Amendments to the Rules of Professional Conduct
Comment on Proposed Revisions to Rule 3-210

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed the proposed amendments to Rule 3-210 of the Rules of Professional Conduct. For the reasons stated by the Commission, our Committee agrees with the Commission's recommendation that California adopt proposed Rule 1.2.1.

Sincerely yours,



Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

Rule 1.0

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 1.4 Communication [3-500, 3-510]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

The modified rule is approved as proposed.

LACBA
Los Angeles County Bar Association

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261 S Figueroa St Suite 300
Los Angeles CA 90012-2533

MAILING ADDRESS:
P O Box 55020
Los Angeles CA 90055-2020

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WRITER'S DIRECT LINE:
(909) 380-7460
(909) 388-6881 fax
llau@scif.com

October 11, 2006

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Amendments to the Rules of Professional Conduct
Comment on Proposed Revisions to Rules 3-500 and 3-510 (Proposed Rule 1.4)

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed the proposed amendments to Rules 3-500 and 3-510 of the Rules of Professional Conduct (proposed rule 1.4).

Our Committee believes there is an inconsistency between the mandatory directive contained in proposed rule 1.4(a)(2) (a lawyer "shall" "reasonably consult with the client about the means by which to accomplish the client's objectives in the representation"), and comment 2 of the draft and comment 3 of the model rule. The comments imply that the directive is not mandatory.

Our Committee also recommends that proposed rule 1.4(a)(1) require that attorneys "reasonably inform" the client. Such language, along with the duty of competence, renders proposed rule 1.4(b) unnecessary.

With respect to Rule 1.4(c), our Committee recommends that the phrase "the lawyer's client" be changed to "the client".

With respect to Comment [1], our Committee recommends that the last sentence read: "This rule is not intended to change a lawyer's duties to his or her clients under Bus. & Prof. Code 2028 subd. (m) and (n), or any other rule of law."

With respect to Comment [4], our Committee recommends that the end of comment 4 should read: "'client' includes a person who possesses the authority to accept an offer of settlement or plea. In a class action, as used throughout this Rule 1.4, "client" means all the named representatives of the class, subject to modification of this requirement by the court."

With respect to Comment [6], our Committee recommends that the last sentence of Comment [6] be made a part of the rule itself. This sentence is a significant exception to the rule, and placing such a significant exception in a lengthy comment is likely to lead to unnecessary confusion.

Sincerely yours,

Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

U.S. Department of Justice

Professional Responsibility Advisory Office

Washington, D.C. 20530

October 13, 2006

Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, California 94105-1639

Re: Comments Submitted by the United States Department of Justice on Rules 1.4 and 5.5 of the Proposed New California Rules of Professional Conduct

Rule 1.0

Dear Ms. Hollins:

Thank you for this opportunity for the Department of Justice to comment about several of the proposed new California Rules of Professional Conduct. As you are aware, the Department of Justice is charged with responsibility for investigating alleged violations of, and otherwise enforcing, federal law. The Department's enforcement duties encompass criminal law as well as civil and other non-criminal law.

The Professional Responsibility Advisory Office of the Department of Justice (PRAO) advises Department of Justice attorneys and Assistant United States Attorneys about compliance with their professional responsibilities. Having worked closely with the United States Attorneys' Offices for the four federal districts in California, we would like to bring our concerns about two proposed rules to your attention, Rules 1.4 and 5.5. As you have requested, a discussion of each rule is set forth in a separate attached page.

We appreciate your consideration of these comments.

Sincerely,

Barbara Kammerman
Acting Director

Attachments

ATTACHMENT 1

Comment on Proposed Rule 1.4
Barbara Kammerman, Acting Director
Professional Responsibility Advisory Office
United States Department of Justice

Rule 1.4, as currently proposed, sets forth a lawyer's duty to communicate with his or her client. The rule requires a lawyer in a criminal matter to convey all offers to the client, and requires a lawyer in a civil matter to convey all written offers and all significant oral offers of settlement to the client. The Department is concerned that the proposed rule and its Comments, as written, will impose confusing, conflicting, or unnecessary requirements upon Department attorneys, who are already subject to internal rules and regulations about authority to accept or reject offers of settlement. For that reason, we propose an additional Comment to clarify the obligations of government lawyers.

Proposed Rule 1.4 currently provides in pertinent part:

> (c) A lawyer shall promptly communicate to the lawyer's client:
>
> (1) All terms and conditions of any offer made to the client in a criminal matter; and
>
> (2) All amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.
>
> Comment
>
> [4] As used in paragraph (c), "client includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.
>
> [5] Because of the liberty interests involved in a criminal matter, paragraph (c)(1) requires counsel in a criminal matter to convey to the client all offers, whether written or oral.
>
> [6] Paragraph(c)(2) requires a lawyer to advise a client promptly of all written settlement offers, regardless of whether the offers are considered by the lawyer to be significant. Notwithstanding paragraph (c)(2), a lawyer need not inform the client of the substance of a written offer of settlement in a civil matter if the client has previously indicated that the proposal will be acceptable or unacceptable, or has previously authorized the lawyer to

accept or to reject the offer, and there has been no change in circumstances that requires the lawyer to consult with the client. See Rule [1.2(a)].

[7] Any oral offers of settlement made to the client in a civil matter must also be communicated if they are significant.

We recommend that an additional comment be added after Comment [7] in recognition of the unique situation created when a governmental entity is represented. Unlike a non-governmental party, governmental entities typically have extensive, formalized procedures in place that govern the approval requirements for settlements. See, e.g,. 28 CFR § 0.160, et seq. (delegation of settlement authority from United States Attorney General to other Department of Justice officials). It would create confusion and the possibility of conflicting requirements if the Rules of Professional Conduct and the rules implemented by the governmental entity employing the attorney imposed upon that attorney different procedures regarding communication, acceptance, and rejection of settlement offers. Furthermore, unlike cases involving private clients, the rules, regulations and procedures for government attorneys representing government entities often vary depending on whether the attorney wishes to accept or reject an offer, which also illustrates the difficulty in applying a rule that varies from the governmental entity's procedures. See e.g., Appendix to Subpart Y immediately following 28 C.F.R. § 0.172, 60 Fed. Reg. 17456 (1995) (delegation of authority to United States Attorneys to reject all settlement offers and to approve settlements under a certain dollar threshold). We believe that it would be more appropriate to incorporate the rules of the governmental entity that employs an attorney rather than to impose a second set of potentially conflicting rules through the Rules of Professional Conduct.

Accordingly, we recommend that an additional Comment be added after Comment [7] and that the numbering of the remaining Comments be changed.

Comment

[8] Notwithstanding the foregoing Comments [4] through [7], when a lawyer is employed by and representing a governmental entity or the public, the lawyer will be in compliance with paragraph (c) if the lawyer acts in accordance with the rules, regulations and guidelines set forth by the employing governmental entity for the communication, acceptance, and rejection of settlement or plea offers.

~~[8]~~[9] A lawyer ordinarily should provide to the client the information that would be appropriate for a comprehending and responsible adult. However, it can be impractical to inform the client fully according to this standard, for example, when the client is a child or suffers from diminished capacity. See Rule [1.14]. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily the lawyer should address communications to the

appropriate officials of the organization. See Rule [1.13[. The lawyer may arrange a system of limited or occasional reporting with the client when many routine matters are involved.

~~[9]~~[10]In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. For example, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. This Rule is not intended to require a lawyer to disclose to a client any information or document that a court order or non-disclosure agreement prohibits the lawyer from disclosing to that client. This Rule is also not intended to override applicable statutory or decisional law requiring that certain information not be provided to criminal defendants who are clients of the lawyer. Compare Rule [1.16, comment __].

~~[10]~~[11]This Rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the lawyer to provide work product to the client shall be governed by relevant statutory and decisional law.

THE STATE BAR OF CALIFORNIA
PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

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Comments submitted are regarded as public record.

DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Peter H. Liederman

Professional Affiliation

*** City** San Francisco

*** State** California

*** email address** lawfirmberkeley@yahoo.com

A copy of your response will be sent to this email add

Rule 1.0

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 1.4 Communication [3-500, 3-510]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

Enter your comments here. To upload files proceed to the ATTACHMENTS section below.

Comment [2] is not useful guidance and should be left out.

Comment [3] first 2 sentences are unnecessary and superfluous to a rule of conduct.

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THE STATE BAR
OF CALIFORNIA

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

October 5, 2006

Ms. Audrey Hollins
Commission for the Revision for
the Revision of the Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 1.5.1

Dear Members:

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 1.5.1 – Financial Arrangements Among Lawyers. While COPRAC generally supports the rule, we request that the commission clarify the language of proposed Rule 1.5.1(a)(2) requiring the client to consent in writing to the division of the fee. As drafted the proposed Rule is unclear regarding whether the client has to sign the agreement to the division of the fee or simply confirm agreement in writing. COPRAC believes that consent from the client to the division of a fee via email should be acceptable, and recommends that the rule or comment, or perhaps another rule more generally defining "consent in writing," make this clear. In addition, COPRAC believes that, somewhere in the rules, perhaps in the general definitions, the Commission should set forth a definition of "informed written consent."

Thank you for consideration of our opinion in this matter.

Sincerely,

Steven Lewis, Chair
Committee on Professional
Responsibility and Conduct

Cc: Members, COPRAC

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 1.5.1 Financial Arrangements Among Lawyers [2-200]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

The Committee has differing thoughts about this rule. As the Committee saw it, the new rule has two big changes: (1) the requirement that the lawyers enter into a written agreement, and (2) a requirement that the client give written consent to the fee split as soon as the lawyers agree to fee split (as opposed to at a later point in time, perhaps when the fee splitting itself is proposed to take place).

The Committee had several members who liked the changes; several who favored changes, but different ones than those proposed; and at least one member who favored the existing rule.

Comment 1:

Those who liked the changes liked the idea of the client knowing about the fee split upfront, so that the client had the option of making decisions based on the proposed split. For example, in a pure referral fee case (where the attorney receiving the referral fee does nothing but make the referral), the client might want to know that his attorney is not receiving the entire fee. The client might conclude that his attorney might not work as hard because of the diminished fee. Those who liked the changes also thought that there is a benefit to requiring attorneys to have their fee splitting in writing, because it reduces unseemly disputes and litigation between attorneys over fees.

Comment 2:

Those who favor the rule "as is" do not believe that we should require all of these things in an ethical rule. An attorney might decide as a matter of best practice that he wants his fee splitting arrangement in writing to avoid disputes, but should we really mandate that in an ethical rule, and make the failure to do so an offense subject to discipline? Because the fee to the client can never be increased by virtue of the fee splitting, the client will not be at a disadvantage by the fee splitting, and, therefore, there is no compelling reason to require it sooner rather than later at the time of the fee splitting. The client always has the option, no matter what he or she is asked, to decline to consent. Those who support the existing rule also raised the issue of whether it is feasible to really pin down all the details of fee splitting at the beginning of the engagement, and memorialize it in two different writings. Arrangements can change as the case changes.

Comment 3:

A third group proposed a compromise. The rule could require disclosure to the client in a signed retainer agreement that the attorney may engage in fee splitting, and that the attorney will secure the written consent of the client before actually do so. This way the client is on notice of the possibility, and can ask questions, but the lawyer is not required to scramble to get two signed writings at a premature point in time.

Dissent 1:

The dissent believed that 1.5.1(a)(3) is unknowable. Arguably, in a competitive market, a fee sharing arrangement that does not correspond to effort will always raise the fee. The dissent therefore preferred the ABA approach to the rule, which limits fee-sharing to situations in which a lawyer shares in the work or responsibility. The dissent, however, did agree in allowing prospective clients to pay lawyers a limited reasonable fee for assistance in identifying the lawyer who is well-suited to the representation.

MEMORANDUM

Via email to: ***randall.difuntorum@calbar.ca.gov***

Date: October 15, 2006

To: Mr. Randall Difuntorum
Staff Counsel, Professional Responsibility
State Bar of California

From: Philip D. Humphreys, Chair
Legal Ethics Committee
Bar Association of San Francisco

Re: ***BASF Legal Ethics Committee comment on certain June 2006 State Bar Rules Revision Commission proposed rule revisions.***

Pursuant to your October 12th telephone conversation with Christopher Muñoz, Secretary of this Committee, we hereby submit the Committee's comment, as approved by Committee resolution, on seven of the proposed new or amended rules in the June 2006 released package.

For the record, we wish to specify that this comment package is submitted as the work product of the Legal Ethics Committee of the Bar Association of San Francisco. We wish to add that, following a review of the substance of these comments, the Board of Directors of the Bar Association of San Francisco has endorsed these work product comments of the Committee as appropriate expressions of the views of the Bar Association of San Francisco.

No inference of either approval or disapproval, by either the Committee or BASF, should be taken from the Committee's declination, at this time, of the opportunity to comment on the remaining twenty rules in the June 2006 package.

/s/ Philip Humphreys
Philip Humphreys

/by/
Christopher Muñoz

Rule 1.5.1 (CRPC Rule 2–200): *Financial Arrangements Among Lawyers.*

This proposed rule sets forth in paragraph (a)(2) the requirement that:

> "The client has consented in writing, either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure to the client that a division of fees will be made, the identity of the lawyers who are parties to the division, and the terms of the division; and"

The language "as soon thereafter as reasonably practicable" is vague and may vary from situation to situation. Since this is a proposed as a rule of discipline, with a disciplinary proceeding being commenced upon an interpretation by the disciplinary agency as to when the agency believes the "as soon as reasonably practicable" period should be, the Committee proposes that that language be modified to read:

> "either at the time the lawyers enter into the agreement to divide the fee *or before disbursement of the proceeds . . .* " (emphasis added).

THE STATE BAR OF CALIFORNIA
PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

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Comments submitted are regarded as public record.

DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Gerald G. Knapton

Professional Affiliation Partner, Ropers, Majeski; Member PRF

City * Los Angeles

State * California

email address * gknapton@ropers.com

A copy of your response will be sent to this email add

Rule 1.0

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 1.5.1 Financial Arrangements Among Lawyers [2-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

Enter your comments here. To upload files proceed to the ATTACHMENTS section below.

Current case law (Macabee) provides that written permission must be obtained but it can be obtained a bit later than at the time of retention as long as the client gives written permission before the fees are actually distributed. That is now the outside limit and I would like to see this accepted and explained in the Rule at section (2) by adding this language: (but in no event later that the disbursal of the funds) so the subsection then reads in part:
1.5.1...
(2) The client has consented in writing, either at the time the lawyers enter into the agreement to divide the the fee or as soon thereafter as reasonably practicable (but in no event later than the disbursal of the funds), after a full written disclosure..."

Attachments

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Comments submitted are regarded as public record.

DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Phillip Feldman

Professional Affiliation varied but individual

*** City** Sherman Oaks

*** State** California

*** email address** StateBarDefense@aol.com

A copy of your response will be sent to this email add

Rule 1.0

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 1.5.1 Financial Arrangements Among Lawyers [2-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

Enter your comments here. To upload files proceed to the ATTACHMENTS section below.

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, CA 94105
415-538-2167
415-538-2171 Fax

Comment 7 to ABA Rule 1.5 says it more succinctly and better. Attempts to harmonize current appellate decisions based on sui generis facts/law/equity is misguided and detracts from the broad, divergent goals of professional responsibility.

Attachments

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Margo A. Traeumer
64 Los Olivos Avenue #6
Daly City, CA 94014

October 19, 2006

California State Bar
180 Howard Street
San Francisco, CA 94105

Re: Professional Rule of Conduct 1.5.1

Dear Sir or Madam:

At the Monterey Conference it was suggested that people with comments about Rule 1.5.1 write to the State Bar. More than one ethics session mentioned the present rule is that attorneys may split fees as long as the client consents prior to distribution.

As a law student, I performed the research and crafted the argument to appeal a summary judgment against the client. Ms. Laureen Bethards wrote the submitted appeal and argued the case at court. The summary judgment was reversed, and the client eventually settled for $3.8 million. I do not remember the attorney's name or the case name, but I would think Ms. Bethards would.

Obviously, no attorneys would ask a client to consent to a law student writing an appeal. Ms. Bethards was an attorney throughout, and I was an attorney when the appeal was published and when the settlement was made. The attorney paid neither Ms. Bethards nor myself. One might say the attorney received what she deserved because her husband filed for divorce the day or the day after the attorney received the check.

My suggestion would be to allow the attorney who does the work to write a letter to the client as an introduction or informative letter if the attorney who has the signed client fee agreement fails to obtain the client's written consent. I view Rule 1.5.1 as protecting unscrupulous or greedy attorneys rather than the client. Perhaps the State Bar might consider that the client has impliedly consented if the introduction or informative letter is received, but there is no formal response from the client or the attorney.

Thank you for your consideration.

Very truly yours,

Margo A. Traeumer
CSB #170861

ORANGE COUNTY
BAR ASSOCIATION

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JULIE M. McCOY
PRESIDENT-ELECT
JOSEPH L. CHAIREZ
TREASURER
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LEX ROMANA
OC ASIAN AMERICAN BAR
OC BARRISTERS
OC DEPUTY PUBLIC DEFENDERS
OC TRIAL LAWYERS ASSOC.
OC WOMEN LAWYERS ASSOC.

MEMORANDUM

Date: December 1, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct The State Bar of California

From: Orange County Bar Association ("OCBA")

Re: Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California Developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

Subj: Proposed Rule 1.5.1 Financial Arrangements Among Lawyers [2-200]

Founded over 100 years ago, the Orange County Bar Association has over 9,800 members, making it the second largest voluntary bar association in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared jointly by the Professionalism & Ethics and Administration of Justice Committees.

The OCBA respectfully submits the following concerning the subject proposed Rule:

*****

Comment:

The OCBA's primary concern with the proposed Rule is the requirement that any agreement for division of fee be memorialized in writing between the lawyers. It seems that the primary purpose of the rule is to protect the client. Here, the proposed Rule provides that the client must receive full written disclosure of the fee division and consent in writing to the division. Thus, the requirement that the lawyers have a written agreement seems to serve no real purpose.

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MEMORANDUM

Via email to: ***randall.difuntorum@calbar.ca.gov***

Date: October 15, 2006

To: Mr. Randall Difuntorum
Staff Counsel, Professional Responsibility
State Bar of California

From: Philip D. Humphreys, Chair
Legal Ethics Committee
Bar Association of San Francisco

Re: ***BASF Legal Ethics Committee comment on certain June 2006 State Bar Rules Revision Commission proposed rule revisions.***

Pursuant to your October 12th telephone conversation with Christopher Muñoz, Secretary of this Committee, we hereby submit the Committee's comment, as approved by Committee resolution, on seven of the proposed new or amended rules in the June 2006 released package.

For the record, we wish to specify that this comment package is submitted as the work product of the Legal Ethics Committee of the Bar Association of San Francisco. We wish to add that, following a review of the substance of these comments, the Board of Directors of the Bar Association of San Francisco has endorsed these work product comments of the Committee as appropriate expressions of the views of the Bar Association of San Francisco.

No inference of either approval or disapproval, by either the Committee or BASF, should be taken from the Committee's declination, at this time, of the opportunity to comment on the remaining twenty rules in the June 2006 package.

/s/ Philip Humphreys
Philip Humphreys

/by/
Christopher Muñoz

Rule 1.8.10 (CRPC Rule 3–120): *Sexual Relations With Client.*

This rule continues the existing language of present rule 3–120, but in subparagraph (b)(3) it adds language, to wit:

> (b) A lawyer shall not
> ...
> (3) Continue representation of a client with whom the lawyer has sexual relations if such sexual relations cause the lawyer to perform legal services incompetently in violation of Rule 1.1, or if the sexual relations would, or would be likely to, damage or prejudice the client's matter.

ABA Model Rule 1.8 was amended in 2000 to include a prohibition on attorney-client sexual relations that did not predate the representation. It is a bright line rule. After reading the proposed comment to the new California rule and the comment to the ABA Model Rule, the Committee urges that the proposed provision (b)(3) be eliminated, and that California should adopt the bright line rule as set forth by the ABA.

Paragraph (b)(3) undermines the purpose of the rule:

Comment [1] to proposed Rule 1.8.10 states: "This Rule is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. . . . Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate." By limiting discipline only to those instances where the sexual relations **cause** the attorney to render incompetent legal services, or where they actually damage or prejudice the client's matter, the rule misses its own point, which is to prohibit lawyers from taking advantage of their clients, period, whether or not such sexual relations actually damage or prejudice the client's matter.

While it is important to discourage an attorney from doing anything that will hurt the client's case or cause the attorney to act incompetently, the purpose of this rule seems to us to be broader, *i.e.*, to preclude instances in which the attorney will obtain an unfair advantage over the client, regardless of actual effect on the client's case. It is not difficult to imagine a situation in which an attorney seduces or prevails upon a client, or takes advantage of a client's gratitude to have sex with the client while still rendering competent representation. At the conclusion of the case the client still may prevail, yet come away with feelings of betrayal or, even worse, with feelings of having been violated. The Committee doubts that the State Bar would similarly limit discipline of an attorney who had entered into a business transaction or other financial dealing unfair or disadvantageous to a client to only those instances in which the client's case was prejudiced, or in which the attorney acted incompetently. Similarly, although the potential emotional or psychological harm to a client from engagement in sexual relations with the client's

attorney is not a financial one, such harm nevertheless should be avoided in all situations, and not merely in those situations in which sexual activity effectively prejudices the client's cause.

Under the proposed rule, violations will be difficult to prove.

At least one member of the Committee, with experience in the representation of clients who had been subjected to sexual advances by their attorneys, reports that in situations in which the consent of the client to sexual relations is at issue, or where causation must be established to prove a violation, the attorney invariably will assert that the client consented to the sexual relations, and that the attorney's representation was not affected by those sexual relations. This sets enormous problems of proof for any client who feels violated by his or her attorney, because it reduces to a "he said, she said" evidentiary contest. A bright line rule makes it easier to determine when an attorney has violated such rule, and it discourages attorneys from thinking that they may have sexual relations with their clients as long as they are otherwise competent within the scope of their representation.

The proposed rule does not address other valid concerns expressed by the ABA.

The ABA comment correctly implies and observes that it is virtually impossible to determine when a client is giving informed consent to sexual relations with the attorney. In addition, the ABA comment expresses concern about the dissemination of otherwise confidential information to the extent that if the lawyer obtains such information in the course and context of a sexually intimate relationship, but not within the course and scope of the legal representation, the attorney–client evidentiary privilege may not attach to that information.

Furthermore, the ABA comment expresses doubt that an attorney who enters into a sexual relationship with a client will be able to maintain unimpaired professional judgment. The proposed California rule, on the other hand, would not discipline a lawyer whose judgment becomes impaired by the sexual relationship unless an actual adverse effect on the client's case could be shown.

Accordingly, the Committee would opt to mold the new rule along the lines of the bright line ABA Model Rule, and to revise paragraph (b)(3) to read:

> "(3) *Continue representation of a client with whom the lawyer has sexual relations if the sexual relations did not predate the representation.*" (emphasis added)

THE STATE BAR OF CALIFORNIA
PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

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Comments submitted are regarded as public record.

DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Alan Konig

Professional Affiliation

*** City** San Francisco

*** State** California

*** email address** ahkcal@comcast.net

A copy of your response will be sent to this email addres

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*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 1.8.10 Sexual Relations With Client [3-120]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

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PROPOSED RULE 1.8.10 (SEXUAL RELATIONS WITH CLIENT)

This proposed rule makes no sense and includes a provision that is contrary to the prophylactic purpose of the prohibition and contrary to the stated intent of the Commission to bring California in line with the nation.

The addition of the qualifying clause, ". . .if such sexual relations cause the lawyer to perform legal services incompetently in violation of Rule 1.1, or if the sexual relations would, or would be likely to, damage or prejudice the client's matter," to paragraph (b)(3) is unwarranted and inconsistent with the intent and purpose of the prohibition against having sexual relations with a client. It also makes, once again, California unique in its rules so that consistency does not exist between it and other national jurisdictions.

The proposed clause would cause any reasonable member of the public to form an opinion that the attorney profession views itself as elitist and above regulation since it has no absolute ban on sexual relations while such a ban is deemed appropriate for other professions such as medicine and collegiate academics.[1] The proposed clause only exacerbates the public's genuine concern about the State Bar's actual commitment to protecting the public instead of protecting the attorney and profession.

As the comments to the rule properly exhibit, the point behind the prohibition is to prevent an attorney from taking advantage of a client's "great emotional vulnerability and dependence" and when such action does occur, it constitutes "undue influence over clients or tak[ing] unfair advantage of clients." The focus of the prohibition is protection of the client and the client's individual rights and the rule must be written from the client's perspective and not the attorney's perspective. Yet, the addition of the clause to paragraph (b)(3) undermines the proper focus of the rule and makes it a hollow regulatory provision.

Taking advantage of a client by exploiting his or her weaknesses and vulnerabilities to engage in sexual conduct with him or her is a violation of the client much the same as sexual assault or battery is a violation of any individual. Both acts lack the required knowing and voluntary consent.

To the client who feels that he or she has been taken advantage of at his or her weakest moment by an individual he or she believed could be trusted and only had the client's best interests in mind, it makes not a bit of difference if the attorney's abuse of the client's trust negatively affected the underlying substantive matter being handled by the attorney. While a detrimental impact on the matter may be an aggravating factor, the primary injury to the client remains that the attorney violated one of the most sacred and fundamental relationships of fidelity and of fiduciary. The victim-client's injury is to his or her own mental and emotional state and that injury will remain independent of any adverse affect the attorney's actions had to the client's matter.

Imposition of the clause to paragraph (b)(3) minimizes the client's actual injury and attempts to equate it to one that can be substantively identified through review of the attorney's representation of the client. It tosses aside the true impact of the misconduct on the human element by completely disregarding the psychological impact the attorney's breach had on the

[1] *See, e.g.,* http://hr.vanderbilt.edu/policies/hr-033.pdf

client. It matters not to the client whose trust and faith has been violated that, in the process, the attorney was able to secure a financial benefit for the client in the client's case. The proposed clause essentially acts as a blank check for any attorney to take advantage of a client by advising the attorney, in advance of the misconduct, that the violation of the client's trust and faith will be overlooked and condoned if you obtained a good, or even somewhat reasonable, result for the client.

The proposed clause to paragraph (b)(3) is also unnecessary and redundant. The rules already provide that a failure to perform competently in a client's matter is grounds for discipline. Why create a separate disciplinable offense for a failure to perform caused by a sexual relationship with a client? Why does it matter that the cause of the failure to perform was a sexual relationship with the client? It is no different than a failure to perform that was caused by an attorney's greed, incompetence, dereliction, conflict of interest, or failure to understand the applicable law. Yet there are not separate disciplinable offenses for these causes of the failure to perform.

Overall, the proposed rule is troubling because of its content and tone. It almost reads as a rule that authorizes sexual relations with a client rather than either prohibiting them or, at least, discouraging them. In this respect, the rule only facilitates an attorney's mistaken belief that such relations are ethical and consensual. The rule, in any form, should include a comment that indicates that the assertion of "mutual consent" will be viewed with skepticism, if not rejected entirely, given the disparity in power, status, vulnerability, and need between the attorney and the client.

Sexual misconduct directed at clients by their attorneys is an abuse of professional power and a violation of the clients' trust. It jeopardizes the well-being of clients and its potential for harm is immeasurable. The proposed clause to paragraph (b)(3) is a bad proposal that only serves to shield an attorney from discipline when he or she takes advantage of a client, empowers the attorney to commit the misconduct, and disregards the interests of the actual intended beneficiary of the prohibition – the client and the public.

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Los Angeles County Bar Association

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October 23, 2006

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Amendments to the Rules of Professional Conduct
Comment on Proposed Revisions to Rule 3-120 (proposed rule 1.8.10)

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed the proposed amendments to Rule 3-120 of the Rules of Professional Conduct (proposed rule 1.8.10). The language of the proposed rule (Rule 1.8.10) tracks almost verbatim Business and Professions Code Section 6106.9 relates to sex with clients. The Committee agrees with and supports the Commission's proposals in rule 1.8.10.

Sincerely yours,

Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

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Comments submitted are regarded as public record.

Deadline to submit public comments was October 16, 2006.
However, this form may still be used to submit a late comment.

Your Information

Name Steve Gupta

Professional Affiliation Attorney, California Bar

*** City** Glendale

*** State** California

*** email address** steve@doctorgupta.com

A copy of your response will be sent to this email address

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*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 1.8.10 Sexual Relations With Client [3-120]

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Attorneys should be held to same high standards demanded from physicians in State of California. Any sexual relations with patients are grounds for loss of license for physicians, if the relationship started after patient-physician relationship was established. Not only that, a physician may not have sexual relations with a former patient for two years after the last date of physician-patient encounter.

Attorneys dealing with divorce, child custody, estate settlement after loss of one's spouse, are in a unique position. The client is under a lot of stress and is in vulnerable position. The client has difficult time asserting that he/she was gullible and was taken advantage of. The client should not have to prove that the attorney who took advantage of him/her provided inferior legal services.

Sexual relations with a client, and recently terminated clients, should be per se violation of ethics. Of course exceptions for pre-existing relationships are warranted.

We should help attorneys reach a level of ethics equal to other such professions. It will go a long way towards establishing public confidence in legal profession.

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NOTE: THE PUBLIC COMMENT PERIOD HAS ENDED.
If you are still intrested in submitting a comment, please contact Audrey Hollins at: (415) 538-2167

Your Information

Name Michael Crockett

Professional Affiliation Attorney - California State Bar

*** City** Hermosa Beach

*** State** California

*** email address** divad069@yaho.com

A copy of your response will be sent to this email address

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 1.8.10 Sexual Relations With Client [3-120]

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It is not necessary and it goes way too far. The current rule is perfect. The current rule allows sexual relations with the client to be looked at as circumstantial evidence in determining if the attorney provided competent legal counsel or not, and it is this which is rightfully the focus; Whether the attorney performed adequate legal services in the case, not whether the attorney may have performed in bed with the client. I think its just another example of the vocal and pushy few, trying to impose their will on the less vocal majority simply going about their business and minding their own for that matter. I learned about this proposed rule during an MCLE session that I attended from a woman is a former state bar prosecutor and who has helped draft this lovely proposed rule. The example she used to drive home her argument for the rules necessity was as follows: A judge, during a divorce case, had his eye on the female litigant. He called her into his office and essentially asked her out, after which time the judge openly claimed that he and the female litigant were dating. The former state bar speaker wasn't sure exactly how, but simply stated that "somehow" the judge ended up throwing the male litigant in jail amongst other very favorable treatment to the female litigant in the case. I believe this lends absolutely zero support to the proposed rule. First, a judge is in a completely different relation to the litigants than an attorney is. A judge must be fair and unbiased to either side, which here the judge was not. I would be 100% in favor of A ban on sex between judges and litigants. But not as between attorneys and clients. Secondly, we do not need an absolute ban on sex between an attorney and client in order to control or stop the behavior engaged in by, for example, this judge. Clearly the rules requiring the judge to be fair and unbiased have been violated. I would also suspect that he also made rulings and decisions in the case that could probably and easily be determined to be abuses of discretion, etc., etc., etc. Essentially what I'm saying is, if somebody does something wrong or in violation of an ethical rule, then we can hold them accountable under that rule, and the sexual relations between the attorney and client could even be admissible circumstantial evidence tending to show whether or not the rule in question may have been violated. But, we should not be making the "sex" the rule in question. We should not be automatically assuming that because two consenting adults have had sex that the attorney must have violated some rule or taken advantage of the client, and then look into maybe destroying this attorneys career by bringing him up on state ethics charges. This is utterly ridiculous and it is some nutty minority trying to demonize sex. We have tons of rules to account for client money, tons of rules regarding duties to the client, etc., etc., etc. If one of these rules is vilolated, then that should be looked into. But, private sexual relations between consenting adults is nobody's business. Didn't our nation's majority already make this clear during the President Clinton/Monica scandal. The former state bar speaker was

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COMMENT TO PROPOSED RULE 1.8.10:

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We have tons of rules to account for client money, tons of rules regarding duties to the client, etc., etc., etc. If one of these rules is vilolated, then that should be looked into. But, private sexual relations between consenting adults is nobody's business. Didn't our nation's majority already make this clear during the President Clinton/Monica scandal. The former state bar speaker was quick to point out that the ABA has already caved and adopted such a rule as well as some other bodies which I don't recall. Gee, how nice. The nutty minority is now looking to have California fall victim to their insane will. The former state bar speaker also pointed out that psychologist have such a ban in their profession. Well good for them. Furthermore, they shouldn't have such a ban either. It's ridiculous and unnecessary. If a psychologist has sex with an underage client, or has sex with an unconscious client on his couch (much like some dentist's have done to unconscious patients on painkillers awaiting oral surgery in the chair), then that's rape, that's not consensual sex between consenting adults and we can admonish that. But, we don't need a flat ban on sex between consenting adults. I know the tired old argument about how the client was vulberable and or the professional had some strange hold over the client. I hate to tell you, but many times it can be the opposite. It can be the client iniating sex, it can be the client trying to manipulate their way into the life of what they perceive as the wealthy attorney. Heh, I was vulnerable and inexperienced in college and I've had a girlfriend or two who has had a strange hold over me. Most marriages have a dominant partner and a weaker partner. So what. That's life, that's dating, that's relationships, and you can't ban life and you can't ban sex. I recall growing up as a child and young adult in the 1980's how horrible and out of control the Women's movement had become at the Zenith of its power. It had basically been comandeered by a radical sector of the lesbian movement and no longer had any resemblance to the women's movement of which it was an extension that had started in the 1960's. Sexual harassment lawsuits seemed to be the new fad. I remember Oprah doing a show on it. Minnesota had enacted an oggling law, whereby people could be arrested and charged with oggling if they stared at someone walking by. I always wondered, what if you got charged a second time? Would that make you a repeat oggler? Another state had been bringing ten, nine, and even eight year old boys up on criminal

charges for playground incidents where they may have pushed down a little girl and things of that sort. It was not until it had gotten to this horrible and insane point, that tons of women started standing up and saying, NO, you don't speak for me, I don't hate men, and I don't agree with you or where you've taken the movement. My point of bringing it up trhough, is that it is an example of how the nutty minority can impose its will on the majority. Sure, let's outlaw sex between attorneys and clients and potentially charge and or disbar attotneys who are found to have had sex (the demon) with a client. Sure, this will make the legal profession and the world a better place. I find this proposed rule horrible and insulting. It's bad enough that over 80% of CA attorney state bar dues go to funding state bar prosecutions to disbar us. CA is the worst state in the entire nation in this regard. Essentially, CA attorneys are being made to pay to disbar themselves. Now let's add sex to the hit list. Now we can start wasting our time and money to determine if an attorney has had sex with a client. If we really wanted to be helping people or the public, and enhancing the legal professions image in the minds of the public, the money wasted on this nonesense could be donated to charity, given to homeless shelters, toys for tots around the holidays. Anything would be better than how the money is currently spent. Furthermore, this public persecution of attotneys only lowers and degrades the public image of the profession and lower and degrades any attorney who might find themself ensnared in such garbage. It is not necessary and it goes way too far. To reiterate, the current rule is perfect. The current rule allows sexual relations with the client to be looked at as circumstantial evidence in determining if the attorney provided competent legal counsel or not, and it is this which is rightfully the focus; Whether the attorney performed adequate legal services in the case, not whether the attorney may have performed in bed with the client.

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October 11, 2006

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Amendments to the Rules of Professional Conduct
Comment on Proposed Revisions to Rule 3-400

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed the proposed amendments to Rule 3-400 of the Rules of Professional Conduct.

Our Committee supports the Commission's recommendation to adopt Rule 1.8.8, subject to the recommendation that the Commission add a reference in the Comments to California Business & Professions Code Section 6090.5. Reference to that section is appropriate for the sake of completeness.

Sincerely yours,

Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

THE STATE BAR OF CALIFORNIA

— COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION

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October 4, 2006

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Proposed New Rule 2.4

Dear Ms. Hollins:

The State Bar's Committee on Alternative Dispute Resolution has been following the work of the Commission for the Revision of the Rules of Professional Conduct with respect to Proposed Rule 2.4 (formerly known as Proposed Rule 1-720) of the Rules of Professional Conduct (the "Proposed Rule"). On February 18, 2004 we wrote to the Commission to express our opposition to the Proposed Rule, albeit in an earlier draft form.

After that letter was written, the Commission continued to work on the Proposed Rule and narrowed the scope to a considerable extent. Only selected portions of the Judicial Council Standards for Mediators in Court Connected Mediation Programs ("Mediator Standards") and the Ethics Standards for Neutral Arbitrators in Contractual Arbitration ("Arbitrator Standards") are now included. Nevertheless we continue to have serious concerns about the Proposed Rule.

On April 25, 2006, we again wrote to the Commission, urging it reconsider paragraphs (C) and (D) of Proposed Rule 1-720 (now paragraphs (c) and (d) of Proposed Rule 2.4), rather than soliciting public comment on the Proposed Rule.

Now that Proposed Rule 2.4 has been released for public comment, we write to reiterate our concerns and also to voice a concern about paragraph (b). In so doing, we wish to state that we support the goal of Proposed Rule 2.4. We believe that all attorney-neutrals should adhere to the minimum standards of conduct promulgated by the Judicial Council as well as to the aspirational standards of professional organizations of lawyers and ADR providers. These include the Model Standards of Conduct for Mediators adopted by the American Arbitration Association, American Bar Association and Association for Conflict Resolution, and the Code of Ethics for Arbitrators in Commercial Disputes prepared by a joint committee of the American Arbitration Association and American Bar Association. Our concern is simply that the Judicial Council standards should not become a basis for attorney discipline in California.

SUMMARY OF COMMENTS

Our concerns are summarized as follows:

1. Enforcement of paragraphs (b) and (c) would be impossible in many cases, because of the confidentiality of mediation.
2. The State Bar disciplinary process was not intended to be a remedy for violation of the Mediator Standards.
3. The State Bar should not attempt to enforce as attorney disciplinary rules ethical standards designed for other professions.
4. The Proposed Rule would create two classes of neutrals and would expose attorney-neutrals to the filing of frivolous complaints for violation of the Rules of Professional Conduct.
5. New civil causes of action may be created, contrary to the intent of the Standards and the Rules of Professional Conduct.
6. The Proposed Rule may discourage attorneys from serving as neutrals on a volunteer basis.

DISCUSSION

1. Enforcement of Paragraphs (b) and (c) Would Be Impossible in Many Cases Because of the Confidentiality of Mediation.

All communications during the course of a mediation or a mediation consultation are confidential. *(See Evid. Code §§1119 and 1122.)* The statutes express a strong public policy of this State.[1]

The term "mediation consultation" is defined as "a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator." (*See Evid. Code § 1115(c).*)

Because of the confidentiality of mediation, enforcement of certain parts of paragraphs (b) and (c) of the Proposed Rule would as a practical matter be impossible in many cases. We refer in particular to rule 1620.5 concerning the mediator's

[1] As stated in *Foxgate Homeowners' Association v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14, "The legislative intent underlying the mediation confidentiality provisions of the Evidence Code is clear. The parties and all amici curiae recognize the purpose of confidentiality is to promote 'a candid and informal exchange regarding events in the past .... This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.' (Nat. Conf. of Comrs. on U. State Laws, U. Mediation Act (May 2001) § 2, Reporter's working notes, ¶ 1; see also Note, Protecting Confidentiality in Mediation (1984) 98 Harv. L.Rev. 441, 445. ['Mediation demands ... that the parties feel free to be frank not only with the mediator but also with each other.... Agreement may be impossible if the mediator cannot overcome the parties' wariness about confiding in each other during these sessions.'].)"

impartiality and rule 1620.6 regarding truthful representation of the mediator's background to the participants. To the extent that the mediator's statements during the mediation or mediation consultation would be put at issue, testimony from the mediator and the participants in the mediation would be necessary in order to investigate, prosecute, and defend against an alleged violation of the Proposed Rule. However, it may be impossible to obtain that testimony.

We believe that the recent experience of the Judicial Council in dealing with enforcement of the Mediator Standards is instructive. Those standards were adopted in 2002, effective January 1, 2003. As part of the adoption of those standards, California Rules of Court, Rule 1622(a) was also adopted. That rule requires superior courts to "establish procedures for receiving, investigating, and resolving complaints that mediators who are on the court's list or who are recommended, selected, appointed, or compensated by the court failed to comply with the [Mediator Standards]." The rules of court did not specify how superior courts should address complaints against mediators in a manner consistent with the mediation confidentiality statutes. Several courts requested guidance.

In 2005 the Judicial Council amended rule 1622 and adopted new rules for all courts to follow concerning complaints against mediators on their panels for alleged violation of the Mediator Standards. First, in recognition of the confidentiality of mediation, the new rules provide that the complaint process must be confidential. (*Cal. Rule of Court 1622.2*) Second, the rules require mediators in court-connected mediations to agree that if an inquiry or a complaint is made about the conduct of the mediator, mediation communications may be disclosed solely for purposes of the complaint process. (*Cal. Rule of Court 1621(b).)* This rule is intended to ensure that the absence of a mediator's agreement to disclosure of mediation communications does not impede the resolution of a complaint against the mediator. Finally, the rules require that the mediator obtain contact information from all participants, retain such information for two years, and provide it to the court upon request. (*Cal. Rule of Court 1621(a).*) This procedure enables the court designee handling a complaint to contact participants and request information. However, in order to investigate and process a complaint against a mediator, the court must not only contact all of the participants and ask for their cooperation; the court must also obtain waivers of confidentiality. In the absence of waivers from *all* participants, the matter cannot proceed.[2] (*See Evidence Code §1122.*) The ADR Committee anticipates that, although a party who has a complaint against a mediator may agree to waive confidentiality, the opposing party in the mediation is unlikely to have the same incentive, and therefore may not agree to the

[2] The Council had originally proposed that the mediator present the parties, at the outset of the mediation, with a form whereby they could elect to waive confidentiality in the event that a complaint were later to be made against the mediator for violation of the Mediator Standards. The Council withdrew this proposal after receiving a multitude of comments to the effect that it would have a chilling effect on the mediation process.

waiver. Thus, confidentiality will remain a major obstacle to the investigation of complaints against mediators, even with the newly adopted court procedures.[3]

The Commission should not assume that the State Bar would or even could choose to follow the same process that the Judicial Council has laid down for the courts. As noted above, the ADR Committee does not believe that process will prove to be an effective means of dealing with mediation confidentiality. Moreover, a confidential complaint process would be contrary to the State Bar's disciplinary system, which requires open hearings. The likely result would be that, even though the Mediator Standards would become applicable to attorney-mediators, enforcement would prove to be illusory in a great many cases. Complaining parties would be disappointed to learn that they had no actual recourse. The mediator may also be put in an untenable position. Paragraph (c) of the Proposed Rule incorporates California Rule of Court 1620.4, which requires a mediator to comply at all times with the applicable law concerning confidentiality. A mediator who is accused of violating one of the other provisions of paragraph (c) would – in the absence of confidentiality waivers from all the participants – be unable to present any confidential mediation communications in his or her own defense, without independently violating the Proposed Rule.

We believe that all that would effectively be accomplished by paragraphs (b) and (c) would be the inclusion of rules 1620.8 [marketing] and 1620.9 [gifts]. It does not seem to be worthwhile to create a disciplinary system for attorney-mediators that could only be used to enforce those standards. As discussed below, however, the ADR Committee does not believe that *any* of the Mediator Standards should become a basis for attorney discipline in California.

2. <u>The State Bar Disciplinary Process Was Not Intended to be a Remedy for Violation of the Mediator Standards</u>.

The purpose of the Mediator Standards is to set minimum standards of conduct for mediators in the court programs and to promote public confidence in the mediation process and the courts. Courts that receive complaints against mediators (and it is noteworthy that there have been exceedingly few) will, if necessary, counsel the

[3] Some may view the confidentiality of mediation as an obstacle to be removed, but the absoluteness of mediation confidentiality was the result of a deliberate policy choice on the part of the Legislature. See *Rojas v. Superior Court* ((2004) 33 Cal.4th 407, 422: "More broadly, the Court of Appeal's construction is inconsistent with the overall purpose of the mediation confidentiality provisions. As noted above, 'confidentiality is essential to effective mediation,' (*Foxgate, supra*, 26 Cal.4th at p. 14) and to 'ensur[e] confidentiality, [our] statutory scheme . . . unqualifiedly bars disclosure of' specified communications and writings associated with a mediation 'absent an express statutory exception.' (*Id.* at p. 15.) In making its 1997 recommendation, the Commission explained that the then-existing 'statutory scheme' regarding mediation confidentiality 'ha[d] ambiguities that cause[d] confusion.' (Recommendation on Mediation Confidentiality, *supra*, 26 Cal. Law Revision Com. Rep., *supra*, at p. 414.) The changes the Commission recommended, which the Legislature adopted, were designed to 'eliminate[]' these ambiguities in order '[t]o further the effective use of mediation' by ensuring the 'candor' that 'is crucial to [its] success.' (*Id.* at p. 431.)"

mediator and perhaps suggest additional training. In an extreme case, the court may remove the mediator from the panel. In no event would a violation of the Mediator Standards affect an attorney-mediator's ability to practice law.[4]

3. The State Bar Should Not Attempt to Enforce As Attorney Disciplinary Rules Ethical Standards Designed for Other Professions.

Arbitration and mediation are professions that are separate and distinct from the practice of law. They are practiced both by attorneys and non-attorneys. The fact that attorneys and retired judges frequently serve as arbitrators and mediators does not justify the State Bar in seeking to regulate their activities as arbitrators or mediators.

It is not uncommon for attorneys to engage in the practice of another profession, either concurrently with or after their retirement from the practice of law. For example, attorneys may also practice accountancy or act as licensed real estate brokers. Each of these professions has its own ethical standards, and violation of those standards may cause harm to the public. Yet the State Bar has never to our knowledge sought to enforce the ethical standards of those professions by incorporating them into the Rules of Professional Conduct.[5]

By enforcing the Arbitrator Standards and the Mediator Standards against attorneys, the State Bar would effectively be regulating the conduct of members in the practice of professions over which it would otherwise have no jurisdiction. It would also reinforce the perception that the State Bar views arbitration and mediation as the practice of law. We know that the State Bar has not actually taken this position, and that is well aware that it does not have the authority to define mediation or arbitration as constituting the practice of law. Nevertheless, we feel that it is important to avoid taking any action that would cause both members and the public at large to believe that the State Bar is attempting to extend its own jurisdiction.

Rule 2.4

[4] The ADR Committee also questions the inclusion of "settlement conference" in all of the provisions of paragraph (c), except for those governing confidentiality. The Mediator Standards were designed for mediations, which are governed by statutes and rules that differ from those governing settlement conferences. See *Foxgate*, 26 Cal.4th at 11, fn. 8; *Travelers Casualty and Surety Co. v. Superior Court* (2005) 126 Cal.App.4th 1131

[5] The only situation of which we are aware in which the State Bar has sought to enforce the ethical standards of another profession is current Rule 1-710, which makes attorneys acting as quasi-judicial officers subject to Canon D of the Canons of Judicial Ethics. The Rule is justified because attorneys are not subject to the jurisdiction of the Commission on Judicial Performance.

4. The Proposed Rule Would Create Two Classes of Neutrals and Would Expose Attorney-Neutrals to the Filing of Frivolous Complaints for Violation of the Rules of Professional Conduct.

Under the Proposed Rule, attorney-neutrals will be subject to disciplinary action for violation of the Mediator Standards and the Arbitrator Standards. Non-attorney neutrals would not be subjected to any disciplinary action, except, as discussed above, in the case of violation of the Mediator Standards in a court-connected mediation.

Opportunities will also be created for disappointed parties in arbitrations and mediations to make unfounded complaints against attorney-neutrals. With regard to arbitration, the award of an arbitrator is generally final and not subject to appeal. Arbitrators are not required to follow the law. The grounds for vacating an arbitration award are limited. Left without a judicial remedy, the losing party in the arbitration may instead decide to file a disciplinary complaint against the arbitrator with the State Bar.

The broad nature of certain of the Arbitrator Standards that are included in the Proposed Rule will afford more than ample opportunity for the filing of frivolous complaints. For example, using Standards 5 or 6, the losing party may allege that the arbitrator lacked impartiality. Or, under Standard 7 the claim might be made that the arbitrator failed to disclose a matter "...that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial..."

In the case of mediation, parties may settle cases and then have second thoughts about their decisions. These remorseful litigants may sue their lawyers for malpractice, claiming that they were not properly advised. Mediators may then be joined as defendants in these cases based upon specious allegations of bias or partiality. The Proposed Rule will simply invite such persons to file a complaint with the State Bar as well as fueling their appetites for frivolous litigation.

5. New Civil Causes of Action May Be Created, Contrary to the Intent of the Standards and the Rules of Professional Conduct.

Both the Arbitrator Standards and the Mediator Standards expressly disclaim any intent to create any new civil cause of action. Yet, by incorporating major parts of the Mediator and Arbitrator Standards into the Rules of Professional Conduct, the State Bar may do exactly that. Even if a new cause of action is not technically created, the Proposed Rule could be viewed as defining the standard of care for attorney-neutrals, and is likely to form the basis of a new cause of action. And by creating the perception that arbitration and mediation are the practice of law, the State Bar would open the way for the filing of *legal* malpractice actions against neutrals, or at the very least the filing of actions for alleged malpractice committed by a neutral.[6]

[6] See *Furia v. Helm* (2003) 114 Cal.App.4th 945, wherein an attorney was sued for legal malpractice after he had attempted to act as mediator while also acting as an attorney for a party.

6. The Proposed Rule May Discourage Attorneys from Serving as Neutrals on a Pro Bono Basis.

There are a number of dispute resolution programs throughout the State that operate as non-profit organizations. These organizations provide valuable services for the resolution of disputes of all kinds, including complaints arising from neighborhood situations, domestic violence, family disputes, and the like. They depend upon the services of volunteer neutrals, and many attorneys donate time serving as neutrals in these programs. The Mediator Standards apply *only* to court-connected mediations. By incorporating certain standards into the Rules of Professional Conduct, those standards would apply outside the court-connected context, *and* form the basis of disciplinary action. The exposure to disciplinary action and civil lawsuits because of a complaint by a dissatisfied party is likely to discourage attorneys from continuing to serve community mediation and other programs that operate as non-profit organizations.

In addition, as we have discussed in Point 1 above, every court that has a mediation program is required to have a procedure in place for the handling of complaints against mediators (although the procedure may not prove to be particularly effective.) Therefore, under the Proposed Rule, an attorney-mediator serving in a court-connected mediation might be required to defend his or her actions in *two* disciplinary forums. This exposure, in addition to the exposure to civil liability, may discourage attorneys from volunteering to serve on court mediation panels, particularly in counties such as Los Angeles which require that substantial amounts of *pro bono* time be devoted to cases.

We appreciate the Commission's attention to this letter. If the ADR Committee can be of any further assistance, please feel free to contact us.

Disclaimer

This position is only that of the State Bar of California's Committee on Alternative Dispute Resolution. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Very truly yours,

/s/

John Toker
Chair, 2005-2006
The State Bar of California
Committee on Alternative Dispute Resolution

October 13, 2006

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Audrey Hollins
Office of Professional Competence,
Planning and Development
THE STATE BAR OF CALIFORNIA
180 Howard Street
San Francisco, CA 94105

RE: Proposed State Bar Rule 2.4

Dear Ms. Hollins:

This letter is provided as comment upon Proposed State Bar Rule 2.4.

Initially, we would like to express our disappointment that neither ADR Services, Inc., nor any other alternate dispute resolution provider of which we are aware, has been notified of the existence of this proposal since its publication on the State Bar website last June. Had it not been for the alert attention of retired State Bar Court Judge Michael Marcus, who is a private neutral with this firm, the comment period may have expired next week without any input from the ADR industry.

Background

ADR Services, Inc. is the fastest growing provider of private dispute resolution services in California, with offices in San Diego, Century City, downtown Los Angeles, San Francisco and Las Vegas, offering the services of more than 140 neutrals, more than half of whom are retired from either the California Superior Court or Court of Appeal.

The private dispute resolution industry as a whole takes great pride in the quality of its services to its users and the consequential benefits provided to the judicial system and the taxpayers of California. Last year, ADR Services' California offices responded to more than 6,000 requests for the private resolution of disputes. Its Los Angeles offices alone calendared 3,375 mediations, 500 arbitrations and 21 private trials (Const. Art. 6, Sec. 21). Had these same events instead taken place in the Superior Court, even assuming equal efficiency and equal effectiveness they would have consumed more than 780 days of judicial time. At $7,500/day to run a trial courtroom (including the cost of judicial and court staff compensation and benefits), this translates into a savings of $5,850,000 of taxpayer dollars. Parties and counsel who used the services of private providers were likewise benefited by the time and expense saved in waiting for a judge with a sufficient window of time to preside over a trial or to assist meaningfully in its settlement.

The Compensation of Lawyer Neutrals Under the State Bar Act

Historically, the compensation of private neutrals has been with the mutual agreement of the parties and their counsel.

The Legislature has determined that the State Bar Board of Governors may formulate and enforce Rules of Professional Conduct with the approval of the Supreme Court (B&P 6076). There is no mechanism for bypassing this section. Yet, proposed State Bar Rule 2.4 (c) and (d) states that all lawyer neutrals "must comply" with standards for mediation and arbitration established by the Judicial Council of California, specifically including standards on compensation and gifts, as well as marketing. By subjecting lawyer neutrals to the (amendable) rules of the Judicial Council, the Bar relinquishes both its own authority to formulate rules as well as the Supreme Court's role in approving them.

Like the State Bar, the Judicial Council has that authority provided under the Constitution and by statute. Effective July 1, 2002, the Legislature adopted CCP 1281.85, which required the Judicial Council to adopt Ethics Standards for Neutral Arbitrators in Contractual Arbitration. Among other things, the Legislature authorized the Council to establish standards on the taking of gifts (CCP 1281(a)). The statute is otherwise silent on the general matter of neutral "compensation." Although the Council adopted a provision called "Standard 16, Compensation," it did not attempt to set any limits on the amount of money a private arbitrator could charge. Std 16 (a) and (b) prohibits arbitrators from charging contingency fees and requires full written disclosure of the arbitrator's fees.

The Legislature has not adopted a similar statute concerning *private mediation.* Nevertheless, effective January 1, 2003, the Judicial Council adopted Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases. We do not quarrel with the Council's right to do so, as these rules apply only to court-established programs for low-cost mediation conducted by volunteers, including, in some cases, non-lawyers. Thus, Std 1620.9, Compensation and Gifts, states: "Compliance with law. (a) A mediator must comply with any applicable requirements concerning compensation established by statute or the court." Because the Judicial Council rules of conduct were specifically designed for the courts' pro-bono mediation programs, proposed Rule 2.4(c) requiring private neutrals to comply with these rules at the very least will cause confusion, necessitating clarification by the Judicial Council.

As Std 1620.9(a) is now written, what would be the "*applicable requirements* concerning compensation" for private mediators? At least three interpretations are possible: (1) As there are no *current* compensation requirements applicable to private mediators, there could be none in the future. If that is the Bar's intention, Std 1620.9(a) has no practical

application and compliance with it should not be required. (2) The second possibility is that "applicable requirements" under Std 1620.9(a) would pertain only to those requirements established by statute. As no such statute exists, a new State Bar rule and Judicial Council standards are not needed to tell lawyer neutrals to obey the law. (3) The third possibility is that "applicable requirements" would refer to those requirements established by local court rules or policy. But what would that mean exactly? Would it mean that private mediators will be bound by the extremely modest compensation rates already adopted by some county courts for the court connected mediation programs (a result that would be a financial disaster for the private dispute resolution industry)? Would it mean that private mediators will be bound by local fee limitation rules or policies yet to be adopted by the 59 county courts? Or would it perhaps mean that that at some point a uniform compensation rule for private mediation may be adopted by the Judicial Council? Presumably, the term "applicable requirements" would have to mean something in reference to private neutrals, and likely would require future definition by the Judicial Council. Surely the Bar cannot intend private mediators to be bound by standards so uncertain, yet that is what proposed Rule 2.4 does.

The simple fact is that there is no legal or historic precedent for a state agency to enact compensation rules for private industry without prior legislative approval. Except for capping the percentages of recovery charged by lawyers in certain cases (e.g. professional negligence suits brought against health care providers (B&P 6146, et seq.)), even the Legislature has not attempted to regulate the hourly fees charged to a client. Presumably because it has no legislative charter to do so, the State Bar does not set the rates of compensation for practitioners in any other field of law.

Proposed Rule 2.4(c) on compensation must at the very least be clarified, lest private mediators be required to live under a sword of Damocles of future action by the Judicial Council or the courts as to compensation.

The Marketing of Private Neutrals

Rule 2.4(c) also provides that private mediators must comply with mediation Std 1620.8. That standard states in pertinent part: "(b) Representations concerning court approval. A mediator…must not indicate that he or she is approved, endorsed, certified, or licensed by the court." (There is no similar standard for arbitrators.) As a rule for court connected volunteers, the standard makes perfect sense. A lawyer should not be permitted to trade on the name of the court (e.g. "official mediator of the Superior Court") in order to imply a connection or status that he/she does not have. Retired judges, by contrast, have a long-standing association with the court, which presumably is an important reason for their retention as private neutrals. It is also why they are commonly appointed by sitting judges to serve as special masters and referees under CCP 638 and 639. By marketing themselves as retired judges with years of experience, including various assignments,

elections and appointments by their peers (e.g. "Supervising Judge of Family Law"), retired judges suggest a previous validation, or "approval" or "endorsement" by the court. Whereas the implication of a validating connection with the court would be improper for a mediator volunteer, there is no reason that it should be improper for a retired judicial officer. Reference to this standard should be deleted.

Conclusion

Private dispute resolution in California saves the court system thousands of days of judicial time and tens of millions of taxpayer dollars annually. Despite the myth of a "private system for the rich," a very substantial number of our users are consumer lawyers. They will tell you that private dispute resolution is especially important for clients with modest resources. By reducing or eliminating expert witness fees, substantial discovery costs, court fees and other expenses that may be incurred absent a settlement, they are able to resolve their disputes expeditiously and at a fraction of the expense of going to trial.

We fear that the unnecessary regulation of private dispute resolution, particularly in the area of compensation, would drive lawyer neutrals into other, more lucrative, fields of law practice, thereby virtually killing an industry that has greatly benefited California.

Moreover, by the adoption of Rule 2.4 the State Bar would create rules and standards that apply to only a small subset of its members. It would do so by subjecting them to regulation by a different state agency whose rules may be amended in the future without approval by the State Bar or the Supreme Court. This is all the more disturbing because there is no compelling state interest in limiting the compensation of neutrals or in stifling the private resolution of disputes.

We strongly oppose any transfer of rulemaking authority from the State Bar to the Judicial Council. Should this rule be sent to the State Bar Board of Governors, at the very least all references to "compensation" and "marketing" should be deleted, as well as references to mediation Std 1620.8(b) (marketing) and 1620.9(a) (compensation).

Very truly yours,
ADR SERVICES, INC.

Gregory C. O'Brien Jr.

GREGORY C. O'BRIEN, JR.
Superior Court Judge, Ret.

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October 16, 2006

Audrey Hollins
Office of Professional Competence,
Planning and Development
THE STATE BAR OF CALIFORNIA
180 Howard Street
San Francisco, CA 94105

Sent Via Fax, Email and Mail

Dear Ms. Hollins,

On behalf of Judicate West, a leading ADR Provider throughout Southern California for the past 13 years, I write to offer comment on the "Proposed Rules" for mediators and arbitrators presently being considered by your committee.

As you know, alternative dispute resolution, including both mediation and arbitration has become a significant and approved adjunct to our system of litigation throughout California. Judicate West is proud of its role in this effort and its panel of mediators and arbitrators, including both retired judges and some of the very best lawyers in California; adhere to the highest ethical and moral standards in rendering services to the profession and the public.

Rule 2.4

We believe that full disclosure, especially in arbitration matters, is in the best interests of those we serve. Mediation on the other hand is voluntary and the mediator has no power to force resolution absent the parties' assent. We would suggest, however, that some disclosure in the mediation arena is necessary especially involving recent personal and social relationships. Our experience has also been that the parties themselves engage in much "due diligence" in the selection of a particular mediator and regularly request certain individuals to handle their mediation matters, sometimes over many years.

The "proposed rules" seem to suggest that the disclosure requirements for mediation should parallel those for arbitration and we believe this would be an unnecessary burden on the parties in terms of increased costs and expenses. We would also respectfully suggest that this would be a huge impediment to the rendering of mediation services by ADR professionals themselves who would have to render disclosures in literally hundreds, if not thousands, of cases. Most of these individuals belong to various organizations that promote the highest ethical and moral standards and there are already in place ethical guidelines for the rendition of mediation and arbitration services.

Lastly, we also feel an obligation to comment on any suggested rules or guidelines regarding compensation for private mediators and arbitrators. While the fees for various individuals vary according to their experience and areas of specialization, the parties seeking these services are readily agreeable to paying for same and, time and again, do so

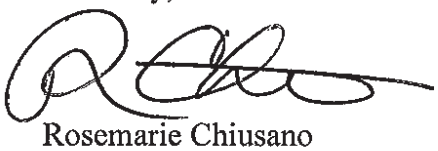
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because of the tremendous savings in fees, costs and expense brought about resolution of cases through ADR. We sincerely believe that this is an issue best left to the "marketplace" as with all other forms of compensation in the profession.

We thank you for your attention to and consideration of this correspondence and ask that we be advised of any hearings scheduled to discuss and review these issues. Please feel free to contact me should you have any inquiries or require additional information.

Sincerely,



Rosemarie Chiusano
Regional Vice President
Judicate West

THE STATE BAR OF CALIFORNIA
PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

This form allows you to submit your comments by entering them in the text box below and/or by uploading files as attachments. You should discuss only **one** Rule per comment submission form. Select the proposed Rule from the drop down list.

Comments submitted are regarded as public record.

DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Alan Konig

Professional Affiliation

*** City** San Francisco

*** State** California

*** email address** ahkcal@comcast.net

A copy of your response will be sent to this email addres

Rule 2.4

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 1.8.10 Sexual Relations With Client [3-120]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

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Rule 2.4

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PROPOSED RULE 1.8.10 (SEXUAL RELATIONS WITH CLIENT)

This proposed rule makes no sense and includes a provision that is contrary to the prophylactic purpose of the prohibition and contrary to the stated intent of the Commission to bring California in line with the nation.

The addition of the qualifying clause, ". . .if such sexual relations cause the lawyer to perform legal services incompetently in violation of Rule 1.1, or if the sexual relations would, or would be likely to, damage or prejudice the client's matter," to paragraph (b)(3) is unwarranted and inconsistent with the intent and purpose of the prohibition against having sexual relations with a client. It also makes, once again, California unique in its rules so that consistency does not exist between it and other national jurisdictions.

The proposed clause would cause any reasonable member of the public to form an opinion that the attorney profession views itself as elitist and above regulation since it has no absolute ban on sexual relations while such a ban is deemed appropriate for other professions such as medicine and collegiate academics.[1] The proposed clause only exacerbates the public's genuine concern about the State Bar's actual commitment to protecting the public instead of protecting the attorney and profession.

As the comments to the rule properly exhibit, the point behind the prohibition is to prevent an attorney from taking advantage of a client's "great emotional vulnerability and dependence" and when such action does occur, it constitutes "undue influence over clients or tak[ing] unfair advantage of clients." The focus of the prohibition is protection of the client and the client's individual rights and the rule must be written from the client's perspective and not the attorney's perspective. Yet, the addition of the clause to paragraph (b)(3) undermines the proper focus of the rule and makes it a hollow regulatory provision.

Taking advantage of a client by exploiting his or her weaknesses and vulnerabilities to engage in sexual conduct with him or her is a violation of the client much the same as sexual assault or battery is a violation of any individual. Both acts lack the required knowing and voluntary consent.

To the client who feels that he or she has been taken advantage of at his or her weakest moment by an individual he or she believed could be trusted and only had the client's best interests in mind, it makes not a bit of difference if the attorney's abuse of the client's trust negatively affected the underlying substantive matter being handled by the attorney. While a detrimental impact on the matter may be an aggravating factor, the primary injury to the client remains that the attorney violated one of the most sacred and fundamental relationships of fidelity and of fiduciary. The victim-client's injury is to his or her own mental and emotional state and that injury will remain independent of any adverse affect the attorney's actions had to the client's matter.

Imposition of the clause to paragraph (b)(3) minimizes the client's actual injury and attempts to equate it to one that can be substantively identified through review of the attorney's representation of the client. It tosses aside the true impact of the misconduct on the human element by completely disregarding the psychological impact the attorney's breach had on the

[1] *See, e.g.,* http://hr.vanderbilt.edu/policies/hr-033.pdf

client. It matters not to the client whose trust and faith has been violated that, in the process, the attorney was able to secure a financial benefit for the client in the client's case. The proposed clause essentially acts as a blank check for any attorney to take advantage of a client by advising the attorney, in advance of the misconduct, that the violation of the client's trust and faith will be overlooked and condoned if you obtained a good, or even somewhat reasonable, result for the client.

The proposed clause to paragraph (b)(3) is also unnecessary and redundant. The rules already provide that a failure to perform competently in a client's matter is grounds for discipline. Why create a separate disciplinable offense for a failure to perform caused by a sexual relationship with a client? Why does it matter that the cause of the failure to perform was a sexual relationship with the client? It is no different than a failure to perform that was caused by an attorney's greed, incompetence, dereliction, conflict of interest, or failure to understand the applicable law. Yet there are not separate disciplinable offenses for these causes of the failure to perform.

Overall, the proposed rule is troubling because of its content and tone. It almost reads as a rule that authorizes sexual relations with a client rather than either prohibiting them or, at least, discouraging them. In this respect, the rule only facilitates an attorney's mistaken belief that such relations are ethical and consensual. The rule, in any form, should include a comment that indicates that the assertion of "mutual consent" will be viewed with skepticism, if not rejected entirely, given the disparity in power, status, vulnerability, and need between the attorney and the client.

Sexual misconduct directed at clients by their attorneys is an abuse of professional power and a violation of the clients' trust. It jeopardizes the well-being of clients and its potential for harm is immeasurable. The proposed clause to paragraph (b)(3) is a bad proposal that only serves to shield an attorney from discipline when he or she takes advantage of a client, empowers the attorney to commit the misconduct, and disregards the interests of the actual intended beneficiary of the prohibition – the client and the public.

THE STATE BAR OF CALIFORNIA
PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

This form allows you to submit your comments by entering them in the text box below and/or by uploading files as attachments. You should discuss only **one** Rule per comment submission form. Select the proposed Rule from the drop down list.

Comments submitted are regarded as public record.

DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Elizabeth A. Moreno

Professional Affiliation Attorney, Mediator and Arbitrator

*** City** Los Angeles

*** State** California

*** email address** emoreno@eampc.com

A copy of your response will be sent to this email addres

Rule 2.4

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 2.4 Lawyer as Third-Party Neutral

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

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I support Rule 2.4. As a private mediator and arbitrator, I see mediators and arbitrators ignoring 'neutrality' in order to obtain business. It is time that this profession is regulated. An attorney will select their friend and buddy to mediate a case. There is no disclosure that these individuals are good friends or give each other gifts, such as football game tickets. It is time that the 'boys club' be broken up, which will cause the mediation and arbitration profession to become more inclusive. I recently wrote an article that was published in the Daily Journal urging Los Angeles Superior Court to change the selection of mediators in their ADR pro bono progam to a random system, to promote inclusiveness and increase the public's perception of fairness. Having rules that regulate third party neutrals will further increase the public's perception of fairness. Attached is the article.

Elizabeth A. Moreno, Esq.

Attachments

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Rule 2.4

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DAILY JOURNAL OCTOBER 10, 2006

L.A. COURT MUST DO BETTER TO BE INCLUSIVE, EQUAL ON MEDIATORS

By Elizabeth A. Moreno, Esq.

The Los Angeles Superior Court's Civil Mediation Panel is not inclusive and destroys the public trust and confidence in the Justice System. In order to restore the confidence in the justice system, the Los Angeles Superior Court must make the selection of pro bono mediators on its panel totally random and discontinue the self-selection process by the attorneys.

The administration of any court supported mediation panel should be held to the same standards as to the judiciary in terms of promoting an inclusive and equal justice system. But unfortunately, the administration of the Los Angeles Superior Court's mediation panel promotes an exclusive system that has the effect of favoring a racial and gender homogenous group of mediators. It is no surprise that there is an ethnic, racial and gender imbalance that greatly affects the dispute resolution profession and its legal and lay participants. The LASC to administer a program that has the effect of favoring one group is unacceptable. The selection of a mediator should be the same as the selection of a judge who presides over a case, random, whether or not the parties stipulate to mediation.

The current system grants attorneys (where 84.4% of the attorneys are White and 66% male), the unfettered right to choose a specific mediator from the thousands of mediators on the court's panel. Although the list does not specifically identify a mediator's ethnicity, culture, or gender, it is relatively easy by viewing the mediator's profile available on the website, for a lawyer, whether consciously or not, to exclude minority and women mediators. Typically, an attorney will select someone they know on a professional or personal basis. As a result, mediators who are minorities and under represented in the legal community, or who are not lawyers, may never be chosen. Many LASC pro bono mediators can attest to the fact that they have requested more and received less that a handful of cases in a year, while others are receiving as many as they can handle. This system does not promote an inclusive, representative and equal justice system. Assuming that LASC's ADR Program actively pursues diversity amongst the panel of qualified mediators, in a court-supported program, mediator selection should follow a procedure that insures that the selection process is ethnic, culture, and gender neutral. The only way to achieve this is by random selection.

The racial and ethnic imbalance in the legal and dispute resolution field causes minorities to lack confidence in and perceive the judicial system as unfair. This was reinforced in the findings of the National Center for the State Courts, "2005 - Trust and Confidence in the California Courts" survey, where the confidence in the judiciary is much lower than among Caucasians. It appears that the Los Angeles Superior Court's self-selection of a mediator from the panel preserves the racial and ethnic imbalance in the legal and dispute resolution profession.

In 1994, the Commission on the Future of the California Courts issued a report entitled “Justice in the Balance, 2020.” The report’s purpose was to explore how the judicial system can provide equal, assessable, and affordable justice to all California citizens. In part the Commission recognized:

> The virtues of a culturally diverse court system need no argument. Through its inclusiveness such diversity promotes public trust in justice. Through its diversity such a court system enhances its own cultural competence. *Justice in the Balance, 2020 Chapter 4, Equal Justice.*

These findings and conclusions do not differ from those in the 2005 survey which found procedural fairness is still a significant concern among minorities, especially African-Americans. The National Center for State Courts recommended that the California courts insure that its programs promote procedural fairness which will reduce the gap between approval of the California courts by African-Americans and other racial and ethnic groups. The survey concluded that in the last ten years there has been very little progress in the diversity of the Bench and bar which makes it critical that the Courts’ programs promote inclusiveness and fairness.

Even though the ADR Program may be perceived as diverse or actively encouraging a diverse panel, it actually has the impact of creating a biased system by allowing attorneys, who are 84.4 percent Caucasian and 66 percent male, to choose the mediator. A fair, inclusive, and equal system would rely on a selection process that is totally random, where all the mediators would receive the same number of cases. This can easily be accomplished by expanding the random selection process already in place to all cases, whether they are limited or unlimited jurisdiction matters. Certainly the court does not want to continue to promote a system that permits an attorney to select a mediator based on criteria that consciously or unconsciously discriminates against minority and women mediators.

As the Commission recognized, ‘Perceptions of unfairness are nearly as damaging to public trust and confidence in justice as the reality.’ Having a random selection for ALL cases would enhance the LASC’s inclusiveness and create interactions between the legal community and a diverse panel of mediators that would create an unequaled educational opportunity that spans gender, racial, ethnic and other lines.

Elizabeth A. Moreno is a Los Angeles mediator and arbitrator who is the former Diversity Chair of the ABA Dispute Resolution Section.

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DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Douglas W. Henkin

Professional Affiliation Milbank, Tweed, Hadley & McCloy LLP

*** City** New York

*** State** New York

*** email address** DHenkin@milbank.com

A copy of your response will be sent to this email addres

Rule 2.4

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 2.4 Lawyer as Third-Party Neutral

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Enter your comments here. To upload files proceed to the ATTACHMENTS section below.

Please see the attached comment letter and exhibits from the National Association of Securities Dealers, Inc., and New York Stock Exchange LLC.

Attachments

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Rule 2.4

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October 16, 2006

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VIA ELECTRONIC SUBMISSION

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: *Proposed Rule of Professional Conduct 2.4*

Rule 2.4

Dear Ms. Hollins:

On behalf of the National Association of Securities Dealers, Inc. ("NASD") and New York Stock Exchange LLC ("NYSE"), I am writing to comment on proposed Rule 2.4 of the Rules of Professional Conduct of the State Bar of California.

In particular, NASD and NYSE are concerned with subsection (d) of the proposed Rule, which would require lawyers serving as neutral arbitrators to comply with certain of the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration (the "California Standards").

NASD and NYSE are self-regulatory organizations ("SROs") that administer arbitrations involving investors and other participants in the national securities markets. They conduct these activities through their respective wholly-owned subsidiaries, NASD Dispute Resolution, Inc. and NYSE Regulation, Inc. These arbitrations are conducted pursuant to NASD's Code of Arbi-

tration Procedure and NYSE's Arbitration Rules, respectively, which have been approved by the United States Securities and Exchange Commission ("SEC") and have the force of federal law.*

Both the California Supreme Court and the United States Court of Appeals for the Ninth Circuit have held that the California Standards are preempted by the federal securities laws insofar as they apply to SRO-administered arbitrations. *Jevne v. Superior Court*, 35 Cal. 4th 935, 111 P.3d 954 (2005); *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 119 (9th Cir. 2005). Copies of the *Jevne* and *Grunwald* decisions are attached as Exhibits A and B.

A rule amendment is currently pending before the Judicial Council that would exempt SRO arbitrations, and arbitrators, from the California Standards. Proposal SP05-10, Arbitration: Ethics Standards for Neutral Arbitrators in Contractual Arbitration. A copy of the proposed amendment is attached as Exhibit C. As the staff report explains:

> Since the Judicial Council adopted these ethics standards, there have been several cases involving their application to arbitrators serving in securities arbitrations for [NASD]. . . . [B]oth the California Supreme Court in [*Jevne*] and the United States Court of Appeal[s] for the Ninth Circuit in [*Grunwald*] held that the federal Securities Exchange Act preempts application of the California ethics standards to NASD arbitrators. The courts concluded that NASD arbitrators are governed by arbitration rules that were approved by the [SEC] under federal law . . . .

Id. at 2. The pending amendment would provide that the California Standards "do not apply to . . . [a]ny arbitrator serving in . . . [a]n arbitration proceeding governed by rules adopted by a securities self-regulatory organization and approved by the United States Securities and Exchange Commission under federal law." Proposed Standard 3(b)(2)(I). The comment to the revised standard 3 would state that "[s]ubdivision (b)(2)(I) is intended to implement the decisions of the California Supreme Court in [*Jevne*] and of the United States Court of Appeals for the Ninth Circuit in [*Grunwald*]."

Proposed Rule of Professional Conduct 2.4(d) would provide that "[a] lawyer serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with" Standards 5-12 and 14-17 of the California Standards. Comment [7] to this proposal states that "[p]aragraph (d) is intended to permit discipline of a lawyer who fails to comply with certain enumerated [Standards] whenever the lawyer is serving as a third-party neutral arbitrator pursuant to an arbitration agreement."

---

* NYSE Arca, Inc., another SRO subsidiary of NYSE Group, Inc. (NYSE's parent), also administers arbitrations pursuant to SEC-approved rules.

Jevne and *Grunwald* hold that the California Standards cannot be applied to arbitrators selected to decide securities arbitrations administered by the SROs pursuant to their SEC-approved rules. Indeed, the Judicial Council has told the Ninth Circuit in a pending case that "it is difficult to conceive of any new ethics standards that would both aggrieve [the SROs] and not be controlled by *Grunwald* and *Jevne*." Appellees' Brief 14, *NASD Dispute Resolution v. Judicial Council*, No. 02-17413 (9th Cir. filed Sept. 29, 2006).

In many NASD and NYSE arbitrations, attorneys are selected to serve as arbitrators. To avoid any confusion or misunderstanding, particularly in light of the express suggestion that attorneys who do not comply may be subject to discipline, Rule 2.4(d) should make clear that it does *not* apply to arbitrators in SRO arbitrations.

The clearest way to accomplish this objective would be to add an express proviso at the end of proposed Rule 2.4(d), using the same language that the Judicial Council staff has proposed for the Standards:

> A lawyer serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with standards 5 [general duty], 6 [duty to refuse appointment], 7 [disclosure], 8 [additional disclosures in consumer arbitrations administered by a provider organization], 9 [arbitrators' duty to inform themselves about matters to be disclosed], 10 [disqualification], 11 [duty to refuse gift, request, or favor], [12 [duties and limitations regarding future professional relationships or employment], 14 [ex parte communications], 15 [confidentiality], 16 [compensation], and 17 [marketing] of the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration, except that a lawyer serving as a neutral arbitrator in an arbitration proceeding governed by rules adopted by a securities self-regulatory organization and approved by the United States Securities and Exchange Commission under federal law shall not be required to comply with such standards.

This change would implement the *Jevne* and *Grunwald* decisions in the context of proposed Rule 2.4(d).

An alternative way to clarify that the proposed Rule of Professional Conduct does not seek to extend the California Standards to SRO arbitrations, assuming that the Judicial Council adopts the SRO exemption to the California Standards, would be to incorporate *all* of the California Standards in Rule 2.4(d), including the express limitations and exemptions. The Rule would then read as follows:

> A lawyer serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with ~~standards 5 [general duty], 6 [duty to refuse appointment], 7 [disclosure], 8 [additional disclosures in consumer arbitrations administered by a provider organization], 9 [arbitrators' duty to inform themselves about matters to be~~

~~disclosed], 10 [disqualification], 11 [duty to refuse gift, request, or favor], [12 [duties and limitations regarding future professional relationships or employment], 14 [ex parte communications], 15 [confidentiality], 16 [compensation], and 17 [marketing] of~~ the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration, except as provided in standards 3 and 8.

This change would incorporate the definitions (standard 2) and other limitations (standard 3) of the California Standards themselves. The Standards currently exempt several other categories of contractual arbitration, such as workers' compensation and labor arbitrations, as well as all arbitrations not conducted in California or subject to California procedural law. Standard 3(a), (b)(2)(A)-(H). Arbitrators in these proceedings who are *not* attorneys plainly are not subject to the Standards' procedural requirements or substantive obligations; if proposed Rule 2.4(d) is adopted without modification, however, arbitrators in these proceedings who *are* attorneys would face substantial uncertainty over whether Rule 2.4(d) incorporates the Standards' exemptions. Adopting this change to proposed Rule 2.4(d) would make clear that no arbitrator in one of these exempted proceedings is required to comply with the California Standards, and would eliminate the possibility that attorneys and other neutral arbitrators would be treated differently.

The preemption issue resolved in *Jevne* and *Grunwald* was the subject of nearly three years of litigation. Now that the state and federal courts have definitively resolved that the California Standards cannot be applied to SRO-administered arbitrations, the State Bar should take this opportunity to clarify proposed Rule 2.4(d) to reflect that definitive resolution and make clear that the Bar is not seeking to reopen the issue for a subset of arbitrators.

If NASD or NYSE can provide any further information that would assist the State Bar or its staff in its consideration of this issue, please do not hesitate to contact me or Douglas W. Henkin of Milbank, Tweed, Hadley & McCloy LLP, counsel for NYSE.

Very truly yours,

Mark A. Perry

Attachments

cc: Douglas W. Henkin, Esq.
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1 Chase Manhattan Plaza
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David Ettinger, Esq.
Horvitz & Levy LLP
15760 Ventura Blvd.
Encino, CA 91436

Attorneys for the Judicial Council of California

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35 Cal.4th 935
28 Cal.Rptr.3d 685

Jack JEVNE et al., Petitioners,

v.

SUPERIOR COURT of Los Angeles County, Respondent;

JB Oxford Holdings, Inc., et al., Real Parties in Interest.

No. S121532.

Supreme Court of California.

May 23, 2005.

Background: Investors brought action against brokerage and financial firm, asserting causes of action for negligence, breach of fiduciary duties, and conversion, which was ordered to arbitration under National Association of Securities Dealers (NASD) rules. Plaintiffs moved to set aside the order compelling arbitration when NASD ceased appointing arbitrators in California due to conflicts with California Standards for Neutral Arbitrators and plaintiff refused to waive state standards. The Superior Court of Los Angeles County, No. SC062784, Jacqueline A. Connor, J., denied plaintiffs' motion. Plaintiffs petitioned for a writ of mandate. The Court of Appeal denied the petition.

Holdings: The Supreme Court granted review, superseding the opinion of the Court of Appeal, and in an opinion by Kennard, Acting C.J., held that:

(1) disclosure requirements of the California Standards' rules were preempted by Securities Exchange Act (SEA);

(2) disqualification standards of the California Standards' rules were preempted by SEA, and

(3) preempted portions of California Standards' rules were not severable.

Affirmed.

Opinion, 6 Cal.Rptr.3d 542, superseded.

1. Courts ⇐78

Because statutes are construed to effectuate the enacting body's intent, the test for determining whether a rule that the Judicial Council has adopted exceeds statutory authority is whether the rule conflicts with the legislative intent underlying the authorization statute.

2. Courts ⇐78

A Judicial Council rule may be broader than the literal terms of its authorizing statute, provided it reasonably furthers the statutory purpose.

3. Statutes ⇐217.3

Reports of commissions which have proposed statutes that are subsequently adopted are entitled to substantial weight in construing the statutes, particularly where the statute proposed by the commission is adopted by the Legislature without any change whatsoever and where the commission's comment is brief, because in such a situation there is ordinarily strong reason to believe that the legislators' votes were based in large measure upon the explanation of the commission proposing the bill.

4. Statutes ⇐217.3

Courts may properly consider Senate floor analysis documents in determining legislative intent.

5. Arbitration ⇐26

Given the relevant legislative history, the Legislature, when it enacted statute relating to neutral arbitrators, intended to authorize the Judicial Council to formulate and adopt ethical standards for neutral arbitrators in private, nonjudicial, arbitration generally, including neutral arbitrators appointed by third-party dispute resolution providers like the National Association of Securities Dealers Dispute Resolution, Inc. (NASDDR). West's Ann.Cal.C.C.P. § 1281.85(a).

6. States ⇐18.3, 18.5

Supremacy clause grants Congress the power to preempt state law, and state law that conflicts with a federal statute is without effect. U.S.C.A. Const. Art. 6, cl. 2.

7. States ⇐18.11, 18.13

Consideration of preemption issues arising under the supremacy clause of the United States Constitution starts with the as-

Exhibit A

sumption that the historic police powers of the states are not to be superseded by federal law unless that is the clear and manifest purpose of Congress; thus, the purpose of Congress is the ultimate touchstone of preemption analysis. U.S.C.A. Const. Art. 6, cl. 2.

8. States ⇐18.3

Federal preemption of state law arises in three circumstances: (1) Congress can define explicitly the extent to which its enactments preempt state law, (2) in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the federal government to occupy exclusively, and (3) state law is pre-empted to the extent that it actually conflicts with federal law. U.S.C.A. Const. Art. 6, cl. 2.

9. States ⇐18.7

Congressional intent to preempt state law may be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, or where an Act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. U.S.C.A. Const. Art. 6, cl. 2.

10. States ⇐18.13

Where the field which Congress is said to have preempted includes areas that have been traditionally occupied by the states, congressional intent to supersede state laws must be clear and manifest. U.S.C.A. Const. Art. 6, cl. 2.

11. States ⇐18.5

Federal preemption of state law has been found where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. U.S.C.A. Const. Art. 6, cl. 2.

12. States ⇐18.9

Federal regulations have no less preemptive effect than federal statutes, but to have preemptive effect, a federal regulation must be one that Congress authorized the promulgating agency to adopt, and a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority. U.S.C.A. Const. Art. 6, cl. 2.

13. Arbitration ⇐90
States ⇐18.15

Because the Securities Exchange Commission (SEC) now reviews all self-regulatory organization (SRO) arbitration rules, any of those rules may be germane to the Securities Exchange Act's (SEA) goals of fair dealing and investor protection, and in considering federal preemption, whether a particular rule is germane to the congressional purposes is a matter to be determined by careful examination of the rule's contents and consideration of any public pronouncements by the SEC concerning the rule's purpose and effect. U.S.C.A. Const. Art. 6, cl. 2; Securities Exchange Act of 1934, § 1 et seq., 15 U.S.C.A. § 78a et seq.

14. Arbitration ⇐90
States ⇐18.15

As the federal agency entrusted with enforcement of the Securities Exchange Act (SEA), approval by Securities Exchange Commission (SEC) of a National Association of Securities Dealers' (NASD) arbitration rules on neutral arbitrators is an expression of federal policy that may have preemptive effect on state law, and will have preemptive effect if the SEC intended that the rule prevail over conflicting state law and if the SEC's decision was not arbitrary or in excess of its statutory authority. U.S.C.A. Const. Art. 6, cl. 2; Securities Exchange Act of 1934, § 1 et seq., 15 U.S.C.A. § 78a et seq.

15. Arbitration ⇐90
States ⇐18.15

The detailed disclosure requirements of the California Standards' rules on arbitrator disclosure for persons serving as neutral arbitrators under contractual arbitration agreements, significantly impede and impair accomplishment of the goals of the National Association of Securities Dealers' (NASD) Code, and thereby the goals of the Securities

Exchange Act (SEA), by increasing administrative costs, by reducing the number of available arbitrators, and by reducing the nationwide uniformity and consistency of NASD arbitrations, and are therefore preempted by the SEA. U.S.C.A. Const. Art. 6, cl. 2; Securities Exchange Act of 1934, § 1 et seq., 15 U.S.C.A. § 78a et seq.; West's Ann.Cal.C.C.P. § 1281.85(a).

See 6 Witkin, Cal. Procedure (4th ed. (1997)Proceedings Without Trial, § 511; Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2003) ¶ 7:39-41.

16. States ⇐18.5

In deciding whether a state law conflicts with a federal law by hindering the complete accomplishment of the federal law's objective, courts give considerable weight to the views of the federal agency charged with administering the federal law. U.S.C.A. Const. Art. 6, cl. 2.

17. Arbitration ⇐90
States ⇐18.15

The system of arbitrator disqualification of the California Standards' rules on arbitrator disqualification for persons serving as neutral arbitrators under contractual arbitration agreements, are fundamentally irreconcilable with the disqualification rules of the National Association of Securities Dealers' (NASD) Code, and are therefore preempted by the Securities Exchange Act (SEA). U.S.C.A. Const. Art. 6, cl. 2; Securities Exchange Act of 1934, § 1 et seq., 15 U.S.C.A. § 78a et seq.; West's Ann.Cal.C.C.P. § 1281.85(a).

18. Arbitration ⇐90
States ⇐18.15

The SEC's approval of rule requiring waiver of the California Standards of arbitrator disclosure and disqualification for persons serving as neutral arbitrators under contractual arbitration agreements, reflect its determination that the National Association of Securities Dealers' (NASD) Code's provisions governing arbitrator selection in self-regulatory organization (SRO) arbitration should prevail over conflicting state law; because that determination was neither arbitrary nor in excess of its statutory authority, the SEA, through the SEC's approval of the NASD Code, preempts the California Standards dealing with disclosure and disqualification of arbitrators. U.S.C.A. Const. Art. 6, cl. 2; Securities Exchange Act of 1934, § 1 et seq., 15 U.S.C.A. § 78a et seq.; West's Ann.Cal. C.C.P. § 1281.85(a).

19. States ⇐18.5

When state law conflicts with federal law, it is preempted only to that extent and no further. U.S.C.A. Const. Art. 6, cl. 2.

20. Statutes ⇐64(1)

An invalid part of a statute can be severed if, and only if, it is grammatically, functionally and volitionally separable; it is grammatically separable if it is distinct and separate and, hence, can be removed as a whole without affecting the wording of any of the measure's other provisions, is functionally separable if it is not necessary to the measure's operation and purpose, and is volitionally separable if it was not of critical importance to the measure's enactment.

21. Arbitration ⇐90
States ⇐18.15

California Standards Code rules on arbitrator disclosure and disqualification for persons serving as neutral arbitrators under contractual arbitration agreements, that were preempted by National Association of Securities Dealers' (NASD) Code's provisions governing arbitrator selection in self-regulatory organization (SRO) arbitration, were not severable from the remaining standards because they are not functionally or volitionally separable, and therefore the California Standards as a whole are preempted in SRO-administered securities arbitrations. U.S.C.A. Const. Art. 6, cl. 2; Securities Exchange Act of 1934, § 1 et seq., 15 U.S.C.A. § 78a et seq.; West's Ann.Cal.C.C.P. § 1281.85(a).

22. Arbitration ⇐91

Stock brokerage customers were not excused from arbitrating their claims against broker pursuant to their arbitration agreement by a delay in submission of the dispute; under the National Association of Securities Dealers' (NASD) governing the time limitation upon submission of a dispute was six

years "from the occurrence or event giving rise to the act or dispute, claim or controversy," where the time had not expired at least as to later transactions, and in any event, the delay appeared to have been reasonably necessitated by uncertainty regarding application of the California Standards rules on arbitrator disclosure and disqualification. Securities Exchange Act of 1934, § 1 et seq., 15 U.S.C.A. § 78a et seq.; West's Ann.Cal. C.C.P. § 1281.85(a).

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Bill Lockyer, Attorney General, Manuel M. Medeiros, State Solicitor General, Andrea Lynn Hoch, Chief Assistant Attorney General, David S. Chaney, Assistant Attorney General, Lawrence K. Keethe and Amy J. Winn, Deputy Attorneys General, for Attorney General Bill Lockyer as Amicus Curiae on behalf of Petitioners.

Kate Gordon, Arthur Bryant, Michael J. Quirk; McGuinn, Hillsman & Palefsky and Cliff A. Palefsky, San Francisco, for California Employment Lawyers Association and Trial Lawyers for Public Justice as Amici Curiae on behalf of Petitioners.

No appearance for Respondent.

Miller Milove & Kob, Jeffrey S. Kob, San Diego, and W. Richard Sintek for Real Parties in Interest.

Conkle & Olesten and Eric S. Engel, Santa Monica, as Amici Curiae on behalf of Real Parties Interest.

George R. Kramer; Munger, Tolles & Olson, Marc T. G. Dworsky, Paul J. Watford, Los Angeles, and Anne M. Voigts, San Francisco, for Securities Industry Association as Amicus Curiae on behalf of Real Parties in Interest.

Milbank, Tweed, Hadley & McCloy, Douglas W. Henkin and M. Benjamin Valerio for New York Stock Exchange, Inc., as Amicus Curiae.

Gibson, Dunn, & Crutcher and Mark A. Perry, Washington D.C., for NASD Dispute Resolution, Inc., as Amicus Curiae.

Giovanni P. Prezioso, Jacob H. Stillman, Eric Summergrad, John W. Avery and Meyer Eisenberg for Securities and Exchange Commission as Amicus Curiae.

Horvitz & Levy, David S. Ettinger, Encino, and Mitchell C. Tilner for Judicial Council of California as Amicus Curiae.

KENNARD, J., Acting C.J.

In 2001, the California Legislature enacted Code of Civil Procedure section 1281.85, subdivision (a) (hereafter section 1281.85(a)), which directed the California Judicial Council to establish ethics standards for persons serving as neutral arbitrators under contractual arbitration agreements. (Stats.2001, ch. 362, § 4.) As explained in a legislative report, the Legislature's purpose was "to provide basic measures of consumer protection with respect to private arbitration, such as minimum ethical standards and remedies for the arbitrator's failure to comply with existing disclosure requirements." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 475 (2001–2002 Reg. Sess.) Aug. 20, 2001, p. 1.)

In response to the Legislature's directive, the Judicial Council adopted the Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Cal. Rules of Court, appen., div. VI; hereafter the California Standards), most of which became effective on July 1, 2002. The stated purposes of the California Standards are "to guide the conduct of arbitrators, to inform and protect participants in arbitration, and to promote public confidence in the arbitration process." (*Id.*, std. 1(a).)

The California Standards are not the only ethics standards to which neutral arbitrators may be subject. The National Association of Securities Dealers, Inc., (NASD) is a self-regulatory organization (SRO) that licenses and regulates broker-dealers in the national securities industry. Through its wholly owned subsidiary, NASD Dispute Resolution, Inc. (NASDDR), it has adopted a Code of Arbitration Procedure (the NASD Code) to govern the arbitration of disputes between its members and their customers. Like the California Standards, the NASD Code contains disclosure requirements and disqualification procedures for arbitrators. Under the

authority of the federal Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.; hereafter SEA), the United States Securities and Exchange Commission (SEC) has approved the NASD Code. (See *Shearson/American Express, Inc. v. McMahon* (1987) 482 U.S. 220, 234, 107 S.Ct. 2332, 96 L.Ed.2d 185 (*McMahon*) ["[T]he SEC has specifically approved the arbitration procedures of . . . the NASD."].)

We granted review in this case to address five issues: (1) Did section 1281.85(a) authorize the Judicial Council to adopt ethics standards for arbitrators appointed by arbitration providers like the NASDDR? (2) Does the SEA preempt section 1281.85(a) and the California Standards for NASDDR-administered arbitration? (3) Are the parties to an arbitration agreement relieved of their duty to arbitrate when their arbitration provider has refused to proceed with arbitration for more than one year? (4) May the parties to an arbitration waive application of the California Standards? (5) Does the Federal Arbitration Act of 1925 (9 U.S.C. § 1 et seq.; hereafter FAA) preempt section 1281.85(a) and the California Standards in arbitrations based on contractual arbitration agreements or disputes affecting interstate commerce?

We conclude that section 1281.85(a) authorized the Judicial Council to adopt ethics standards for arbitrators appointed by arbitration providers like the NASDDR, but also that the SEA preempts section 1281.85(a) and the California Standards for NASDDR-administered arbitration. Under the circumstances of this case, we further conclude that the delay in arbitrator selection and appointment, resulting from uncertainty regarding the applicability of the California Standards, does not relieve plaintiffs of their duty to arbitrate. In light of these conclusions, we find it unnecessary to address the remaining issues concerning waiver and preemption under the FAA.

I. Facts and Procedural History

In early 1996, Jack Jevne opened an account with JB Oxford & Company (Oxford) in the name of Avalon Investments, S.A. (Avalon), a business entity that Jevne wholly owns, to safeguard funds obtained from the sale of certain securities. Oxford is a licensed securities broker-dealer and a member of the NASD. To open the account, Oxford required Jevne to sign an "account opening statement" in which he agreed that all disputes with Oxford would be resolved by arbitration in accordance with the NASD Code. The account opening statement declared that California law would govern "[t]he agreement and its enforcement."

Jevne has alleged that when he opened the account, he personally instructed Oxford that he was the only person authorized to withdraw funds and securities from the account. He has further alleged that Oxford violated this instruction by allowing $1,026,535 to be taken from the account between April 1997 and September 1999 through a series of withdrawals that he did not authorize.

In August 2000, Jevne and Avalon (plaintiffs) sued Oxford and JB Oxford Holdings, Inc. (defendants) in superior court alleging negligence, breach of fiduciary duty, and conversion. Defendants moved to compel arbitration under the terms of the account opening statement. Plaintiffs did not oppose the motion, which the trial court granted, and in May 2001 the parties signed a uniform submission agreement agreeing to arbitrate according to the NASD Code. After one "nonpublic arbitrator" and two "public arbitrators" were appointed according to the NASD Code, the arbitration proceedings began.[1]

1. For a claim exceeding $50,000, the NASD Code requires "an arbitration panel composed of one non-public arbitrator and two public arbitrators, unless the parties agree to a different panel composition." (NASD Code, rule 10308(b)(1)(B).)

The NASD Code provides these definitions of nonpublic and public arbitrators:

"(4) 'non-public arbitrator'

"The term 'non-public arbitrator' means a person who is otherwise qualified to serve as an arbitrator and:

"(A) is, or within the past 5 years, was:

"(i) associated with a broker or a dealer (including a government securities broker or dealer or a municipal securities dealer);

"(ii) registered under the Commodity Exchange Act;

"(iii) a member of a commodities exchange or a registered futures association; or

After the California Standards went into effect in July 2002, the NASD adopted a rule, designated IM–10100–(f), establishing a temporary waiver program for arbitrations in California. Under this rule, to participate in NASDDR-administered arbitration, California investors were required to waive application of the California Standards (to have their arbitration proceedings held in California) or agree to conduct the arbitration outside of California. The SEC promptly approved the waiver rule as a six-month pilot program.[2] (See 67 Fed.Reg. 62085–01 (Oct. 3, 2002).) The SEC has approved several extensions of the NASD's temporary waiver rule, which is to expire on September 30, 2005. (70 Fed.Reg. 8862–01 (Feb. 23, 2005).)

On July 9, 2002, the NASD arbitration panel granted defendants' motion to dismiss plaintiffs' claim, with leave to amend. Plaintiffs filed an amended claim, and defendants again moved to dismiss. In September 2002, before the panel ruled on this motion, the nonpublic arbitrator disqualified himself for undisclosed reasons. The NASDDR suspended the proceedings and asked plaintiffs to sign a statement waiving application of the California Standards. Plaintiffs refused to sign the waiver and, in February 2003, asked the superior court to set aside the order compelling arbitration and to restore the matter to the active civil trial calendar. In April 2003, the court denied the motions. Plaintiffs then petitioned the Court of Appeal for a writ of mandate directing the trial court to set aside its order denying the motions and to enter a new order granting the motions. The petition named defendants as real parties in interest.

After receiving an opposition from defendants (see Cal. Rules of Court, rule 56(b)),

''(iv) associated with a person or firm registered under the Commodity Exchange Act;

''(B) is retired from, or spent a substantial part of a career, engaging in any of the business activities listed in subparagraph (4)(A);

''(C) is an attorney, accountant, or other professional who has devoted 20 percent or more of his or her professional work, in the last two years, to clients who are engaged in any of the business activities listed in subparagraph (4)(A); or

''(D) is an employee of a bank or other financial institution and effects transactions in securities, including government or municipal securities, and commodities futures or options or supervises or monitors the compliance with the securities and commodities laws of employees who engage in such activities.

''(5) 'public arbitrator'

''(A) The term 'public arbitrator' means a person who is otherwise qualified to serve as an arbitrator and:

''(i) is not engaged in the conduct or activities described in paragraphs (a)(4)(A) through (D);

''(ii) was not engaged in the conduct or activities described in paragraphs (a)(4)(A) through (D) for a total of 20 years or more;

''(iii) is not an investment advisor;

''(iv) is not an attorney, accountant, or other professional whose firm derived 10 percent or more of its annual revenue in the past 2 years from any persons or entities listed in paragraph (a)(4)(A); and

''(v) is not the spouse or an immediate family member of a person who is engaged in the conduct or activities described in paragraphs (a)(4)(A) through (D).

''(B) For the purpose of this Rule, the term 'immediate family member' means:

''(i) the parent, stepparent, child, or stepchild, of a person engaged in the conduct or activities described in paragraphs (a)(4)(A) through (D);

''(ii) a member of the household of a person engaged in the conduct or activities described in paragraphs (a)(4)(A) through (D);

''(iii) a person who receives financial support of more than 50 percent of his or her annual income from a person engaged in the conduct or activities described in paragraphs (a)(4)(A) through (D); or

''(iv) a person who is claimed as a dependent for federal income tax purposes by a person engaged in the conduct or activities described in paragraphs (a)(4)(A) through (D).'' (NASD Code, rule 10308(a)(4), (5).)

2. In September 2002, before its approval of rule IM–10100–(f), the SEC announced it had asked Michael Perino, an associate professor at St. John's University School of Law in Jamaica, New York, ''to assess whether the current disclosure requirements in the NASD and NYSE arbitration procedures should be modified to reflect any of the new disclosure concepts in the new California rules.'' In November 2002, the SEC released Professor Perino's report, with this summary of its conclusions: ''Perino's report concludes that there is little if any indication that undisclosed conflicts represent a significant problem in NASD or NYSE (collectively, SROs) arbitrations. As a result, his report concludes that having the SROs adopt the California arbitration rules would likely yield very few benefits for investors. At the same time, his report concludes that adopting the California arbitration rules may impose significant costs and may have significant unintended consequences that may reduce investors' perceptions of the fairness of SRO arbitrations.''

the Court of Appeal issued an alternative writ, and it received briefs from several amici curiae: the NASDDR, the New York Stock Exchange (N.Y.SE),[3] the SEC, and the California Attorney General. In lieu of an amicus brief, the California Judicial Council submitted a copy of a brief it had filed in another case, *NASD Dispute Resolution, Inc. v. Judicial Council of Cal.* (N.D.Cal.2002) 232 F.Supp.2d 1055.

On November 19, 2003, the Court of Appeal denied plaintiffs' petition. Although the court concluded that the Judicial Council had acted within its authority in drafting the California Standards and that they are not preempted by the FAA, it also concluded that the California Standards conflict with, and are preempted by, the SEA. On December 11, 2003, plaintiffs petitioned the Court of Appeal for a rehearing to consider issues not addressed in the original decision. The Court of Appeal denied rehearing the next day.

We granted plaintiffs' petition for review. Thereafter, on April 21, 2004, we granted a joint motion to intervene by the NASDDR and the NYSE (interveners) as additional real parties in interest. We have also accepted briefs from several amici curiae: the California Employment Lawyers Association, the Trial Lawyers for Public Justice, the Securities Industry Association, the California Attorney General, and the California Judicial Council.

After we had placed this matter on calendar for oral argument, a panel of the United States Court of Appeals for the Ninth Circuit issued its decision in *Credit Suisse First Boston Corporation v. Grunwald* (9th Cir. 2005) 400 F.3d 1119. Consistent with our decision in this case, which affirms the judgment of the state Court of Appeal, the Ninth Circuit concluded that the Judicial Council had statutory authority to adopt ethics standards for arbitrators appointed by arbitration providers like the NASDDR, but also that the SEA preempts the California Standards for SRO-administered arbitration.

II. The California Standards and SRO–Appointed Arbitrators

Do the California Standards that the Judicial Council adopted in 2002 apply to neutral arbitrators appointed for contractual arbitration by an SRO or other third-party arbitration service or provider? To the extent the California Standards purport to apply to arbitrators appointed by SRO's and other third-party arbitration providers, are they invalid as exceeding the scope of the statutory authorization?

Section 1281.85(a) mandates that "a person serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with" the California Standards. Code of Civil Procedure section 1280, subdivision (d) (hereafter section 1280(d)) defines a "neutral arbitrator" as one who is either "(1) selected jointly by the parties or by the arbitrators selected by the parties or (2) appointed by the court when the parties or the arbitrators selected by the parties fail to select an arbitrator who was to be selected jointly by them." As mentioned earlier, the Legislature enacted section 1281.85(a) in 2001; it adopted section 1280(d)'s definition of arbitrator, however, much earlier, in 1961 (Stats.1961, ch. 461, § 2, p. 1540), and it has not amended this definition since.

The California Standards define "neutral arbitrator" somewhat differently than section 1280(d) does: " 'Arbitrator' and 'neutral arbitrator' mean any arbitrator who is subject to these standards and who is to serve impartially, whether selected or appointed: [¶] (A) Jointly by the parties or by the arbitrators selected by the parties; [¶] (B) By the court, when the parties or the arbitrators selected by the parties fail to select an arbitrator who was to be selected jointly by them; or [¶] (C) *By a dispute resolution provider organization, under an agreement of the parties.*" (California Standards, std. 2(a)(1), italics added.)[4] The standards de-

3. The NYSE, like the NASD, is an SRO that administers an arbitration program under rules approved by the SEC.

4. The California Standards do not apply to "party arbitrators" (defined as an arbitrator selected unilaterally by a party) or to international arbitration proceedings under Code of Civil Procedure section 1297.11 et seq.; judicial arbitra-

fine "[d]ispute resolution provider organization" as "any nongovernmental entity that, or individual who, coordinates, administers, or provides the services of two or more dispute resolution neutrals." (*Id.*, std. 2(g).)

[1, 2] The California Constitution grants the Judicial Council authority to, among other things, "adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute." (Cal. Const., art. VI, § 6, subd. (d).) The Constitution adds: "The rules adopted shall not be inconsistent with statute." (*Ibid.;* see also *People v. Mendez* (1999) 19 Cal.4th 1084, 1094, 81 Cal.Rptr.2d 301, 969 P.2d 146.) Because statutes are construed to effectuate the enacting body's intent, the test for determining whether a rule that the Judicial Council has adopted exceeds statutory authority is whether the rule conflicts with the legislative intent underlying the authorization statute. (See *People v. Hall* (1994) 8 Cal.4th 950, 960–961, 35 Cal.Rptr.2d 432, 883 P.2d 974; *In re Robin M.* (1978) 21 Cal.3d 337, 346, 146 Cal.Rptr. 352, 579 P.2d 1.) Thus, a rule may be broader than the literal terms of its authorizing statute, provided it reasonably furthers the statutory purpose. (*Trans–Action Commercial Investors, Ltd. v. Firmaterr, Inc.* (1997) 60 Cal.App.4th 352, 364, 70 Cal. Rptr.2d 449.)

On first reading, standard 2(a)(1) appears to broaden section 1280(d)'s definition of neutral arbitrator to include a class not mentioned in the statute—arbitrators selected by a "dispute resolution provider organization" such as the NASDDR. Under the NASD Code, the NASDDR uses a computerized "Neutral List Selection System" to generate two lists of available arbitrators, one list for public arbitrators and another for nonpublic arbitrators. Each party may strike one or more of the arbitrators from each list for any reason and may rank the remaining candidates by order of preference. The NASD's Director of Arbitration then consolidates the parties' lists and appoints a panel according to their reported preferences, but if the number of remaining arbitrators is insufficient to fill the panel, the Director may appoint one or more arbitrators not named on the lists submitted to the parties. (NASD Code, rule 10308(b), (c).) Thus, although the parties' preferences play a role in the process, the NASDDR both limits the pool of potential arbitrators and, through its Director of Arbitration, makes the final selection. Whether this method of selection is consistent with section 1280(d)'s definition of "neutral arbitrator" depends on what that definition means when it refers to an arbitrator "selected jointly by the parties." Does it require that the parties *directly and personally* agree to the particular individual who is to serve as arbitrator, or is it sufficient that the parties have *jointly agreed to a selection method or procedure,* even though the method or procedure authorizes a third party to make the final determination? On this point, the statutory language is ambiguous.

To determine the legislative intent underlying section 1280(d)'s definition of "neutral arbitrator," we consider its legislative history. In 1956, the Legislature, by a concurrent resolution, authorized the California Law Revision Commission to study, among other

tion proceedings under Code of Civil Procedure section 1141.10 et seq.; attorney-client fee arbitration under Business and Professions Code section 6200 et seq.; the automobile warranty dispute resolution process under California Code of Regulations, title 16, division 33.1; workers' compensation arbitration under Labor Code sections 5270 et seq. or 5308 et seq.; contractor complaint arbitration under Business and Professions Code section 7085 et seq.; or "arbitration conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements." (California Standards, std. 3(b).)

When drafting the California Standards, the Judicial Council also considered whether they should apply to SRO-administered securities arbitration. In a report to members of the Judicial Council, staff gave this explanation for its decision: "An exemption was not added for securities industry disputes because these disputes did not fall within any of the categories warranting exemption. They are arbitrations conducted under arbitration agreements, not independent statutory schemes; they are binding arbitrations, not some other dispute resolution process; and, while the self-regulatory organizations that administer these arbitration programs are subject to oversight by the Securities and Exchange Commission, the specific procedures of their dispute resolution programs, including any applicable ethics requirements, do not appear to be mandated by statute or government regulation."

things, whether the statutes relating to arbitration should be revised. (Stats.1956, ch. 42, p. 264.) In December 1960, the commission submitted its report and recommendations, which included adoption of a statutory definition of "neutral arbitrator." (Recommendation and Study Relating to Arbitration (Dec.1960) 3 Cal. Law Revision Com. Rep. (1961) pp. G–1, G–12.) The Legislature enacted the definition of "neutral arbitrator" exactly as the commission had recommended. (Compare *id.* at p. G–12 with § 1280(d).)

[3] "Reports of commissions which have proposed statutes that are subsequently adopted are entitled to substantial weight in construing the statutes. [Citations.] This is particularly true where the statute proposed by the commission is adopted by the Legislature without any change whatsoever and where the commission's comment is brief, because in such a situation there is ordinarily strong reason to believe that the legislators' votes were based in large measure upon the explanation of the commission proposing the bill." (*Van Arsdale v. Hollinger* (1968) 68 Cal.2d 245, 249–250, 66 Cal.Rptr. 20, 437 P.2d 508; accord, *People v. Martinez* (2000) 22 Cal.4th 106, 129, 91 Cal.Rptr.2d 687, 990 P.2d 563.)

Regarding the meaning of "neutral arbitrator," the commission stated: "When a tripartite arbitration board is appointed, it is usually composed of a representative of each of the contending parties *and a third arbitrator chosen by the other two or by some other predetermined procedure.* The third arbitrator, who is the *neutral arbitrator,* often acts as the chairman of the board.... [¶] It is suggested that the California statute should distinguish the arbitrators by their titles. *The arbitrators appointed by both parties, or by the two arbitrators chosen by the parties, or appointed by the court, or any other disinterested agency, should be designated the 'neutral arbitrator'* .... The arbitrators representing the parties should be designated 'party arbitrators'...." (Recommendation and Study Relating to Arbitration, *supra,* 3 Cal. Law Revision Com. Rep. at p. G–42, italics added; see also *id.* at pp. G–7 to G–8.) This comment indicates that the primary purpose of the statutory definition of "neutral arbitrator" was to distinguish arbitrators chosen in a manner likely to ensure their neutrality and impartiality from an arbitrator selected by one party unilaterally to act as an advocate for that party's interests. The definition was not intended to exclude arbitrators selected by a neutral third party, like an arbitration provider or administrator, to which the parties had mutually assigned that responsibility. On the contrary, it was intended to include arbitrators chosen by any "disinterested agency" to which the parties mutually entrusted the task of appointing an impartial arbitrator.

This understanding of the meaning of "neutral arbitrator" is also consistent with the legislative intent underlying the 2001 legislation that authorized the Judicial Council to formulate and adopt the California Standards. Nothing in the enactment history of that legislation suggests a legislative intent to exempt from the California Standards all arbitrators appointed by arbitration providers. Rather, the documented concerns underlying the legislation, relating to the fairness of private contractual arbitration, strongly suggest an intent to apply the standards to contractual arbitration generally.

[4] For example, a report by the Assembly Committee on Judiciary noted that "the growing use of private arbitrators—including the imposition of mandatory, pre-dispute binding arbitration contracts in consumer and employment disputes—has given rise to a largely unregulated private justice industry." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 475 (2001–2002 Reg. Sess.), *supra,* p. 4.) The report stated that the proposed legislation "seeks to provide basic measures of consumer protection with respect to private arbitration, such as minimum ethical standards and remedies for the arbitrator's failure to comply with existing disclosure requirements." (*Id.,* p. 1.) A Senate floor analysis stated that this legislation would apply to "an appointed arbitrator in non-judicial (private or contractual) arbitrations," that it would "address concerns of fairness by requiring private arbitrators to comply with ethical guidelines to be established by [the] Judicial Council," and that proponents of the legislation argued that

strict ethical guidelines "should apply to private arbitrators to ensure that parties to the arbitration can have confidence in the integrity and fairness of the private arbitrator." (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 475 (2001–2002 Reg. Sess.) Sept. 6, 2001, pp. 1, 4–5.) We may properly consider these legislative documents in determining legislative intent. (See *People v. Cruz* (1996) 13 Cal.4th 764, 773, fn. 5, 55 Cal.Rptr.2d 117, 919 P.2d 731.)

Interveners the NASDDR and the NYSE point out that the staff of the Judicial Council, in a report to the members of the Judicial Council dated April 9, 2002, stated that the then proposed definition of "neutral arbitrator" in standard 2(a) "expands upon the definition of 'neutral arbitrator' in Code of Civil Procedure section 1280(d), *which does not include arbitrators appointed by a dispute resolution provider organization* or by any party acting alone, even if those arbitrators are to serve impartially." (Italics added.) Interveners argue that this statement somehow proves that standard 2(a) is inconsistent with section 1280(d) and that the Judicial Council exceeded its authority in adopting it. We are unpersuaded. The comments by the Judicial Council staff to members of the Judicial Council in 2002 are not probative of the legislative intent underlying either the 1961 enactment of section 1280(d) or the 2001 enactment of section 1281.85(a). Moreover, as we have explained, the test is not whether the rule adopted is broader than the literal terms of its authorizing statute, or a related statute, but whether the rule adopted reasonably furthers the purpose underlying the statutory authorization.

[5] Given the relevant legislative history, we agree with the Court of Appeal in this case that the Legislature, when it enacted section 1281.85(a) in 2001, intended to authorize the Judicial Council to formulate and adopt ethical standards for neutral arbitrators in private (nonjudicial) arbitration generally, including neutral arbitrators appointed by third-party dispute resolution providers like the NASDDR.

III. Preemption

A. General Principles

We recently explained the general principles governing claims of federal preemption of state law, in these words:

[6, 7] "The supremacy clause of article VI of the United States Constitution grants Congress the power to preempt state law. State law that conflicts with a federal statute is ' "without effect." ' (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (*Cipollone*), quoting *Maryland v. Louisiana* (1981) 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576.) It is equally well established that '[c]onsideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress." ' (*Cipollone,* at p. 516, 112 S.Ct. 2608.) Thus, ' " '[t]he purpose of Congress is the ultimate touchstone' " of pre-emption analysis.' (*Ibid.*)

[8–11] "The United States Supreme Court has explained that federal preemption arises in three circumstances: 'First, Congress can define explicitly the extent to which its enactments pre-empt state law. [Citation.] Pre-emption fundamentally is a question of congressional intent, [citation] and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one. [¶] Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." [Citation.] Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized:

"Where . . . the field which Congress is said to have pre-empted" includes areas that have "been traditionally occupied by the States," congressional intent to supersede state laws must be " 'clear and manifest.' " [Citations.] [¶] Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, [citation] or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ' (*English v. General Electric Co.* (1990) 496 U.S. 72, 78–79 [110 S.Ct. 2270, 110 L.Ed.2d 65], fn. omitted; see *Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 372–373 [120 S.Ct. 2288, 147 L.Ed.2d 352]; *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 814 [135 Cal.Rptr.2d 1, 69 P.3d 927].)" (*Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923–924, 12 Cal.Rptr.3d 262, 88 P.3d 1; see also *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955, 17 Cal.Rptr.3d 180, 95 P.3d 422.)

B. Preemption by the SEA

The SEA contains no express preemption provision; on the contrary, it contains two savings clauses expressly preserving state law in certain limited areas (15 U.S.C. §§ 77p, 77r). Accordingly, neither express preemption nor field preemption by the SEA is at issue in this case. As the Court of Appeal in this case correctly recognized, and as the parties themselves agree, we are concerned here only with conflict preemption by the SEA. As noted earlier (28 Cal.Rptr.3d p. 697, 111 P.3d pp. 963–964, *ante*), conflict preemption applies in two situations: when it is impossible to comply with both the federal and the state law, and when the state law could prevent or impair accomplishment of the purposes and objectives of the federal law. (*English v. General Electric Co., supra,* 496 U.S. at p. 79, 110 S.Ct. 2270.)

As a preliminary matter, we must decide whether, as defendants and interveners argue, the provisions of the NASD Code have the force of federal law, so that if the California Standards conflict with the NASD Code, they likewise necessarily conflict with the SEA, and are therefore preempted. Plaintiffs and the California Attorney General, as amicus curiae, argue that the NASD Code does not have the preemptive force of federal law, and, as a consequence, the California Standards may conflict with the NASD Code without necessarily being preempted by the SEA.

1. The preemptive force of the NASD Code

[12] "Federal regulations have no less pre-emptive effect than federal statutes." (*Fidelity Federal Sav. & Loan Assn. v. de la Cuesta* (1982) 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (*Fidelity*).) To have preemptive effect, however, a federal regulation must be one that Congress authorized the promulgating agency to adopt. (*Id.* at p. 154, 102 S.Ct. 3014.) Thus, "a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority[,] . . . [for] an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." (*Louisiana Public Service Comm'n v. FCC* (1986) 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369; accord, *New York v. F.E.R.C.* (2002) 535 U.S. 1, 18, 122 S.Ct. 1012, 152 L.Ed.2d 47.) Here, the relevant questions are whether the SEC intended to preempt the California Standards, and, if so, whether that action is within the scope of the SEC's delegated authority. (See *Fidelity, supra,* at p. 154, 102 S.Ct. 3014 ["the questions upon which resolution of this case rests are whether the Board meant to pre-empt California's due-on-sale law, and, if so, whether that action is within the scope of the Board's delegated authority."].)

In 1973, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware* (1973) 414 U.S. 117, 94 S.Ct. 383, 38 L.Ed.2d 348 (*Ware*), the United States Supreme Court considered whether NYSE arbitration rules preempted a California law governing employee wage claims. Merrill Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch) had established a profit-sharing plan for its employees under terms providing that an employee who voluntarily ter-

minated employment and competed with Merrill Lynch forfeited all benefits. (*Id.* at pp. 119–120, 94 S.Ct. 383.) David Ware, a former employee whose profit-sharing benefits had been forfeited under this provision, brought a class action against Merrill Lynch in California state court, arguing that the forfeiture provision was void under a California law (Bus. & Prof.Code, § 16600) prohibiting contracts that restrained anyone from engaging in a lawful profession, trade, or business. (*Ware, supra*, at pp. 120–121, 94 S.Ct. 383.) Merrill Lynch petitioned to compel arbitration, invoking an arbitration provision in Ware's employment agreement and a provision of the NYSE rules requiring that any controversy between a member and the member's employee be settled by arbitration in accordance with NYSE arbitration rules. (*Id.* at pp. 121–122, 94 S.Ct. 383.) The trial court denied the petition to compel arbitration, and the Court of Appeal affirmed, reasoning that profit-sharing contributions were a form of wages and that another California law (Labor Code, § 229) permitted an employee to sue for wages "without regard to the existence of any private agreement to arbitrate." (*Ware, supra*, at pp. 123–125, fn. 7, 94 S.Ct. 383.)

The United States Supreme Court granted certiorari to decide "the extent to which authority delegated under a federal regulatory statute pre-empts state law." (*Ware, supra*, 414 U.S. at p. 125, 94 S.Ct. 383.) The court stated that its guiding principle was that state law "should be pre-empted by exchange self-regulation 'only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act.' " (*Id.* at p. 127, 94 S.Ct. 383, quoting *Silver v. New York Stock Exchange* (1963) 373 U.S. 341, 361, 83 S.Ct. 1246, 10 L.Ed.2d 389.) The SEA embodies Congress's decision to use an approach of "supervised self-regulation" of the national securities market. (*Ware, supra*, at p. 127, 94 S.Ct. 383.) Under the SEA, securities may be traded only on registered exchanges, and an exchange seeking registration must show that it "has rules that are 'just and adequate to insure fair dealing and to protect investors.' " (*Ware, supra*, at p. 128, 94 S.Ct. 383, quoting 15 U.S.C. § 78f(d).) The *Ware* court noted that the SEA gave the SEC authority to alter or supplement an exchange's rules, but only in 12 designated areas; exchange rules outside those areas were not subject to SEC scrutiny. (*Ware, supra*, at p. 129, 94 S.Ct. 383.)

From this review, the high court concluded "that the congressional aim in supervised self-regulation is to insure fair dealing and to protect investors from harmful or unfair trading practices" and that "any rule or practice not germane to fair dealing or investor protection would not appear to fall under the shadow of the federal umbrella; it is, instead, subject to applicable state law." (*Ware, supra*, 414 U.S. at pp. 130–131, 94 S.Ct. 383.) Applying this conclusion to the facts before it, the *Ware* court noted that nothing in the SEA or in any SEC rule specified arbitration as the favored means of resolving employer-employee disputes, and that the NYSE rule requiring arbitration of those disputes was not within any of the areas subject to SEC scrutiny. The court further noted that arbitration of employer-employee disputes was not essential to protect investor confidence in the market, contrasting the NYSE's arbitration rule with other exchange rules providing for "direct effective disciplinary action against any abusive exchange practice." (*Ware, supra*, at p. 136, 94 S.Ct. 383.) Rules of that kind "designed to insure fair dealing and to protect investors, are of the kind directly related to the Act's purposes and ordinarily would not be expected to yield to provisions of state law." (*Ibid.*)

The high court in *Ware* rejected the NYSE's argument that federal preemption was necessary to allow national uniformity in the resolution of wage claims between exchange members and their employees. "Convenience in exchange management may be desirable, but it does not support a plea for uniform application when the rule to be applied is not necessary for the achievement of the national policy objectives reflected in the Act." (*Ware, supra*, 414 U.S. at p. 136, 94 S.Ct. 383.) The court added: "In effect, we are asked to sacrifice the individual's expectation of uniform treatment in the State of his residence for uniformity of application of the effect of an exchange's rules. We decline to do so because we believe that Congress

intended that those elements of the old regime of complete self-regulation, that is, those elements not related to the federal objectives, be subject to state law and to established conflicts principles when their application out of State comes into controversy." (*Id.* at p. 138, 94 S.Ct. 383.) The United States Supreme Court thus concluded that the NYSE rule requiring arbitration of employer-employee wages disputes did not preempt California law.[5]

Making a significant change, Congress in 1975 amended section 19 of the SEA (15 U.S.C. § 78s) to grant the SEC "broad authority to oversee and to regulate the rules adopted by the SROs relating to customer disputes, including the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights." (*McMahon, supra,* 482 U.S. at pp. 233–234, 107 S.Ct. 2332.) As a result of the 1975 amendments of the SEA, the SEC must approve *any* NASD rule before it can be implemented. (See 15 U.S.C. § 78s(b).) To approve a rule, the SEC must determine that the rule is consistent with the requirements and goals of the SEA "to protect investors and the public interest." (15 U.S.C. § 78o–3(b)(6); see *McMahon, supra,* at p. 233, 107 S.Ct. 2332.)

Although Congress's 1975 amendment of the SEA substantially altered the statutory scheme that the high court had earlier construed in *Ware, supra,* 414 U.S. 117, 94 S.Ct. 383, 38 L.Ed.2d 348, the precise impact of the amendment on the continuing validity of *Ware*'s reasoning is unclear. *Ware* implied that because Congress had given the SEC authority to review SRO rules in certain defined areas, it was reasonable to infer that all rules within the designated areas were germane to the primary purposes of the SEA—fair dealing and investor protection—and that all rules outside those areas were not germane to those purposes. Interveners the NASDDR and the NYSE here appear to argue that because the SEC now reviews all SRO rules, courts must infer that all SRO rules are germane to the SEA's purposes and thus have the preemptive force of federal law.

[13, 14] Absent guidance from the United States Supreme Court, we are unwilling to go that far. Rather, we conclude that because the SEC now reviews all SRO rules, any of those rules *may be* germane to the SEA's goals of fair dealing and investor protection. Whether a particular rule is germane to the congressional purposes is a matter to be determined by careful examination of the rule's contents and consideration of any public pronouncements by the SEC concerning the rule's purpose and effect. As the federal agency entrusted with enforcement of the SEA, the SEC's approval of an NASD rule is an expression of federal policy that *may* have preemptive effect. (See *Dowhal v. SmithKline Beecham Consumer Healthcare, supra,* 32 Cal.4th at p. 928, 12 Cal.Rptr.3d 262, 88 P.3d 1.) SEC approval *will* have preemptive effect if the SEC intended that the rule prevail over conflicting state law and if the SEC's decision was not arbitrary or in excess of its statutory authority. (See *Fidelity, supra,* 458 U.S. at pp. 153–154, 102 S.Ct. 3014.)

The Court of Appeal here concluded that three of the California Standards—standards 7 and 8, concerning disclosure, and standard 10, concerning disqualification—conflict with the NASD Code, and thus also with the SEA. We begin with standards 7 and 8 and then examine standard 10.

2. Standards 7 and 8—disclosure

Standard 7 sets forth in considerable detail "the matters that must be disclosed by a person nominated or appointed as an arbitrator." (California Standards, std. 7, subd. (a).) Standard 8 lists additional matters that an arbitrator must disclose in a consumer arbitration [6] administered by a provider organi-

5. In *Ware, supra,* 414 U.S. 117, 94 S.Ct. 383, 38 L.Ed.2d 348, the high court did not consider whether the FAA preempted Labor Code section 229 (barring enforcement of agreements to arbitrate wage claims). In a later case, the court held that it did. (*Perry v. Thomas* (1987) 482 U.S. 483, 491, 107 S.Ct. 2520, 96 L.Ed.2d 426.)

6. The California Standards give this definition of "consumer arbitration":

" 'Consumer arbitration' means an arbitration conducted under a predispute arbitration provision contained in a contract that meets the criteria listed in paragraphs (1) through (3) below.

zation. Among other things, the arbitrator must disclose relationships between the provider organization and any of the parties or lawyers in the arbitration.

By comparison, the NASD Code contains a relatively concise description of matters that must be disclosed: "Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination. Each arbitrator shall disclose: [¶] (1) Any direct or indirect financial or personal interest in the outcome of the arbitration; [¶] (2) Any existing or past financial, business, professional, family, social, or other relationships or circumstances that are likely to affect impartiality or might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators must disclose any such relationships or circumstances that they have with any party or its counsel, or with any individual whom [*sic*] they have been told will be a witness. They must also disclose any such relationship or circumstances involving members of their families or their current employers, partners, or business associates." (NASD Code, rule 10312(a).) The NASD Code further provides that arbitrators "must make a reasonable effort to inform themselves of any interests, relationships or circumstances" that should be disclosed, and that after appointment they have "a continuing duty . . . to disclose, at any stage of the arbitration, any such interests, relationships, or circumstances that arise, or are recalled or discovered." (*Id.,* rule 10312(b), (c).) Finally, the Director of Arbitration must advise the parties of any information disclosed by an arbitrator, unless the arbitrator voluntarily withdraws or the Director removes the arbitrator. (*Id.,* rule 10312(e).)

3. Standard 10—disqualification

Standard 10(a) provides that an arbitrator "is disqualified" in these situations:

"(1) The arbitrator fails to comply with his or her obligation to make disclosures and a party serves a notice of disqualification in the manner and within the time specified in Code of Civil Procedure section 1281.91;

"(2) The arbitrator complies with his or her obligation to make disclosures within 10 calendar days of service of notice of the proposed nomination or appointment and, based on that disclosure, a party serves a notice of disqualification in the manner and within the time specified in Code of Civil Procedure section 1281.91;

"(3) The arbitrator makes a required disclosure more than 10 calendar days after service of notice of the proposed nomination or appointment and, based on that disclosure, a party serves a notice of disqualification in the manner and within the time specified in Code of Civil Procedure section 1281.91;

"(4) A party becomes aware that an arbitrator has made a material omission or material misrepresentation in his or her disclosure and, within 15 days after becoming aware of the omission or misrepresentation and within the time specified in Code of Civil Procedure section 1281.91(c), the party serves a notice of disqualification that clearly describes the material omission or material misrepresentation and how and when the party became aware of this omission or misrepresentation; or

"(5) If any ground specified in Code of Civil Procedure section 170.1 exists and the party makes a demand that the arbitrator disqualify himself or herself in the manner and within the time specified in Code of Civil Procedure section 1281.91(d)."

The standard further provides that "[n]otwithstanding any contrary request, consent, or waiver by the parties, an arbitrator must disqualify himself or herself if he or she concludes at any time during the arbitration that he or she is not able to conduct the

'Consumer arbitration' excludes arbitration proceedings conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements.

''(1) The contract is with a consumer party, as defined in these standards;

''(2) The contract was drafted by or on behalf of the nonconsumer party; and

''(3) The consumer party was required to accept the arbitration provision in the contract.'' (California Standards, std. 2(d).)

arbitration impartially." (California Standards, std. 10(c).)

The NASD Code's arbitrator disqualification provisions differ significantly. The NASD Code provides: "After the appointment of an arbitrator and prior to the commencement of the earlier of (A) the first prehearing conference or (B) the first hearing, if the Director or a party objects to the continued service of the arbitrator, the Director shall determine if the arbitrator should be disqualified. If the Director sends a notice to the parties that the arbitrator shall be disqualified, the arbitrator will be disqualified unless the parties unanimously agree otherwise in writing and notify the Director not later than 15 days after the Director sent the notice. [¶] . . . [¶] The Director will grant a party's request to disqualify an arbitrator if it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased, lacks impartiality, or has an interest in the outcome of the arbitration. The interest or bias must be direct, definite, and capable of reasonable demonstration, rather than remote or speculative." (NASD Code, rule 10308(d); see also, *id.,* rule 10312(d)(3).)

4. Analysis

As noted earlier (p. 15, *ante*), conflict preemption applies in two situations: when it is impossible to comply with both the federal and the state law, and when the state law could prevent or impair accomplishment of the purposes and objectives of the federal law. (*English v. General Electric Co., supra,* 496 U.S. at pp. 78–79, 110 S.Ct. 2270.) We consider first the California Standards' disclosure requirements, then their disqualification requirements.

It is not impossible to comply with both the disclosure requirements of the California Standards and the NASD Code. Assuming that the matters required to be disclosed differ somewhat under each, the arbitrator need only disclose all matters required by both codes. For matters required to be disclosed by the California Standards, the arbitrator would make the disclosure directly to the parties, as the California Standards require. For matters required to be disclosed by the NASD Code, the arbitrator would make the disclosure to the Director of Arbitration, as the NASD Code requires.

[15] The remaining question is whether the detailed disclosure requirements of the California Standards in any significant way impede or impair accomplishment of the goals of the NASD Code, and thereby the goals of the SEA. The SEC has expressed its opinion that the California Standards' disclosure requirements will adversely affect NASD arbitrations in three ways: by increasing administrative costs associated with the more detailed disclosure requirements,[7] by reducing the number of available arbitrators (because many will be unwilling to comply with standard 7's requirements), and by reducing the nationwide uniformity and consistency of NASD arbitrations by imposing special disclosure requirements applicable in only one state.

The SEC first expressed these views in July 2002 in a letter addressed to the leadership of the California Legislature. In that letter, the SEC's Director stated: "[T]he burdens associated with complying with some of the disclosure requirements may have a deleterious effect on SRO arbitration programs by causing some arbitrators to resign rather than comply. Finally, adjudicating a national program to the specific requirements of any state or every state will unnecessarily burden the administration of SRO arbitration programs to the detriment of investors."

The SEC again expressed these views in October 2002 when it approved rule IM–10100 of the NASD Code, requiring waiver of the California Standards. Announcing its approval of the rule, the SEC recited the concerns expressed by the NASDDR: "The California Standards put extreme and unnec-

7. In its report to the Judicial Council, the council's staff conceded that the California Standards' disclosure requirements would impose significant new administrative burdens on arbitrators and arbitration provider organizations: "Implementation of these standards, particularly the disclosure requirements, will create new administrative burdens and is likely to impose new costs on both individual arbitrators and on dispute resolution provider organizations."

essary disclosure burdens on individuals who serve on NASD arbitration panels and already meet stringent disclosure rules. The extensive record-keeping requirements for arbitrators, coupled with potential liability for even inadvertent violations of the California Standards, led the NASD to conclude that, if the NASD were required to implement the California rules, investors and other parties would be saddled with higher costs, a less efficient and streamlined process, and a much smaller arbitrator roster from which to select the panelists who will decide their cases." (67 Fed.Reg. 62086–62087.) The SEC concluded that the proposed rule change was consistent with the SEA and that accelerated approval of the rule change was "necessary to protect investors in that the rules are designed to help address the backlog of cases created by the confusion over the new California standards, are designed to provide them with a mechanism to help resolve their disputes with broker-dealers in a more expedited manner, and are designed to help ensure the certainty and finality of arbitration awards." (*Id.* at p. 62088.)

The SEC next expressed these views in January 2003 in an amicus curiae brief submitted to the federal district court in *Mayo v. Dean Witter Reynolds, Inc.* (2003) 258 F.Supp.2d 1097 (*Mayo*). (See *Auer v. Robbins* (1997) 519 U.S. 452, 462, 117 S.Ct. 905, 137 L.Ed.2d 79 [administrative agency's interpretation of federal law in a legal brief is worthy of deference when it reflects "the agency's fair and considered judgment on the matter in question"].) In that brief, the SEC stated: "The Commission is of the view that in light of the Commission's comprehensive oversight under federal law of the SROs, only the Commission can decide what disclosure and disqualification standards are appropriate for the protection of investors in SRO arbitration, and can insure that those standards are part of an effective national system. The California Standards, to the extent they apply to the SROs, are preempted by virtue of this scheme of federal regulation." The federal district court gave "great weight" to the SEC's views (*Mayo, supra,* at p. 1109, fn. 15), and it concluded that the SEA preempted the California standards for SRO-administered arbitrations (*id.* at p. 1112).

Finally, the SEC expressed these views in an amicus curiae brief submitted to the Court of Appeal in this very case. The SEC stated that the California Standards for disclosure and disqualification "are preempted by federal law" for arbitrations conducted by the NASDDR. The SEC attached a copy of the brief it had submitted in *Mayo, supra,* 258 F.Supp.2d 1097, and it reiterated its position that "only the Commission can decide what disclosure and disqualification standards are appropriate for the protection of investors or employees in SRO arbitration, for the furtherance of market efficiency and regulation of national securities associations and exchanges, and can insure that those standards are part of an effective national system."

[16] In deciding whether a state law conflicts with a federal law by hindering the complete accomplishment of the federal law's objective, we give considerable weight to the views of the federal agency charged with administering the federal law. (*Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861, 883, 120 S.Ct. 1913, 146 L.Ed.2d 914.) Accordingly, based on the views of the SEC discussed above, we conclude that the SEA preempts the California Standards' rules on arbitrator disclosure.

The case for SEA preemption is even more compelling as to the California Standards' disqualification rules.

[17] Standard 10 of the California Standards conflicts with rule 10308 of the NASD Code insofar as it deprives the Director of Arbitration of authority to determine whether, after an arbitrator has been appointed, that arbitrator should be disqualified on the ground of bias or interest. Under standard 10, disqualification is automatic if a party timely serves a notice of disqualification in any of the circumstances described in the standard, some of which may occur after an arbitrator has been selected and appointed. Under the NASD Code, after an arbitrator is appointed, a party may seek disqualification of the arbitrator by making an objection, but it is the Director of Arbitration who makes

the disqualification determination. This may often require the exercise of judgment to determine whether information that the arbitrator disclosed after appointment, or failed to disclose before appointment, sufficiently demonstrates a disqualifying bias or interest. These different systems of arbitrator disqualification are fundamentally irreconcilable because application of standard 10 could require disqualification of an arbitrator who could not be disqualified under the NASD rules because the Director of Arbitration had determined that the arbitrator did not have a disqualifying bias or interest. (See *Mayo, supra,* 258 F.Supp.2d at p. 1107 ["Application of the California standards thus would greatly reduce, if not eliminate in practice, the role of the Director of Arbitration in the disqualification process."].)

In October 2002, when it approved rule IM–10100 of the NASD Code, requiring waiver of the California Standards, the SEC relied on the existence of this conflict: "Under the California Standards, even inadvertent non-disclosure of immaterial relationships is a basis for removal of an arbitrator and vacatur of an award. The California Standards remove from the alternative dispute resolution administrator the power to decide contested challenges to arbitrators, instead vesting this authority unilaterally in any party to the arbitration. As currently drafted, the California Standards would allow a party unilaterally to challenge and remove one arbitrator after another, thus destroying any notion of arbitral finality and closure." (67 Fed.Reg. 62087.) In adopting a rule designed to prevent implementation of the California Standards in NASD arbitrations, the SEC made a finding that the NASD rule was "consistent with Section 15A(b)(6) of the Act, which requires that the rules be designed to promote just and equitable principles of trade, as well as to remove impediments to and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest." (67 Fed. Reg. 62088, fn. omitted.)

The SEC has expressed its view that the California Standards' disqualification provision, standard 10, conflicts with the NASD Code in a way that threatens to frustrate the congressional goals and objectives underlying the SEA. In its brief in *Mayo,* the SEC stated: "[T]he California standards for disqualification conflict with the SRO rules in that they require arbitrator disqualification in circumstances where the SRO rules do not permit it. While the SRO rules provide that an arbitrator may, prior to the hearing, be disqualified by the Director of Arbitration based upon the information disclosed under SRO rules, and the NASD allows removal based on previously unknown disqualifying information after the hearing begins, the California statute mandates that an arbitrator 'shall be disqualified,' upon notice from either party, for failure to comply with California disclosure requirements." The SEC further noted: "This conflict cannot be resolved by the SROs simply by interpreting their existing rules more broadly to accommodate the California standards. All interpretations of rules that are not reasonably and fairly implied in the rule are classified as proposed rule changes and subject to Commission review." "[U]nilateral imposition of the state's regulations would impair the balance that the Commission has struck in approving existing disclosure and disqualification rules, as well as its obligation to consider and strike a balance in any revision of those rules." "As noted, serious concerns have been raised by the Commission staff that the added opportunities under the California system for disqualification and vacature of arbitral decisions may increase the complexity, cost, and uncertainty of the arbitration process. If so, this would serve the interests of well-financed brokerage firms, while the average investor would suffer from protracted and costly proceedings. The Commission must have an opportunity to consider these factors and make its own determination where to strike the appropriate balance."

It appears that application of the California Standards' disqualification provisions would allow a party to disqualify *any* arbitrator in an NASDDR-administered arbitration. Standard 8(b)(1)(A) requires the arbitrator to disclose any party's membership in the provider organization. Because an NASDDR-administered arbitration always includes one party—the broker/dealer—who is an NASD member, every arbitrator would have to

make this disclosure. Under standard 10(a)(2), a party may serve a notice of disqualification based on any disclosure that the arbitrator has made. If the notice is timely served, in the proper form, standard 10 provides that the arbitrator "is disqualified." Thus, in an NASDDR-administered arbitration between a broker/dealer and a customer, the customer may disqualify every potential arbitrator based on the arbitrator's required disclosure that the broker/dealer is an NASD member.

[18] The SEC's approval of rule IM–10100 of the NASD Code, and its pronouncements quoted above, reflect its determination that the NASD Code's provisions governing arbitrator selection should prevail over conflicting state law, and this determination is neither arbitrary nor in excess of its statutory authority. Therefore, we conclude that the SEA, through the SEC's approval of the NASD Code, preempts the California Standards dealing with disclosure and disqualification, including standards 7, 8, and 10.

C. Severability

As plaintiff Jevne points out, the California Standards contain 17 standards in all. He argues that the SEA preempts only those standards that actually conflict with it, and that the other, nonconflicting standards may be enforced in an NASD-administered arbitration. We disagree.

[19, 20] When state law conflicts with federal law, "it is preempted only to that extent and no further." (*Peatros v. Bank of America* (2000) 22 Cal.4th 147, 158, 91 Cal.Rptr.2d 659, 990 P.2d 539 (plur. opn. of Mosk, J.); see also *id.* at pp. 172–173, 91 Cal.Rptr.2d 659, 990 P.2d 539.) Whether the other 14 standards are enforceable in SRO arbitrations depends on whether those standards also conflict with federal law and, if not, whether they are severable from the standards that do conflict. "An invalid part can be severed if, and only if, it is 'grammatically, functionally and volitionally separable.' [Citation.] It is 'grammatically' separable if it is 'distinct' and 'separate' and, hence, 'can be removed as a whole without affecting the wording of any' of the measure's 'other provisions.' [Citation.] It is 'functionally' separable if it is not necessary to the measure's operation and purpose. [Citation.] And it is 'volitionally' separable if it was not of critical importance to the measure's enactment. [Citation.]" (*Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 613, 88 Cal.Rptr.2d 56, 981 P.2d 990.)

Standards 7, 8, and 10, are *grammatically* separable from the other 14 standards in the sense that they are separate and distinct standards that may be removed without affecting the wording of the other standards. Whether they are *functionally* or *volitionally* separable, in the sense that they are unnecessary to the California Standards' operation and purpose or not critical to their enactment, is more problematic. The preempted provisions govern disclosure and disqualification, two areas that would appear to be both necessary to the California Standards' operation and critical to their enactment. When it directed the Judicial Council to draft the standards, the Legislature specified that the California Standards "shall address the disclosure of interests, relationships, or affiliations that may constitute conflicts of interest, including prior service as an arbitrator or other dispute resolution neutral entity, disqualifications, acceptance of gifts, and establishment of future professional relationships." (Code Civ. Proc., § 1281.85, subd. (a).) Thus, the preempted standards relate to the first two of the four areas required by the Legislature.

A review of the remaining standards confirms the overriding importance of the preempted standards. The first four standards impose no ethical duties on arbitrators. Standard 1 is a declaration of purpose, standard 2 contains definitions, standard 3 specifies the standards' application and effective date, and standard 4 specifies the duration of the duties the standards impose on arbitrators—"from acceptance of appointment until the conclusion of the arbitration." Standard 5 states the general duties of an arbitrator to "act in a manner that upholds the integrity and fairness of the arbitration process" and to "maintain impartiality toward all participants in the arbitration at all times." Stan-

dard 6 says that a proposed arbitrator who is unable to be impartial must decline appointment. Standard 9 states that arbitrators must make a reasonable effort to learn about matters that must be disclosed under standards 7 and 8. Standard 11 prohibits an arbitrator from accepting gifts or favors from parties or other persons whose interests are at stake in the arbitration. Standard 12 limits an arbitrator's ability to entertain or accept offers of employment from persons involved in the arbitration. Standard 13 requires arbitrators to conduct the arbitration proceedings fairly, promptly, and diligently. Standard 14 restricts ex parte communications with the arbitrator. Standard 15 imposes certain duties of confidentiality on the arbitrator. Standard 16 governs compensation for the arbitrator, prohibiting compensation that is contingent on the outcome and requiring prior written disclosure of the terms and conditions of the arbitrator's compensation. And Standard 17 addresses the arbitrator's conduct in marketing his or her services, requiring that it be "truthful and accurate" and prohibiting solicitation of business from a participant in the arbitration while the arbitration is pending.

[21] To the extent these other standards impose additional duties and restrictions on arbitrators, they are not severable from the disqualification standard (standard 10), because disqualification is the primary mechanism for enforcing these duties and restrictions. Accordingly, we conclude that the preempted standards—standards 7, 8, and 10 (and possibly 9 as well, because it relates to disclosure)—are not severable from the remaining standards because they are not functionally or volitionally separable, and therefore the California Standards as a whole are preempted in SRO-administered securities arbitrations.

IV. Arbitration Delays Caused By Arbitration Provider

[22] Plaintiffs argue that they should not be held to their arbitration agreement because they were led to believe that arbitration would lead to a quick resolution of their dispute with defendants. Under the NASD Code, rule 10304, the time limitation upon submission of a dispute is six years "from the occurrence or event giving rise to the act or dispute, claim or controversy." The alleged mishandling of the funds occurred from 1997 through 1999, so the six-year period will not expire, at least as to the later transactions, until sometime this year. In any event, the delay appears to have been reasonably necessitated by uncertainty regarding application of the California Standards. Thus, we conclude there is no reason to excuse plaintiffs from their arbitration agreement.

V. Conclusion and Disposition

Federal law regulates the national securities market to ensure fair trading practices and the protection of legitimate investor interests. Federally registered private entities, the SRO's, are responsible in the first instance for ensuring that these congressional goals are met. A federal agency, the SEC, supervises the performance by the SRO's of their regulatory functions.

The NASD, a registered SRO subject to SEC supervision, has adopted comprehensive arbitration rules, the NASD Code, that include detailed arbitrator selection procedures. The SEC has approved these procedures, and it has determined that they should preempt the California Standards. In making this determination, the SEC has acted within its authority, and its determination is neither arbitrary nor unreasonable. Accordingly, federal securities law (the SEA, by way of the SEC's approval of specific NASD rules) preempts the California Standards.

The Court of Appeal's judgment is affirmed.

WE CONCUR: WERDEGAR, CHIN, BROWN, MORENO, JJ., VARTABEDIAN, J.*, and WARD, J.**



* Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Acting Chief Justice pursuant to article VI, section 6 of the California Constitution.

** Associate Justice of the Court of Appeal, Fourth Appellate District, Division Two, assigned by the Acting Chief Justice pursuant to article VI, section 6 of the California Constitution.

ment. The court would, therefore, reconsider a portion of its order granting summary judgment to Westport. Reviewing the evidence now offered by Reid, the court concluded: "the court reaffirms its earlier decision to enter summary judgment in favor of Westport."

On June 24, 2002, Reid moved ex parte for entry of judgment in favor of Westport, "so that appeal may be taken from this Court's decision granting on March 5, 2002, 'Plaintiff's Motion for Reconsideration of Order on Cross–Motions for Summary Judgment.'" On March 25, 2003, the district court denied this motion, ruling that its judgment entered on October 10, 2001 had never been "vacated, altered or amended."

Reid filed an appeal of the March 25, 2003 order as well as of the judgment of October 10, 2001. Westport moved to dismiss the appeal. This court limited the appeal to review of the order of March 25, 2003.

ANALYSIS

Fifty days after the court entered judgment on October 10, 2001, Reid moved for reconsideration. At this point, the 30–day period for filing a notice of appeal set by Fed. R.App. Proc. 4(a) had already run. No time remained for Reid to appeal the judgment. The late motion for reconsideration had no tolling effect. Only if the motion had been made within 10 days of the judgment would it have had such effect. Fed. R.App. Proc. 4(a)(4)(A)(vi).

Reid's present appeal, seeking the entry of a new judgment in favor of its adversary, appears to be an effort to create a new time from which appeal of the judgment might be taken. No reason exists to countenance this maneuver. The court's judgment was entered in 2001. The appeals period expired in 2001. The present appeal is DISMISSED.



CREDIT SUISSE FIRST BOSTON CORPORATION, a Massachusetts corporation, Plaintiff–Appellee,

v.

Michael Scott GRUNWALD, a California resident, Defendant–Appellant.

No. 03–15695.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 2, 2003.

Filed March 1, 2005.

Background: Employee filed motion requesting district court to reconsider its preliminary injunction barring him from arbitrating his employment dispute before American Arbitration Association (AAA). The United States District Court for the Northern District of California, Saundra Brown Armstrong, J., denied the motion, and employee appealed.

Holdings: The Court of Appeals, Paez, Circuit Judge, held that:

(1) employee's motion was not subject to the ten-day time limit for motions to alter or amend a judgment;

(2) National Association of Securities Dealers (NASD) arbitrators were "neutral arbitrators" within the meaning of California Ethics Standards applicable to arbitrators appointed by dispute resolution provider organizations (DRPOs); and

(3) Securities Exchange Act preempted application of the California Ethics

Standards to NASD-appointed arbitrators.

Affirmed.

Berzon, Circuit Judge, filed opinion concurring in the judgment.

1. Injunction ⇐159

Ten-day time limit for motions to alter or amend a judgment applies to motions for reconsideration of a preliminary injunction order. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.

2. Injunction ⇐167

There is no time limit on a motion to vacate or dissolve a preliminary injunction. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

3. Injunction ⇐159, 169

Motion requesting district court to reconsider its preliminary injunction, which was based on circumstances that occurred after the court granted the preliminary injunction, was, in substance, a motion to vacate or dissolve the injunction based on changed circumstances, and therefore not subject to the ten-day time limit for motions to alter or amend a judgment. Fed. Rules Civ.Proc.Rules 54(b), 59(e), 28 U.S.C.A.

4. Federal Courts ⇐724

Employee's appeal from denial of motion requesting district court to reconsider its preliminary injunction barring him from arbitrating his employment dispute before American Arbitration Association (AAA) was not rendered moot by fact that employee dismissed his claim before the AAA, and commenced arbitration of his claim before National Association of Securities Dealers (NASD); because there was no showing that employee's claims before the AAA were dismissed with prejudice, he would still be able to re-file his claims with the AAA, and employee also requested that the district court modify the preliminary injunction to allow him to file his claims in state court.

5. Federal Courts ⇐572.1

There is no requirement that an appeal from an interlocutory order be premised on a fundamental right. 28 U.S.C.A. § 1292(a)(1).

6. Federal Courts ⇐815

Court reviews for abuse of discretion the district court's decision denying the motion to modify or dissolve the preliminary injunction.

7. Statutes ⇐181(1), 183

Under California law, legislative intent prevails over the letter of the law in construing a statute, and the letter will, if possible, be so read as to conform to the spirit of the act.

8. Courts ⇐78

California Judicial Council may not act inconsistent with its governing statutes. West's Ann.Cal. Const. Art. 6, § 6; West's Ann.Cal.C.C.P. § 1281.85(a).

9. Exchanges ⇐11(11.1)

National Association of Securities Dealers (NASD) arbitrators were "neutral arbitrators" within the meaning of California Ethics Standards applicable to arbitrators appointed by dispute resolution provider organizations (DRPOs). West's Ann. Cal.C.C.P. §§ 1280(d), 1281.85(a).

See publication Words and Phrases for other judicial constructions and definitions.

10. Exchanges ⇐11(12)

States ⇐18.77

California Ethics Standards conflicted with National Association of Securities Dealers (NASD) arbitration disqualification and disclosure rules, and therefore Securities Exchange Act preempted application of the California Ethics Standards to NASD-appointed arbitrators; NASD could not simultaneously comply with both the NASD Code's and the California Eth-

ics Standards' disqualification rules, and application of the California Ethics Standards' disclosure requirements to NASD-appointed arbitrators would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Securities Exchange Act of 1934, § 19(b), 15 U.S.C.A. § 78s(b); West's Ann.Cal.C.C.P § 1281.85(a).

11. States ⚿18.5

Preemption occurs where it is impossible for a private party to comply with both state and federal law.

West Codenotes

Limited on Preemption Grounds

Cal.Civ.Proc.Code §1281.85(a)

Cal.Civ.Proc.Code § 1286.2(a)(6)

Michael Blumenfeld, Los Angeles, CA, argued the case for the appellant, and Todd M. Lander, Los Angeles, CA, assisted on the briefs.

Michael D. Early, San Francisco, CA, argued the case for the appellee, and Dena L. Narbaitz, San Francisco, CA, and Suzy C. Douglass, San Francisco, CA, assisted on the briefs.

Mark A. Perry, Washington, DC, argued the case for amicus curiae NASD Dispute Resolution, Inc., and Douglas W. Henkin, New York, NY, for amicus curiae New York Stock Exchange, Inc., assisted on the joint brief of NASD and NYSE in support of affirmance.

Mitchell C. Tilner and David S. Ettinger, Encino, CA, submitted an amicus curiae brief on behalf of the Judicial Council of California.

Eric Summergrad, Washington, DC, Deputy Solicitor for the SEC, submitted the Statement of the Securities and Exchange Commission, amicus curiae, in Support of the Position of the plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California; Saundra B. Armstrong, District Judge, Presiding. D.C. No. CV–02–02051–SBA.

Before: LEAVY, PAEZ, and BERZON, Circuit Judges.

PAEZ, Circuit Judge:

In this appeal we decide whether California's recently-adopted ethics standards for neutral arbitrators apply to arbitrations conducted in California by the National Association of Securities Dealers ("NASD"). We conclude that the California legislature intended the new ethics standards to apply to NASD-appointed neutral arbitrators. We hold, however, that the Securities and Exchange Act of 1934 ("Exchange Act"), as amended, preempts application of California's ethics standards to NASD arbitrations. In so holding, we further conclude that NASD rules approved by the Securities and Exchange Commission have preemptive force over conflicting state law. Accordingly, we affirm.

I.

This appeal arises out of an employment dispute between Scott Grunwald and his former employer, Credit Suisse First Boston ("CSFB"). After CSFB terminated Grunwald from his position as Director of CSFB's Technology Private Client Services Program, Grunwald exhausted CSFB's internal grievance procedures and mediated his dispute with CSFB through JAMS/Endispute—the initial steps required by CSFB's Employment Dispute Resolution Program ("EDRP"). Grunwald then filed a demand for arbitration with the American Arbitration Association ("AAA"). CSFB, however, successfully

obtained a preliminary injunction in district court that enjoined Grunwald from arbitrating before the AAA. The court granted the preliminary injunction on the ground that CSFB's EDRP required employees registered with the NASD, like Grunwald, to arbitrate before a NASD-appointed arbitration panel. Grunwald responded to the preliminary injunction by filing a demand for arbitration with the NASD.

Before the NASD appointed Grunwald's arbitration panel, the California Judicial Council [1] adopted heightened disclosure and disqualification standards for "neutral arbitrators." *See* Ethics Standards for Neutral Arbitrators in Contractual Arbitration, Cal. Rules of Court, appen., Div. VI (hereinafter "California Ethics Standards"). The NASD, however, determined that the California Ethics Standards should not apply to NASD arbitrations because the standards conflicted with the NASD's own rules that had been approved by the Securities and Exchange Commission. Consequently, the NASD immediately suspended the appointment of arbitrators in California when the California Ethics Standards went into effect on July 1, 2002. On August 6, the NASD announced that it would recommence arbitrations initiated in California, but only on the express condition that all parties agreed to arbitrate outside of California.[2] In September, the NASD gave California parties the additional option of waiving the California Ethics Standards and proceeding with arbitration in California.[3] In connection with this waiver policy, the NASD successfully sought Commission approval of a new rule [4] requiring industry parties to NASD arbitrations in California to waive the California Ethics Standards upon waiver of these standards by investors or associated persons. Because Grunwald qualified as an associated person, the Commission-approved waiver rule would have required CSFB to waive the California Ethics Standards if Grunwald had chosen to waive the standards.[5]

1. "Article VI, section 6 of the California Constitution requires the [California Judicial Council] to improve the administration of justice by . . . [a]dopting rules for court administration and rules of practice and procedure that are not inconsistent with statute. . . ." Cal. R. Ct. 6.1(b).

2. Memorandum from Laura J. Hartt, Senior Attorney, NASD, to Parties and Counsel of Record (Aug. 6, 2002).

3. Letter from Robert R. Glauber, Chairman and C.E.O. of NASD, to SEC Chairman Harvey L. Pitt (Sept. 19, 2002).

4. NASD Rule IM–10100(f); Self–Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by National Association of Securities Dealers, Inc. To Require Industry Parties in Arbitration To Waive Application of Contested California Arbitrator Disclosure Standards, Upon the Request of Customers and Associated Persons With Claims of Statutory Employment Discrimination, for a Six–Month Pilot Period, 67 Fed.Reg. 62,085 (Oct. 3, 2002) (hereinafter "Industry Party Waiver Rule"); Self–Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Extend for an Additional Six–Month Period a Pilot Rule To Require Industry Parties in Arbitration To Waive Application of Contested California Arbitrator Disclosure Standards, Upon the Request of Customers and Associated Persons With Claims of Statutory Employment Discrimination, 68 Fed.Reg. 17,713 (Apr. 10, 2003); Self–Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Extend, for an Additional Six–Month Period, a Pilot Rule Regarding Waiver of California Arbitrator Disclosure Standards, 68 Fed.Reg. 57,494 (Oct. 3, 2003); 69 Fed.Reg. 17,010 (Mar. 31, 2004); 69 Fed.Reg. 58,567 (Sept. 30, 2004) (hereinafter "September 30, 2004 Industry Party Waiver Rule").

5. Any "natural person who is registered or has applied for registration" with the NASD

Grunwald, however, refused to waive the California Ethics Standards and declined the NASD's offer to proceed with arbitration outside of California. Grunwald then requested that the district court grant him leave to file a motion to reconsider the preliminary injunction. He argued that the NASD's suspension of arbitrations in California undermined his right to an expeditious arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16. He also asserted that the NASD's waiver option amounted to a coerced waiver of his right to have his arbitration conducted pursuant to the California Ethics Standards. Grunwald's motion sought modification or dissolution of the preliminary injunction so that he could re-file his claims in state court or with the AAA.

The district court permitted Grunwald to file his motion for reconsideration, but ultimately denied the motion. In refusing to modify or dissolve the preliminary injunction, the district court determined that the California Ethics Standards did not apply to NASD arbitrators because the standards apply only to "neutral arbitrators" appointed directly by the parties. Thus, Grunwald did not have a right to have his NASD arbitration conducted pursuant to the requirements of the California Ethics Standards. Additionally, the district court determined that there was no right to a speedy and expeditious arbitration under the FAA. Even if such a right existed, the district court held that Grunwald could obtain a speedy arbitration by submitting to arbitration outside California or by waiving application of the California Ethics Standards to his NASD arbitration. Finally, the district court determined that the FAA precluded invalidation of the parties' agreement to arbitrate their employment dispute before the NASD. Grunwald filed a timely appeal from the district court's order denying his motion for reconsideration of the preliminary injunction.

is an ''associated person.'' By-laws of the NASD, Art. I(dd). Grunwald qualifies as an associated person because he was registered with the NASD. We also note that the waiver rule applies to associated persons like Grunwald that have been terminated. September 20, 2004 Industry Party Waiver Rule, 69 Fed. Reg. at 58,567 n. 7.

II.

We begin by considering four jurisdictional objections raised by CSFB. Because the district court's order was an "[i]nterlocutory order[ ] ... refusing to dissolve or modify [the] injunction[ ]," 28 U.S.C. § 1292(a)(1), we have jurisdiction over this appeal.

A.

[1] Initially, CSFB contends that Grunwald's motion for reconsideration was untimely because it was filed some ninety days after the district court granted the preliminary injunction. CSFB points out that a motion to alter or amend a judgment must be filed within ten days of the entry of the judgment. Fed.R.Civ.P. 59(e). CSFB also correctly states that this ten-day time limit applies to motions for reconsideration of a preliminary injunction order.[6] *See Sierra On–Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1419 (9th Cir.1984). Consequently, if Grunwald's motion was not based on events that occurred after the district court granted the preliminary injunction, the motion

6. Rule 59(e) applies to ''[a]ny motion to alter or amend a judgment,'' and under Rule 54(a), a *judgment* is defined to include ''any order from which an appeal lies.'' Because 28 U.S.C. § 1292(a)(1) establishes appellate jurisdiction over an appeal from a preliminary injunction, a preliminary injunction order is a ''judgment'' and is therefore subject to Rule 59(e)'s ten-day time limit on motions for reconsideration.

would be untimely because it was filed well after the ten-day time limit.

[2] Although a motion for reconsideration is subject to Rule 59(e)'s ten-day time limit, there is no time limit on a motion to vacate or dissolve a preliminary injunction. Federal Rule of Civil Procedure 54(b) states that a district court can modify an interlocutory order "at any time" before entry of a final judgment, and we have long recognized "the well-established rule that a district judge always has power to modify or to overturn an interlocutory order or decision while it remains interlocutory." *Tanner Motor Livery, Ltd. v. Avis, Inc.,* 316 F.2d 804, 809 (9th Cir.1963).

[3] In determining whether a motion requesting the district court to reconsider its preliminary injunction should be treated as a motion for reconsideration under Rule 59 or a motion for dissolution or modification under Rule 54, we agree with the Third Circuit that "we must look beyond the motion's caption to its substance." *Favia v. Ind. Univ. of Pa.,* 7 F.3d 332, 337 (3d Cir.1993); *see also Ortho Pharm. Corp. v. Amgen, Inc.,* 887 F.2d 460, 463 (3d Cir.1989) ("We agree with Amgen that we must determine from its substance and not from its form whether we should treat Ortho's motion as a motion for reconsideration under Fed.R.Civ.P. 59(e) or a motion to modify a preliminary injunction under Fed.R.Civ.P. 62(c)."). While "[t]he purpose of a motion to reconsider under Fed.R.Civ.P. 59(e) is to relitigate the 'original issue,' " *Ortho,* 887 F.2d at 463, "[a] motion to modify a preliminary injunction is meant only to relieve inequities that arise after the original order." *Favia,* 7 F.3d at 338. Thus, a motion that merely seeks to relitigate the issues underlying the original preliminary injunction order is subject to Rule 59(e)'s ten-day limit, while a motion that in substance is based on new circumstances that have arisen after the district court granted the injunction may be filed at any time before entry of a final judgment.

If we did not look at the substance of the motion, a preliminary injunction would forever be subject to challenge and appeal. *See Sierra On–Line, Inc.,* 739 F.2d at 1418 n. 4. In *Sierra On–Line,* the appellant conceded that it had presented no new matter in its motion for reconsideration. We declined to treat the district court's order denying the motion for reconsideration as an order refusing to dissolve the preliminary injunction, explaining:

> "The evident purpose of [Section 1292(a)(1)] is to permit review of orders made in response to claims of changed circumstances, not to extend indefinitely the time for appeal from a preliminary injunction by the simple device of seeking to vacate it or modify it." 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 3924, at 88 (1977). As a general rule, therefore, the denial of a motion to modify or dissolve an injunction, or to reconsider a request for an injunction, will be appealable only if the motion raises new matter not considered when the injunction was first issued.

Id. Thus, our task is to determine whether the substance of Grunwald's motion was based on changed circumstances.

Grunwald's motion indeed "raise[d] new matter not considered when the injunction was first issued." *Id.* The California Ethics Standards were implemented after the district court granted the preliminary injunction. The NASD also suspended arbitrations in California, absent waiver of the California Ethics Standards, after the district court had issued the preliminary injunction. Grunwald's motion alleged that these post-injunction events deprived him of his right to a speedy arbitration, as well as his right to have his arbitration conducted pursuant to the requirements of the

California Ethics Standards. Thus, Grunwald's motion was based on circumstances that occurred after the court granted the preliminary injunction. Consequently, Grunwald's "Motion for Reconsideration" was, in substance, a motion to vacate or dissolve the injunction based on changed circumstances.

In light of the nature of Grunwald's motion, we conclude that it was timely filed. As we explained above, a motion to vacate or dissolve an injunction based on changed circumstances is not subject to the ten-day time limit in Rule 59(e). Because Grunwald's motion alleged changed circumstances and did not simply seek to relitigate the issues decided by the district court when it granted the preliminary injunction, Grunwald was not required to file his motion within the ten-day period established by Rule 59(e). Consequently, Grunwald's motion, although filed some ninety days after the district court granted the preliminary injunction, was timely.

B.

[4] CSFB next argues that this appeal is moot because Grunwald dismissed his claim before the AAA, and commenced arbitration of his claim before the NASD. Although a "party moving for dismissal on mootness grounds bears a heavy burden," *Coral Constr. Co. v. King County*, 941 F.2d 910, 927–28 (9th Cir.1991), CSFB fails to explain why these events render Grunwald's appeal moot. If Grunwald had obtained the relief he sought in his motion for reconsideration, the preliminary injunction order would have been modified to permit Grunwald to proceed with arbitration before the AAA or to file his case in state court. Because there is no showing that Grunwald's claims before the AAA were dismissed with prejudice, he would still be able to re-file his claims with the AAA. In any event, Grunwald also requested that the district court modify the preliminary injunction to allow him to file his claims in state court. Because the outcome of this appeal will determine whether Grunwald can pursue arbitration with the AAA or file his case in state court, this is not a situation where "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). Therefore, we conclude that this appeal is not moot.

C.

Next, CSFB argues that Grunwald is improperly attempting to obtain judicial review of the NASD's rule changes. However, as even CSFB appears to recognize, Grunwald only seeks to vindicate an alleged right to have his arbitration conducted in accordance with the California Ethics Standards. Grunwald may lack such a right, but that is a question that goes to the merits of this appeal, not to our jurisdiction.

D.

[5] Finally, CSFB asserts that Grunwald's appeal from the district court's denial of his motion for reconsideration fails to satisfy the criteria for an interlocutory appeal under § 1292(a)(1). CSFB reasons that an appellant can only bring an interlocutory appeal when "fundamental rights" are at stake, and contends that arbitrator-disclosure rules do not implicate fundamental rights. There is no requirement, however, in § 1292(a)(1) that an appeal from an interlocutory order be premised on a fundamental right. Consequently, we conclude that we have jurisdiction, and we turn to the merits of Grunwald's appeal.

III.

[6] The district court concluded that the Judicial Council had exceeded its stat-

utory authority by applying the California Ethics Standards to arbitrators appointed by a dispute resolution provider organization ("DRPO") like the NASD because the California Legislature only authorized the adoption of ethics standards for arbitrators jointly selected by the parties.[7]

"Because the California Supreme Court has not addressed" whether the Judicial Council acted within its authority in this instance, "our task is to 'predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance.' " *Walker v. City of Lakewood*, 272 F.3d 1114, 1125 (9th Cir.2001) (quoting *NLRB v. Calkins*, 187 F.3d 1080, 1089 (9th Cir.1999)).[8]

[7] In interpreting the California statute at issue here, we look to California principles of statutory construction. *Neilson v. Chang* (*In re First T.D. & Investment, Inc.*), 253 F.3d 520, 527 (9th Cir. 2001). These principles require us to " 'ascertain the intent of the Legislature so as to effectuate the purpose of the law' " by looking first to the words of the statute. *State Farm Mut. Auto. Ins. Co. v. Garamendi*, 32 Cal.4th 1029, 12 Cal.Rptr.3d 343, 88 P.3d 71, 78 (Cal.2004) (citations omitted). We utilize the ordinary meaning of words in a statute unless the Legislature has defined the terms. *Sec. Pac. Nat'l Bank v. Wozab*, 51 Cal.3d 991, 275 Cal. Rptr. 201, 800 P.2d 557, 561 (Cal.1990). " 'It is axiomatic that in the interpretation of a statute where the language is clear, its plain meaning should be followed.' " *Id.* (citation omitted). This "plain meaning" rule, however, "does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute." *Lungren v. Deukmejian*, 45 Cal.3d 727, 248 Cal.Rptr. 115, 755 P.2d 299, 304 (1988). Thus, "[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." *Id.* In the event the letter of the law is ambiguous, California law requires us to examine the legislative history for further guidance. *Hughes v. Bd. of Architectural Exam'rs*, 17 Cal.4th 763, 72 Cal.Rptr.2d 624, 952 P.2d 641, 649 (1998) (per curiam).

[8] The California statute authorizing the Judicial Council to adopt new ethics standards specified that "[t]he Judicial Council shall adopt ethical standards for all *neutral arbitrators* effective July 1,

7. We review for abuse of discretion the district court's decision denying the motion to modify or dissolve the preliminary injunction. *Miller ex rel. NLRB v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 455 (9th Cir.1994) (en banc). A district court abuses its discretion when it bases its decision on an erroneous legal standard. *Sierra On–Line*, 739 F.2d at 1421. Consequently, we review *de novo* any underlying issues of law, *Does 1–5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir.1996), including the district court's interpretation of California state law. *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 665 (9th Cir.2003).

8. We recognize that the California Court of Appeal addressed this issue of California law in *Jevne v. Superior Court*, 6 Cal.Rptr.3d 542 (Ct.App.2003). The California Supreme Court, however, recently granted review in *Jevne* thereby superceding the opinion of the California Court of Appeal. 11 Cal.Rptr.3d 222, 86 P.3d 290 (2004). Under California Rules of Court, a superceded opinion is not considered published, and an unpublished opinion cannot be cited to or relied on by other courts. Cal. R. Ct. 976, 977. In short, an unpublished opinion does not constitute binding precedent. Accordingly, we are not bound by the *Jevne* court's analysis of California law. *See Aeroquip Corp. v. Aetna Cas. & Sur. Co.*, 26 F.3d 893, 894 n. 1 (9th Cir.1994) (per curiam) (disregarding a California Court of Appeals decision because it had been ordered depublished).

2002." Cal.Civ.Proc.Code § 1281.85(a) (emphasis added). Thus, the California legislature authorized the Judicial Council to adopt ethics standards only for "neutral arbitrators," a term that is defined by statute to mean:

> an arbitrator who is (1) selected jointly by the parties or by the arbitrators selected by the parties or (2) appointed by the court when the parties or the arbitrators selected by the parties fail to select an arbitrator who was to be selected jointly by them.

Cal.Civ.Proc.Code § 1280(d). The California Ethics Standards explicitly apply to arbitrators appointed by DRPOs. Standard 2(a)(1)(C).[9] However, the Judicial Council may not act "inconsistent with the governing statutes." *People v. Hall*, 8 Cal.4th 950, 35 Cal.Rptr.2d 432, 883 P.2d 974, 980 (Cal.1994). Thus, the only question is whether the Judicial Council exceeded its authority when it required DRPO-appointed arbitrators to comply with the new standards.

[9] The district court held that because section 1281.85 plainly applies only to "neutral arbitrators" as defined by section 1280, it could not apply to DRPO-appointed arbitrators. Although we agree with the district court's determination that section 1281.85 permitted the Judicial Council to adopt ethics standards only for neutral arbitrators, we disagree with its unjustified assumption that all DRPO-appointed arbitrators are not neutral arbitrators. As section 1280 sets forth, an arbitrator qualifies as a neutral arbitrator if he is "selected jointly by the parties."

Under the NASD's Code of Arbitration Procedure ("NASD Code"), the parties jointly select the arbitrators that serve on the panel. After receiving a list of potential arbitrators, "[a] party may strike one or more of the arbitrators from each list for any reason." NASD Code § 10308(c)(1)(A). The parties then rank order all of the remaining arbitrators. *Id.* § 10308(c)(1)(B), (C). Next, the NASD's Director of Arbitration adds the parties' rankings together, and must appoint the arbitrators that have the best consolidated rankings, subject only to availability and disqualification. *Id.* § 10308(c)(3), (4). Because the parties have unlimited strikes and the power to choose the arbitrators through the consolidated ranking process, we conclude that NASD arbitrators are "selected jointly by the parties" and therefore qualify as "neutral arbitrators." *See* Cal.Civ.Proc.Code § 1280.

Because NASD arbitrators are "neutral arbitrators" within the meaning of section 1280, section 1281.85 authorized the Judicial Council to adopt ethics standards that would be applicable to NASD arbitrators. The Judicial Council therefore did not exceed its authority by requiring DRPOs, like the NASD, to comply with the California Ethics Standards. Accordingly, contrary to the district court's ruling, we hold that the Judicial Council did not act *ultra vires* by subjecting NASD arbitrators to the new ethics standards. For a different reason, however, we agree with the district court's ultimate conclusion that the new ethics standards cannot be applied to NASD arbitrators.

9. Under the California Ethics Standards, "neutral arbitrator" is defined to mean:

> any arbitrator who is subject to these standards and who is to serve impartially, whether selected or appointed:
> (A) Jointly by the parties or by the arbitrators selected by the parties;
> (B) By the court, when the parties or the arbitrators selected by the parties fail to select an arbitrator who was to be selected jointly by them; or
> (C) *By a dispute resolution provider organization, under an agreement of the parties.*

Standard 2(a) (emphasis added).

IV.

[10] CSFB contends that the Exchange Act preempts application of the California Ethics Standards to NASD-appointed arbitrators. We agree.

Under the Supremacy Clause, federal laws preempt conflicting state laws. U.S. CONST., art. VI, cl. 2. Federal regulations issued by an agency in the scope of its congressionally-delegated authority are included among the "Laws of the United States" which can preempt state law. *City of New York v. FCC,* 486 U.S. 57, 63–64, 108 S.Ct. 1637, 100 L.Ed.2d 48 (1988). We deal here, however, with rules adopted by private entities—self-regulatory organizations ("SROs") within the securities industry—rather than federal agencies. The Exchange Act "delegated government power" to SROs such as the New York Stock Exchange ("NYSE") and the NASD "to enforce . . . compliance by members of the industry with both the legal requirements laid down in the Exchange Act and ethical standards going beyond those requirements." S.Rep. No. 94–75, at 23 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179, 201.

Whether SRO rules can preempt conflicting state laws is an issue that we have not addressed. In *Merrill Lynch, Pierce, Fenner & Smith v. Ware,* however, the Supreme Court suggested by implication that SRO rules can in certain circumstances have preemptive force despite the fact that they are adopted and enforced by private organizations. 414 U.S. 117, 127, 94 S.Ct. 383, 38 L.Ed.2d 348 (1973) ("[C]onflicting law . . . should be pre-empted by exchange self-regulation 'only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act.' " (quoting *Silver v. N.Y. Stock Exch.,* 373 U.S. 341, 361, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963))). In light of the Supreme Court's *Ware* decision and the 1975 Amendments to the Exchange Act, we conclude that SRO rules approved by the Commission preempt conflicting state law. Because the NASD arbitration rules at issue here were approved by the Commission and because the California Ethics Standards conflict with the NASD arbitration disclosure rules, the California Ethics Standards are preempted by the NASD rules.

A.

The Securities Exchange Act of 1934 created a system of supervised self-regulation in the securities industry whereby organizations such as the NASD or the NYSE could promulgate their own governing rules and regulations, subject to oversight by the Securities and Exchange Commission. The original version of the statute gave SROs considerable latitude to fashion their own governing rules. S.Rep. No. 73–792, at 5 (1934). The Commission was authorized to take action only when "necessary or appropriate for the protection of investors or to insure fair dealing. . . ." 15 U.S.C. § 78s(b) (1934).

This system gave rise to questions regarding the preemptive effect of SRO rules, issued by private organizations although sanctioned by federal law, over conflicting state law. The Supreme Court addressed this issue in 1973 in *Ware* and articulated a standard to determine when SRO rules would preempt state law. 414 U.S. at 125, 130–31, 94 S.Ct. 383. Merrill Lynch argued that a NYSE rule providing for compulsory arbitration preempted a California state law that afforded employees a right of action for unpaid wages regardless of any private agreement to arbitrate. The Court disagreed, and instead held that state law applied. *Id.* at 138–39, 94 S.Ct. 383.

As the Court explained, Congress's aim in providing for supervised self-regulation was "to insure fair dealing and to protect investors from harmful or unfair trading

practices." *Id.* at 130, 94 S.Ct. 383. SRO rules that contradicted this policy were subject to Commission supervision. Conversely, however, "any rule or practice not germane to fair dealing or investor protection would not appear to fall under the shadow of the federal umbrella; it is, instead, subject to applicable state law." *Id.* at 130–31, 94 S.Ct. 383. Because the arbitration rules at issue were insufficiently related to fair dealing or the protection of investors, the Court concluded that they fell outside the federal shadow. *Id.* at 135, 94 S.Ct. 383 ("[T]he relationship between compulsory employer-employee arbitration and fair dealing and investor protection is 'extremely attenuated and peripheral, if it exists at all.' " (citation omitted)).

The Court's decision in *Ware* emphasized that the limited authority granted to the Commission under the 1934 Exchange Act was central to its preemption analysis. *Id.* at 349, 94 S.Ct. 383; *see also Perry v. Thomas*, 482 U.S. 483, 490, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987); *Silver*, 373 U.S. at 358 n. 12, 83 S.Ct. 1246 ("Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling, . . . a different case would arise concerning exemption from the operation of laws . . ., an issue we do not decide today."). The authority to adopt self-governing rules was vested in the SROs, and as Congress put it, "[i]t is only where [SROs] fail adequately to provide protection to investors that the Commission is authorized to step in and compel them to do so." S.Rep. No. 73–792, at 13; *see also Ware*, 414 U.S. at 130, 94 S.Ct. 383. The Commission's ability to scrutinize SRO rules was confined to designated subject areas,[10] and the direct supervisory power the Commission did enjoy was exercised "sparingly." *Ware*, 414 U.S. at 129–30, 94 S.Ct. 383.

It was in this context of the Commission's limited regulatory control over the SROs and the SROs' substantial rule-making latitude that the Court decided *Ware*. The arbitration rule at issue, in fact, clearly "would not [have been] subject to the Commission's modification or review" under the 1934 Exchange Act. *Id.* at 135, 94 S.Ct. 383. The Court explained that because the Exchange Act's self-regulatory scheme provided for no agency check on SRO behavior in some cases, state laws could operate as a beneficial " 'form of review of exchange self-policing . . . .' " *Id.* at 137, 94 S.Ct. 383 (quoting *Silver*, 373 U.S. at 359, 83 S.Ct. 1246).

Just two years after the Supreme Court decided *Ware*, however, Congress initiated a major overhaul of the Exchange Act and drastically shifted the balance of rulemaking power in favor of Commission over-

10. The Commission was authorized to compel SROs to amend their rules relating to the following areas:

> (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters.

15 U.S.C. § 78s(b) (1934).

sight. Securities Acts Amendments of 1975, Pub.L. No. 94–29, 89 Stat. 168 (codified as amended at 15 U.S.C. § 78a to 80b–4 (1975)). The amendments were intended to work "a fundamental reform of the economic and regulatory structure of the securities markets and the securities industry." S.Rep. No. 94–75, at 1. Under the amended statute, the Commission "play[s] a much larger role than it has in the past. . . ." *Id.*

After the 1975 Amendments, the SROs' "authority to regulate independently of the SEC's control" was substantially curtailed. *Id.* at 23. This limitation on the SROs' rule-making authority was accomplished by requiring SROs to file a proposed rule with the Commission, along with a policy statement justifying the basis and purpose for the proposed rule. 15 U.S.C. § 78s(b)(1). The Commission must give public notice of the proposed rule and provide an opportunity for comment. *Id.* With the enhanced supervisory role of the Commission, SROs are no longer free to adopt new substantive rules or modify existing rules at any time as they could prior to the amendments. S.Rep. No. 94–75, at 30. "No proposed rule change shall take effect unless approved by the Commission[,]" 15 U.S.C. § 78s(b)(1);[11] moreover, the Commission must give public notice of the specific reasons for its approval. S.Rep. No. 94–75, at 30.

The ultimate approval of a proposed SRO rule reflects the Commission's determination that the proposed rule is consistent with the purposes of the Exchange Act. 15 U.S.C. § 78s(b)(2); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 233, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987) ("No proposed rule change may take effect unless the SEC finds that the proposed rule is consistent with the requirements of the Exchange Act. . . ."). Moreover, the 1975 Amendments gave the Commission the power to abrogate, add to, and delete from the rules of any SRO "as the Commission deems necessary or appropriate to insure the fair administration of the self regulatory organization. . . ." 15 U.S.C. § 78s(c). Unlike the restrictions in the original statute, this new authority is not limited to specific subject matter areas.[12] S.Rep. No. 94–75, at 27–28, 31. The Commission's expanded authority includes, for example, "the power to mandate the adoption of any rules [the Commission] deems necessary to ensure that arbitration procedures adequately protect statutory rights." *Shearson/Am. Express, Inc.*, 482 U.S. at 234, 107 S.Ct. 2332.

Finally, the 1975 Amendments removed the original statute's explicit requirement that all SRO rules be consistent with "the applicable laws of the State in which[the exchange] is located. . . ." 15 U.S.C. § 78f(c) (1934). By contrast, the current statute requires that SRO rules be "not inconsistent with . . . applicable Federal and State law" *only* when they are promulgated as either administrative, "house-

11. A proposed SRO rule may take effect upon filing, without Commission approval, where the SRO designates the rule as

> (i) constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization, (ii) establishing or changing a due, fee, or other charge imposed by the self-regulatory organization, or (iii) concerned solely with the administration of the self-regulatory organization. . . .

15 U.S.C. § 78s(b)(3)(A); *see also* 17 C.F.R. § 240.19b–4. The statute, however, specifies that such "housekeeping" rules must not be inconsistent with applicable federal and state law. The Commission also retains the authority to summarily abrogate the rule within sixty days of filing and require the SRO to refile it in accordance with the approval procedures of § 78s(b)(2). 15 U.S.C. § 78s(b)(3)(C).

12. *See supra* note 10.

keeping" matters that do not require Commission approval (under § 78s(b)(3)(A)), or when they are temporary rule changes instituted summarily by the Commission (under § 78s(b)(3)(B)). The mandated approval process under § 78s(b)(2) does not contain a similar requirement that SRO rules be consistent with state law.

These new provisions for Commission approval are "now the 'measure of congressionally delegated authority for self-regulation in the national interest. . . .' " *Drayer v. Krasner*, 572 F.2d 348, 358 (2d Cir.1978). Section 78s(b)(2) provides for vastly expanded Commission oversight and requires that SRO rules promote the federal objectives of the Exchange Act. Commission approval of an SRO rule under the new § 78s(b)(2) therefore satisfies *Ware's* requirement that a rule be germane to fair dealing or investor protection and fall under the shadow of the federal umbrella; indeed, the Commission is in fact obligated "to refrain from imposing, or permitting to be imposed, any new regulatory burden 'not necessary or appropriate in furtherance of the purposes' of the Exchange Act." *Drayer*, 572 F.2d at 358 (quoting H.R. Conf. Rep. No. 94–229, at 94 (1975), *reprinted in* 1975 U.S.C.C.A.N. 321, 325).[13]

The Supreme Court has expressly withheld any opinion regarding the effect of the 1975 Amendments on *Ware's* holding and the preemptive effect of SRO arbitration rules approved under § 78s(b)(2). *Perry*, 482 U.S. at 487 n. 5, 107 S.Ct. 2520. But our decision here is consistent with the Second Circuit's analysis in *Drayer*, decided not long after the effective date of the 1975 Amendments. 572 F.2d at 358. Drayer's wrongful termination claim against his employer, a member of the NYSE, was stayed pending arbitration in accordance with NYSE rules. *Id.* at 350. The Second Circuit affirmed the district court's confirmation of the arbitration award, concluding that supervised self-regulation contemplated by the Exchange Act. *Id.* at 356.

The court in *Drayer* concluded that *Ware's* specific holding—that compulsory arbitration fell outside the Exchange Act's purposes—was abrogated by the 1975 Amendments. *Id.* at 357. As the court explained, the 1975 Amendments expanded the "federal umbrella" such that the compulsory arbitration rule now falls within the Act's reach as "germane to the goal of market efficiency . . . and to the objective of fair administration of the Exchange. . . ." *Id.* at 358.

Having recognized the significance of the 1975 Amendments, the court in *Drayer* held that the NYSE employment arbitration rules were within the purposes of the Exchange Act even though the Commission had at that time never specifically reviewed those rules. *Id.* The fact that the Commission had the opportunity for involvement—even though it had not exercised that power—was sufficient to satisfy *Ware's* requirements.

Since the Second Circuit decided *Drayer*, however, the Commission has issued an

13. Although we agree with the Second Circuit's analysis, *Drayer* skipped over one point that we believe was central to its analysis. The 1975 Amendments require, as a condition of SRO registration, that "[t]he rules of the [SRO] . . . are not designed . . . to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of the [SRO]." 15 U.S.C. §§ 78f(b)(5), 78*o*–3(b)(6); *see also* S.Rep. No. 94–75, at 28 ("[The Act] would limit by [these sections] the scope of the self-regulatory organizations' authority over their members to matters related to the purposes of the Exchange Act."). Because the SEC may only approve SRO rules if "it finds that [the rule] is consistent with the requirements" of the Exchange Act, 15 U.S.C. § 78s(b)(2), any rule properly approved by the SEC is necessarily related to "the purposes of [the Exchange Act] or the administration of the [SRO]."

affirmative statement of approval for the SRO arbitration rules. In 1989, the SROs overhauled their arbitration procedures. "[T]he SEC ... specifically approved the arbitration procedures of ... the NASD" after a period of public notice and comment, in line with the Exchange Act's requirements. *Shearson/Am. Express, Inc.* 482 U.S. at 234, 107 S.Ct. 2332. This, of course, included a thorough review and eventual approval of the NASD Code's disclosure and disqualification rules.[14]

The Commission worked closely with the Securities Industry Conference on Arbitration, a group composed of representatives from each SRO that had an arbitration program, a representative of the securities industry, and three or four public representatives, to develop the SROs' arbitrator-disclosure rules.[15] In addition, with respect to the current controversy, the Commission directed a special study to examine whether the SROs should amend their rules to incorporate the California Ethics Standards' disclosure and disqualification requirements. Michael A. Perino, Report to the Securities and Exchange Commission Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitrations, at 1 (Nov. 4, 2002) (hereinafter "Perino Report").[16] The Commission also has repeatedly approved the NASD's waiver rule, which requires industry parties to waive the California Ethics Standards if those standards are waived by an investor or an associated person.[17] 67 Fed.Reg. 62,085–88 (Oct. 3, 2002); *see also* 69 Fed.Reg. 58,567 (Sept. 30, 2004).

In sum, we conclude that SRO rules that have been approved by the Commission pursuant to 15 U.S.C. § 78s(b)(2)[18] preempt state law when the two are in conflict, either directly or because the state law stands as an obstacle to the accomplishment of the objectives of Congress. Specifically, we hold that the NASD arbitration procedures in dispute here have preemptive force over conflicting state law.

B.

[11] As we previously noted, if a state law prevents the NASD from complying with its rules or if it interferes with the Congressional goals underlying the Exchange Act, the state law is preempted by federal law.[19] Preemption occurs "where

14. Self–Regulatory Organizations; Order Approving Proposed Rule Changes by the New York Stock Exchange, Inc., National Association of Securities Dealers, Inc., and the American Stock Exchange, Inc. Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses, 54 Fed.Reg. 21,144 (May 16, 1989) (hereinafter "1989 Order Approving Proposed Rule Changes").

15. *See* 1989 Order Approving Proposed Rule Changes, *supra* note 14.

16. The Perino Report is available at http://www.sec.gov/pdf/ arbconflict.pdf.

17. *See supra* note 4.

18. We are not faced with the problem of preemption in the context of SRO "housekeeping" rules that do not require Commission approval and take effect upon filing pursuant to 15 U.S.C. § 78s(b)(3). Section 78s(b)(3) specifically provides that such a rule "may be enforced by [an SRO] to the extent it is not inconsistent with ... applicable Federal and State law." 15 U.S.C. § 78s(b)(3)(C). Whether these rules can ever preempt conflicting state law is a question we leave for another day.

19. The Exchange Act requires SROs like the NASD to "comply with ... its own rules." 15 U.S.C. § 78s(g)(1); *see also Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1212 (9th Cir.1998). Thus, if the NASD violates its own rules, it likewise violates federal law. By extension, if a state law makes it impossible for the NASD to comply with its own rules, that state law prevents the NASD from complying with federal law.

it is impossible for a private party to comply with both state and federal law." *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 372, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000). Additionally, state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* Thus, the Exchange Act preempts application of the California Ethics Standards to NASD-appointed arbitrators if it impossible for the NASD to comply with both its own rules and the Ethics Standards, or if the Ethics Standards would inhibit the achievement of Congressional objectives. *See Serv. Eng'g Co. v. Emery,* 100 F.3d 659, 661 (9th Cir.1996). We will evaluate the disqualification rules and disclosure rules in turn.

1. Disqualification Rules

The NASD cannot simultaneously comply with both the NASD Code's and the California Ethics Standards' disqualification rules. If an arbitrator fails to make a required disclosure, the California Ethics Standards provide for mandatory and automatic disqualification of the arbitrator once a party serves a timely notice of disqualification. Standard 10(a)(1). If the arbitrator fails to remove himself from the panel, the arbitration award can be vacated. Cal.Civ.Proc.Code § 1286.2(a)(6). In contrast, the NASD Code specifies that the Director of Arbitration "may" remove an arbitrator if he fails to make a required disclosure. NASD Code § 10308(d)(2) ("[T]he Director may remove an arbitrator from an arbitration panel based on information that is required to be disclosed pursuant to Rule 10312 and that was not previously disclosed."). Thus, in the event of a failure to make a required disclosure, the California Ethics Standards require disqualification once a party serves a notice of disqualification, while the NASD Code grants discretion to the NASD Director of Arbitration to decide whether the arbitrator should be disqualified.

The NASD Director of Arbitration would find himself in a catch–22 if the California Ethics Standards applied to NASD arbitrations. If the NASD Director exercises his discretion under the NASD Code by refusing to dismiss an arbitrator that failed to make a required disclosure, the Director violates the California Ethics Standards' mandatory disqualification provision. *See* Standard 10(a)(1). Alternatively, if the Director determines that he is bound by the California Ethics Standards, he effectively forfeits his discretionary authority under the NASD Code. *See* NASD Code § 10308(d)(2).

A similar conflict would arise if an arbitrator's disclosure revealed a possible conflict of interest. Again, under the California Ethics Standards, disqualification is mandatory and automatic if a party serves a timely notice of disqualification. Standard 10(a)(2); *see also Azteca Const., Inc. v. ADR Consulting, Inc.,* 121 Cal.App.4th 1156, 18 Cal.Rptr.3d 142, 146 (2004) ("There is no good faith or good cause requirement for the exercise of this right, nor is there a limit on the number of proposed neutrals who may be disqualified in this manner."). But under the NASD Code, when a party objects to an arbitrator's appointment, the NASD Director of Arbitration "shall determine if the arbitrator should be disqualified." NASD Code § 10308(d)(1).[20] Likewise, the disclosure

20. Although the NASD Director has the power to make the initial determination that an arbitrator should be disqualified, the parties can prevent the disqualification by unanimously agreeing that the arbitrator should not be disqualified. NASD Code § 10308(d)(1). Accordingly, even at this late stage of the arbitrator-selection process, the parties are still responsible for selecting their arbitrators, a fact which supports our conclusion that NASD arbitrators are "neutral arbitrators."

rule in the NASD Code also specifies that "[t]he Director *may* remove an arbitrator based on information that is required to be disclosed pursuant to this Rule." *Id.* § 10312(d) (emphasis added). Application of the California Ethics Standards to NASD arbitrations would strip the Director of Arbitration of his federally-recognized obligation to make a determination whether an arbitrator should in fact be disqualified. Because the NASD Director cannot comply with both sets of disqualification rules, the California Ethics Standards are preempted. *See Crosby,* 530 U.S. at 372, 120 S.Ct. 2288.

2. Disclosure Rules

In contrast to the disqualification rules, it is not physically impossible for a party to simultaneously comply with the NASD Code and the California Ethics Standards. True, the California Ethics Standards' enumerated list of mandatory disclosures is more extensive than the NASD Code's disclosure rule. *Compare* Standard 7(d)(1)-(14),[21] *with* NASD Code § 10312(a);[22] *see also* Perino Report at 44 ("While the California Ethics Standards and the SRO rules clearly require disclosure of similar kinds of information, they are not co-extensive. [Standard 7(d)] requires disclosures that current rules do not."). For example, under the California Ethics Standards "an arbitrator could be subject to disqualification because her spouse used to serve on a bar committee with an associate of a party's lawyer, even if the associate is uninvolved in the case." Perino Report at 45.[23] Because such a remote relationship is completely unlikely "to affect impartiality" or to "reasonably create an appearance of partiality or bias," the NASD Code would not require this disclosure. *See* NASD Code § 10312(a)(2).

Nonetheless, the two sets of disclosure standards do not actually conflict because it is "entirely possible" for an arbitrator to satisfy both sets of disclosure requirements without violating the NASD Code. *See Serv. Eng'g Co.,* 100 F.3d at 661 (holding that federal law did not preempt a state workers' compensation program because it was possible for a claimant to collect under both the federal and state programs). "While the state standards are more stringent than the federal standards, it is possible to comply with both." *North Star Int'l v. Ariz. Corp. Comm'n,* 720 F.2d 578, 583 (9th Cir.1983). Nothing in the NASD Code prevents an arbitrator from disclosing more information than is required by the NASD Code's disclosure rule. *See* NASD Code § 10312(a). To the

21. Standard 7(d)(1)-(14) is set forth in the appendix to this opinion.

22. The NASD requires its arbitrators to disclose:

> (1) Any direct or indirect financial or personal interest in the outcome of the arbitration;
>
> (2) Any existing or past financial, business, professional, family, social, or other relationships or circumstances that are likely to affect impartiality or might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships or circumstances that they have with any party or its counsel, or with any individual whom they have been told will be a witness. They should also disclose any such relationship or circumstances involving members of their families or their current employers, partners, or business associates.

NASD Code § 10312(a).

23. Standard 7(d)(8) requires the disclosure of "[a]ny other professional relationship . . . that the arbitrator or a member of the arbitrator's immediately family has or has had with a party or lawyer for a party." Standard (2)(m) defines "Lawyer for a party" to include the law firm and associates of the lawyer representing the party. Thus, read together, these two provisions require an arbitrator to disclose any professional relationship his spouse had with anyone associated with a party's lawyer's law firm.

contrary, the NASD encourages its arbitrators to " 'bend over backwards' to avoid any appearance of bias" by opting for disclosure in close cases.[24] Thus, an arbitrator that discloses all of the information required by the California Ethics Standards may go beyond the call of duty, but he does not violate any rule contained in the NASD Code. The two sets of disclosure rules, while not coextensive, do not conflict.

We must, however, consider the second type of conflict preemption: whether application of the California Ethics Standards' disclosure requirements to NASD-appointed arbitrators would stand as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Crosby,* 530 U.S. at 373, 120 S.Ct. 2288. This type of preemption naturally requires us to look to Congressional intent in enacting the Exchange Act, and determine whether state law would result in a "frustration of [this] purpose." *Serv. Eng'g Co.,* 100 F.3d at 661.

The Commission contends in its *amicus curiae* brief that the California Ethics Standards do interfere with Congressional goals for at least two reasons. First, permitting each state to regulate NASD arbitration procedures would create a patchwork of laws that would interfere with Congress's chosen approach of delegating nationwide, cooperative regulatory authority to the Commission and the NASD. Second, the Commission contends that the California Ethics Standards' extensive disclosure requirements may undermine the NASD arbitration system's protection of investors. As the Commission points out, its study of the California Ethics Standards concluded that the additional disclosure rules are unnecessary because empirical evidence reveals little evidence of bias in SRO arbitration outcomes, survey data suggests participants in SRO arbitrations perceive arbitrators as fair and unbiased, and SRO-arbitration awards are rarely challenged on the basis of arbitrator bias. Perino Report at 30–37.

At the same time, the added disclosure requirements could have a number of costs. First, they would increase the NASD's administrative costs because the NASD would have to create and maintain a more extensive database of information on each of its arbitrators. These higher administrative costs will either be shouldered by the parties, thereby making arbitration more costly for investors and employees, or by the NASD, which would result in the NASD having fewer resources available for its other regulatory responsibilities. Second, the additional record-keeping requirements may deter well-qualified individuals from serving as NASD arbitrators, especially in light of the relatively low honorariums that NASD arbitrators receive.[25] *See id.* at 41 (concluding that the California Ethics Standards "may well deter many individuals from participating" in SRO arbitrations). Finally, the Commission expresses concern that the California Ethics Standards would "increase the complexity, cost, and uncertainty of the arbitration process" because of the potential for a party to seek an award's vacature under the California disclosure rules. As the Commission explains, these problems could significantly undermine a primary congressional purpose in enacting the Exchange Act—in-

24. Perino Report at 14 (quoting Securities Industry Conference on Arbitration, The Arbitrator's Manual 5 (Jan.2001)).

25. NASD honorarium rates are substantially lower than non-SRO arbitration compensation rates. NASD arbitrators receive $200 to $275 for each hearing session they attend, while non-SRO arbitrators receive $750 to $1,000 per day. Perino Report at 16.

vestor protection—because the average investor is less likely than the average brokerage firm to be able to afford the costs of protracted litigation. In sum, the Commission has taken the position in its *amicus curiae* brief that application of the California Ethics Standards disclosure requirements would create "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Crosby,* 530 U.S. at 373, 120 S.Ct. 2288.

The Commission has extensive experience with regulating the SROs' arbitration procedures, and it is in a unique position to evaluate whether application of the California Ethics Standards to NASD arbitrations would frustrate the objectives of the Exchange Act. In short,

> [b]ecause the [Commission] is the federal agency to which Congress has delegated its authority to implement the provisions of the [Exchange Act], the agency is uniquely qualified to determine whether a particular form of state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Medtronic, Inc. v. Lohr, 518 U.S. 470, 496, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (footnote omitted) (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)). Accordingly, we "place some weight upon" the Commission's conclusion that the California Ethics Standards conflict with the purposes of the Exchange Act. *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 883, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000).

The Commission has reasonably concluded that allowing California to regulate SRO arbitrations would result in a patchwork of inconsistent state arbitration regulations that would interfere with Congress's intent in delegating SRO regulatory authority to the Commission. Indeed, we have recognized that "allow[ing] states to define by common law the regulatory duties of [the NASD is] a result which cannot co-exist with the Congressional scheme of delegated regulatory authority under the Exchange Act." *Sparta Surgical Corp.,* 159 F.3d at 1215. There is also nothing "arbitrary, capricious, or manifestly contrary to statute" about the Commission's fear that the California Ethics Standards' disclosure rules would undermine the Exchange Act's goal of protecting investors and the public interest. *See Brannan v. United Student Aid Funds, Inc.,* 94 F.3d 1260, 1264 (9th Cir. 1996); *see also Geier,* 529 U.S. at 884, 120 S.Ct. 1913. The only study that has examined the effects of applying the California Ethics Standards to NASD arbitrators concluded that California's disclosure rules were unnecessary and would increase the costs of NASD arbitrations. *See* Perino Report at 48. Because the Commission's determination that the state law conflicts with SRO rules is well-supported by the record, we conclude that the Exchange Act preempts application of the California Ethics Standards' disclosure rules to NASD-appointed neutral arbitrators.[26]

V.

In light of our holding that the California Ethics Standards cannot apply to NASD arbitrations because they are preempted by federal law, we also reject Grunwald's claims that the NASD and CSFB were attempting to coerce him to waive his rights under the California Ethics Standards and were depriving him of his right to a speedy arbitration. Grun-

26. Because we conclude that the Exchange Act preempts application of the California Ethics Standards to NASD arbitrators, we have no need to consider whether the Federal Arbitration Act also preempts application of these standards to NASD arbitrators.

wald argues that he faces an unacceptable choice: accept the NASD's offer to go forward with the arbitration subject to Grunwald's waiver of the California Ethics Standards thereby forfeiting his right to have his arbitration conducted in accordance with the Ethics Standards; or forfeit his right to a speedy arbitration by refusing the NASD's offer. Grunwald's dilemma is illusory, however, because he never had a right to have his arbitration conducted pursuant to the California Ethics Standards. Because federal law preempts the California Ethics Standards, the Ethics Standards are "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) ("Since . . . *M'Culloch v. Maryland*, it has been settled that state law that conflicts with federal law is 'without effect.' " (citation omitted) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981))).

Even if the Federal Arbitration Act creates an enforceable right to a speedy arbitration, a contention that we take no position on, Grunwald could have chosen the first option—waiver of the California Ethics Standards in exchange for a speedy arbitration—without forfeiting any right. Instead, Grunwald chose to litigate the issue of whether the California Ethics Standards should apply to NASD arbitrators. As we have explained, Grunwald had no right to an arbitration conducted in accordance with ethics standards that were "without effect." *See id.* at 516, 112 S.Ct. 2608. Having refused the option of waiving the California Ethics Standards and proceeding with the NASD arbitration, Grunwald cannot now complain that he was denied a speedy arbitration.

VI.

Although the district court erroneously concluded that the California Judicial Council acted *ultra vires* when the Judicial Council applied the California Ethics Standards to NASD arbitrators, we agree with the district court's ultimate conclusion that the Ethics Standards do not apply to NASD arbitrations because the Ethics Standards are preempted by the Exchange Act. Accordingly, we affirm.

AFFIRMED.

APPENDIX

Standard 7(d)(1)-(14) requires that arbitrators disclose the following information:

(1) (*Family relationships with party*) The arbitrator or a member of the arbitrator's immediate or extended family is a party, a party's spouse or domestic partner, or an officer, director, or trustee of a party.

(2) (*Family relationships with lawyer in the arbitration*) The arbitrator or the spouse, former spouse, domestic partner, child, sibling, or parent of the arbitrator or the arbitrator's spouse or domestic partner is:

(A) A lawyer in the arbitration.

(B) The spouse or domestic partner of a lawyer in the arbitration; or

(C) Currently associated in the private practice of law with a lawyer in the arbitration.

(3) (*Significant personal relationship with party or lawyer for a party*) The arbitrator or a member of the arbitrator's immediate family has or has had a significant personal relationship with any party or lawyer for a party.

(4) (*Service as arbitrator for a party or lawyer for party*)

(A) The arbitrator is serving or, within the preceding five years, has served:

(i) As a neutral arbitrator in another prior or pending noncollective bargaining case involving a party to the current arbitration or a lawyer for a party;

APPENDIX—Continued

(ii) As a party-appointed arbitrator in another prior or pending noncollective bargaining case for either a party to the current arbitration or a lawyer for a party; or

(iii) As a neutral arbitrator in another prior or pending noncollective bargaining case in which he or she was selected by a person serving as a party-appointed arbitrator in the current arbitration.

(B) [Case information] If the arbitrator is serving or has served in any of the capacities listed under (A), he or she must disclose:

(i) The names of the parties in each prior or pending case and, where applicable, the name of the attorney representing the party in the current arbitration who is involved in the pending case, who was involved in the prior case, or whose current associate is involved in the pending case or was involved in the prior case.

(ii) The results of each prior case arbitrated to conclusion, including the date of the arbitration award, identification of the prevailing party, the amount of monetary damages awarded, if any, and the names of the parties' attorneys.

(C) [Summary of case information] If the total number of the cases disclosed under (A) is greater than five, the arbitrator must also provide a summary of the cases that states:

(i) The number of pending cases in which the arbitrator is currently serving in each capacity;

(ii) The number of prior cases in which the arbitrator previously served in each capacity;

(iii) The number of prior cases arbitrated to conclusion; and (iv) The number of such prior cases in which the party to the current arbitration,

APPENDIX—Continued

the party represented by the lawyer for a party in the current arbitration, or the party represented by the party-arbitrator in the current arbitration was the prevailing party.

(5) (*Compensated service as other dispute resolution neutral*) The arbitrator is serving or has served as a dispute resolution neutral other than an arbitrator in another pending or prior noncollective bargaining case involving a party or lawyer for a party and the arbitrator received or expects to receive any form of compensation for serving in this capacity.

(A) [Time frame] For purposes of this paragraph (5), 'prior case' means any case in which the arbitrator concluded his or her service as a dispute resolution neutral within two years before the date of the arbitrator's proposed nomination or appointment, but does not include any case in which the arbitrator concluded his or her service before January 1, 2002.

(B) [Case information] If the arbitrator is serving or has served in any of the capacities listed under this paragraph (5), he or she must disclose:

(i) The names of the parties in each prior or pending case and, where applicable, the name of the attorney in the current arbitration who is involved in the pending case, who was involved in the prior case, or whose current associate is involved in the pending case or was involved in the prior case;

(ii) The dispute resolution neutral capacity (mediator, referee, etc.) in which the arbitrator is serving or served in the case; and

(iii) In each such case in which the arbitrator rendered a decision as a temporary judge or referee, the date of the decision, the prevailing party, the amount of monetary damages

APPENDIX—Continued

awarded, if any, and the names of the parties' attorneys.

(C) [Summary of case information] If the total number of cases disclosed under this paragraph (5) is greater than five, the arbitrator must also provide a summary of these cases that states:

(i) The number of pending cases in which the arbitrator is currently serving in each capacity;

(ii) The number of prior cases in which the arbitrator previously served in each capacity;

(iii) The number of cases in which the arbitrator rendered a decision as a temporary judge or referee; and

(iv) The number of such prior cases in which the party to the current arbitration or the party represented by the lawyer for a party in the current arbitration was the prevailing party.

(6) (*Current arrangements for prospective neutral service*) Whether the arbitrator has any current arrangement with a party concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in or, within the last two years, has participated in discussions regarding such prospective employment or service with a party.

(7) (*Attorney-client relationships*) Any attorney-client relationship the arbitrator has or has had with a party or lawyer for a party. Attorney-client relationships include the following:

(A) An officer, a director, or a trustee of a party is or, within the preceding two years, was a client of the arbitrator in the arbitrator's private practice of law or a client of a lawyer with whom the arbitrator is or was associated in the private practice of law;

(B) In any other proceeding involving the same issues, the arbitrator gave advice to a party or a lawyer in the arbitration concerning any matter involved in the arbitration; and

(C) The arbitrator served as a lawyer for or as an officer of a public agency which is a party and personally advised or in any way represented the public agency concerning the factual or legal issues in the arbitration.

(8) (*Other professional relationships*) Any other professional relationship not already disclosed under paragraphs (2)-(7) that the arbitrator or a member of the arbitrator's immediate family has or has had with a party or lawyer for a party. Professional relationships include the following:

(A) The arbitrator was associated in the private practice of law with a lawyer in the arbitration within the last two years.

(B) The arbitrator or a member of the arbitrator's immediate family is or, within the preceding two years, was an employee of or an expert witness or a consultant for a party; and

(C) The arbitrator or a member of the arbitrator's immediate family is or, within the preceding two years, was an employee of or an expert witness or a consultant for a lawyer in the arbitration.

(9) (*Financial interests in party*) The arbitrator or a member of the arbitrator's immediate family has a financial interest in a party.

(10) (*Financial interests in subject of arbitration*) The arbitrator or a member of the arbitrator's immediate family has a financial interest in the subject matter of the arbitration.

(11) (*Affected interest*) The arbitrator or a member of the arbitrator's immediate family has an interest that could be substantially affected by the outcome of the arbitration.

APPENDIX—Continued

(12) (*Knowledge of disputed facts*) The arbitrator or a member of the arbitrator's immediate or extended family has personal knowledge of disputed evidentiary facts relevant to the arbitration. A person who is likely to be a material witness in the proceeding is deemed to have personal knowledge of disputed evidentiary facts concerning the proceeding.

(13) (*Membership in organizations practicing discrimination*) The arbitrator's membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation. Membership in a religious organization, an official military organization of the United States, or a nonprofit youth organization need not be disclosed unless it would interfere with the arbitrator's proper conduct of the proceeding or would cause a person aware of the fact to reasonably entertain a doubt concerning the arbitrator's ability to act impartially.

(14) Any other matter that:

(A) Might cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial;

(B) Leads the proposed arbitrator to believe there is a substantial doubt as to his or her capacity to be impartial, including, but not limited to, bias or prejudice toward a party, lawyer, or law firm in the arbitration; or

(C) Otherwise leads the arbitrator to believe that his or her disqualification will further the interests of justice.

APPENDIX—Continued

BERZON, Circuit Judge, concurring in the judgment:

I agree in the main with the majority opinion, with the exception of Section IV(A).[1] With regard to that section, concerning whether the NASD's arbitration and waiver rules as applied to employer/employee disputes are capable of preempting state law, I fear that the majority's otherwise cogent discussion oversimplifies the exceedingly challenging issue at the heart of this litigation—the *substantive* extent of the authority of self-regulatory organizations (SROs) to promulgate preemptive rules under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, as amended by the Securities Act Amendments of 1975, Pub.L. No. 94–29, 89 Stat. 97.

Nonetheless, as I explain below, the two potential results in this case seem equally plausible and equally imperfect. Given the apparent equipoise, I do not support creating a circuit split with *Drayer v. Krasner*, 572 F.2d 348 (2d Cir.1978). Thus, while I write separately to explain why I cannot join in Section IV(A) of the majority opinion, I am not sufficiently convinced that the *result* it reaches is wrong to justify

1. I also have some disagreement with the methodology, though not the result, of the majority's conflict preemption analysis with regard to the NASD's disqualification rules in Subsection IV(B)(1). The majority asserts that "[b]ecause the NASD Director cannot comply with both sets of disqualification rules, the California Ethics Standards are preempted." *Ante* at 1134. The conflict, however, does not seem to arise out of the NASD Director's inability to comply with both the NASD and state standards. There are no state standards that the NASD Director cannot comply with. The state standards are directed at the arbitrators, and would require them to remove *themselves* from the pool of available arbitrations for a potential case. Instead, the conflict arises from the systems envisioned by the two regulatory schemes, which grant different authority to different players in the arbitration administration process. On this point, I find more convincing the district court's analysis in *Mayo v. Dean Witter Reynolds, Inc.*, 258 F.Supp.2d 1097, 1105–07 (N.D.Cal.), *as amended*, 260 F.Supp.2d 979 (N.D.Cal.2003).

dissenting. I therefore concur in the judgment.

I

My concerns with the majority opinion are easy enough to describe: The majority holds that *any* SRO rule purportedly promulgated under section 19(b)(2) of the Exchange Act, 15 U.S.C. § 78s(b)(2),[2] may preempt contrary state law, including the California Ethics Standards that would otherwise govern the employment arbitration at issue in this case. *See ante* at 1132. Section 19(b)(2), however, is a provision that governs the *procedure* by which an SRO rule is promulgated; on its own, it does not govern the permissible substance of such a rule. The majority thus concludes that *how* an SRO promulgates and the SEC approves (or does not need to approve, *see* Exchange Act § 19(b)(3), 15 U.S.C. § 78s(b)(3)) a rule, rather than the substance of that rule, is solely determinative of its preemptive force. This procedure-centric focus for determining the preemptive force of SRO rules does not address or resolve a substantive question embedded in the Exchange Act as amended in 1975: Are the NASD arbitration and waiver rules *as applied to employer-employee disputes* within the authority of SROs to enact (and the SEC to approve) under section 19(b)(2) in the first place?

SRO rules approved pursuant to section 19(b)(2) must be "consistent with the requirements of [the Exchange Act] and the rules and regulations thereunder applicable to[the SRO]." 15 U.S.C. § 78s(b)(2). These requirements include the registration requirements in sections 6(b)(5) and 15A(b)(6) of the Exchange Act for "exchanges" and "associations" respectively, one of which mandates that "[t]he rules of the [SRO] ... [must] not [be] designed ... to regulate by virtue of any authority conferred by [the Exchange Act] matters not related to the purposes of [the Act] or the administration of the [SRO]." 15 U.S.C. §§ 78f(b)(5), 78 *o*–3(b)(6). In other words, in its current form, the Exchange Act does not authorize SROs to promulgate *any* rules, let alone preemptive rules, not related either to the purposes of the Act or the administration of the SRO. *See ante at* 1131 n. 13; *see also* S.Rep. No. 94–75, at 27–28 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179, 206–07; *cf. Business Roundtable v. SEC,* 905 F.2d 406, 414–15 (D.C.Cir.1990) (discussing the relationship between section 6(b)(5) and section 19).[3] Thus, whether the NASD had the *substantive* authority, under the Exchange Act, to promulgate the rules at issue here is, in my view, central to the preemption question before us. The majority's analysis almost entirely passes by this potentially determinative issue.

Any discussion of this substantive authority question must begin with *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 94 S.Ct. 383, 38 L.Ed.2d 348 (1973). *Ware* held that the arbitration of employee/employer disputes is outside the "shadow of the federal umbrella" created by the Exchange Act, and is therefore not an area in which SRO rules have preemptive force. Without doubt, *Ware* would control the outcome of this case but for the passage of the Securities Act Amendments of 1975. These Amendments substantially revised the su-

2. For the sake of convenience, I provide parallel citations to the Exchange Act itself and the corresponding U.S.Code provision throughout.

3. Even before the 1975 Amendments, the Supreme Court had read the interplay between the registration requirements and SROs' rulemaking authority as "establish[ing] the measure of congressionally delegated authority for self-regulation in the national interest." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 134, 94 S.Ct. 383, 38 L.Ed.2d 348 (1973).

pervisory authority of the Securities and Exchange Commission (SEC) over SRO rulemaking. As the majority recounts, *see ante* at 1129–30, the changes regarding the nature of SEC oversight of SRO rules were extensive. The impact of the 1975 Amendments on the permissible *substantive* reach of SRO rules is much less clear.

We are therefore left with a substantive question deceptively simple in formulation: Did the 1975 Amendments bring employer-employee arbitration procedures such as those at issue both in *Ware* and in this case back *within* the "shadow of the federal umbrella"? If not, then *Ware* still controls, and the California Ethics Standards cannot be preempted by the NASD rules at issue here. If the 1975 Amendments did, however, make *Ware* obsolete on this substantive breadth point, then the majority is correct in its preemption conclusion. Further complicating this inquiry is an important distinction unresolved by *Ware:* In referencing the "shadow of the federal umbrella," *Ware* was unclear as to whether it meant the substantive scope of the Exchange Act or the substantive limits of the SEC's oversight thereunder. Although such a distinction is empty under the current Exchange Act, since the 1975 Amendments expanded SEC oversight to occupy the field of self-regulation, it wasn't at the time of *Ware.*

Only one court, in the thirty years since the 1975 Amendments, has addressed this difficult question with any care. The Second Circuit, in *Drayer,* understood the issue in exactly these terms, and offered two different explanations for why the same New York Stock Exchange rule that was outside the "shadow of the federal umbrella" in *Ware* was moved inside that shadow by the 1975 Amendments. The majority understandably reads *Drayer* for the proposition that "the 1975 Amendments expanded the 'federal umbrella' such that the compulsory arbitration rule now falls within the Act's reach." *Ante* at 1131. What the majority does not examine, however, is whether that holding was correct. As I explain in more detail below, while I agree with the Second Circuit's methodology, I do not agree with some of its conclusions, nor with the extent to which the majority finds its decision controlling here.

II

I begin with the original language of the Exchange Act. As initially enacted, the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881, included one non-preemption provision, section 6(c), which provided that "[n]othing in this title shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this title and the rules and regulations thereunder and the applicable laws of the State in which it is located." [4] Although the original Exchange Act largely left SROs on their own with regard to rulemaking, as the majority deftly summarizes, the SEC was given supervisory authority, in particular, for thirteen designated subject areas (the last of which was a catchall, "similar matters") where the Commission was authorized to "alter or supplement" SRO rules. *See* Exchange Act § 19(b), 48 Stat. at 898–99; *ante* at 1129 n.10. The exercise of oversight, how-

4. The remainder of section 6 provided (and still provides) the registration requirements for national securities ''exchanges.'' The Maloney Act of 1938, Pub.L. No. 75–519, ch. 677, 52 Stat. 1070, created the concept of and regulatory structure for national securities ''associations,'' of which the NASD remains today the sole example, by writing new section 15A into the Exchange Act. *See id.,* 52 Stat. at 1070. Tracing the origins of the registration requirements is necessary because, as explained above, the registration requirements for SROs, especially after the 1975 Amendments, place important limits on the substantive scope of SRO rulemaking. *See ante* at 1141.

ever, even in these discrete areas, was further conditioned on the SEC's determination that "such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange." Exchange Act § 19(b), 48 Stat. at 898. As such, under the Exchange Act as originally enacted, there were three distinct categories of SRO rules: (1) rules over which the SEC exercised substantive oversight; (2) rules within the scope of the Exchange Act over which the SEC did *not* exercise substantive oversight; and (3) rules outside the scope of the Exchange Act.

In *Ware,* the Supreme Court was asked to pass on a question largely analogous to that presented here: "[W]hether certain rules of the New York Stock Exchange [(N.Y.SE)], promulgated as self-regulating measures pursuant to § 6 of the Securities Exchange Act of 1934, and a broker's employee's pledge to abide by those rules,[[5]] pre-empt avenues of wage relief otherwise available to the employee under state law." 414 U.S. at 119, 94 S.Ct. 383 (citation omitted).[6] After surveying the legislative background of the Exchange Act, the Court concluded as follows:

> It is thus clear that the congressional aim in supervised self-regulation is to insure fair dealing and to protect investors from harmful or unfair trading practices. To the extent that any exchange rule or practice contravenes this policy, or any authorized rule or regulation under the Act, the rule may be subject to appropriate federal regulatory supervision or action. Correspondingly, any rule or practice not germane to fair dealing or investor protection would not appear to fall under the shadow of the federal umbrella; it is, instead, subject to applicable state law.

Id. at 130–31, 94 S.Ct. 383. Based on this reading of the Exchange Act, *Ware* interpreted the New York Stock Exchange's rule requiring mandatory employer-employee arbitration as falling far enough outside the "federal umbrella," so as not to preempt state law. Stated in broader terms, any SRO rule outside the "shadow of the federal umbrella," according to *Ware, cannot* preempt state law.

Importantly, in conducting this analysis, the Court rejected two lines of analysis made by Merrill Lynch and germane here. First, and most significantly, the Court decisively rejected Merrill Lynch's contention that the mandatory employer-employee arbitration rule fell under the NYSE's obligation to "protect the investing public and to insure just and equitable trade practices." [7] *Id.* at 134, 94 S.Ct. 383. As the Court explained:

> Merrill Lynch has not alleged that arbitration will effect fair dealing or result in investor protection. It suggests only that investor confidence not be shaken further by public airing of employer-employee disputes. There is no explanation of why a judicial proceeding, even though public, would undermine investor confidence. It is difficult to understand

5. The rule at issue in *Ware* required brokers to arbitrate wage disputes with their employers. *See* 414 U.S. at 122 n. 3, 94 S.Ct. 383.

6. The Court had earlier suggested that certain SRO rules could have force only to the extent to which they were directly addressed to the goals of the Exchange Act. *See Silver v. N.Y. Stock Exch.,* 373 U.S. 341, 354–55, 361–62, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963).

7. This latter mandate came from section 6 of the Exchange Act. The Court rejected Merrill Lynch's contention, however, that its mandate to "insure just and equitable trade practices" applied to the NYSE arbitration rule, since that language only applied to SRO disciplinary rules under section 6(b) of the original Act. *See Ware,* 414 U.S. at 134 & n. 13, 94 S.Ct. 383.

> why muffling a grievance in the cloakroom of arbitration would prevent lessening of confidence in the market. To the contrary, for the generally sophisticated investing public, market confidence may tend to be restored in the light of impartial public court adjudication. Furthermore, it should be apparent that, so far as investor confidence is concerned, compulsory arbitration of an employee-employer grievance is no substitute for direct effective disciplinary action against any abusive exchange practice. Other rules of the Exchange serve this very function.

Id. at 135–36, 94 S.Ct. 383.

Second, the Court flatly rejected Merrill Lynch's contention that the arbitration rule was necessary to ensure uniform national regulation. In so holding, *Ware* concluded that:

> There is no revelation in the Act or in any Commission rule or regulation that nationwide uniformity of an exchange's housekeeping affairs is necessary or desirable. And Merrill Lynch has not demonstrated that national uniformity in the area of wage claims is vital, in some way, to federal securities policy. Convenience in exchange management may be desirable, but it does not support a plea for uniform application when the rule to be applied is not necessary for the achievement of the national policy objectives reflected in the Act.

Id. at 136–37, 94 S.Ct. 383.

All told, *Ware appears* to be a clear holding that only SRO rules intimately related to the fundamental purposes of the Exchange Act—which the Court identified as ensuring fair dealing and investor protection—can preempt state law. *See id.* at 127, 94 S.Ct. 383 ("The principle that emerged from *Silver,* and the premise upon which the Court based its judgment, was that conflicting law, absent repealing or exclusivity provisions, should be preempted by exchange self-regulation 'only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act.' " (quoting *Silver,* 373 U.S. at 361, 83 S.Ct. 1246)). Because it held that arbitration of employer/employee disputes was not so related, the Court did not allow the NYSE's arbitration rules to preempt California's state arbitration laws.

III

Just over four years after *Ware,* the Second Circuit reached the diametrically opposite result in *Drayer.* The turnaround was premised entirely on the 1975 Amendments. *Drayer* followed, rather than departed from, *Ware's* "shadow" approach—that an SRO rule, to have preemptive force, must be within the federal umbrella. *Drayer,* however, offered two different theories for why the "shadow of the federal umbrella" had expanded since 1973.[8]

8. One reason not advanced by any of the parties here for concluding that the 1975 Amendments left the result in *Ware* undisturbed might be derived from section 28(b) of the Exchange Act, 15 U.S.C. § 78bb(b). That section provides, as here relevant, that: "Nothing in this chapter shall be construed to modify existing law with regard to the binding effect (1) on any member of *or participant in* any self-regulatory organization of any action taken by the authorities of such organization to settle disputes between its members or participants . . . ." (emphasis added).

> I emphasize the language added by the 1975 Amendments, the legislative history of which makes clear that this provision was specifically addressed toward preserving the binding effect—or lack thereof—of SRO arbitration rules. *See, e.g.,* H.R. CONF. REP. NO. 94–229, at 111 (1975) ("It was the clear understanding of the conferees that this amendment did not change existing law . . . concerning the effect of arbitration proceeding provisions in agreements entered into by persons dealing with members and participants of self-regulatory organizations."), *reprinted in* 1975

At issue in *Drayer* was NYSE Rule 347, the same rule at issue in *Ware,* which required compulsory arbitration of employee/employer disputes. After observing that section 19(b)(2) of the Exchange Act, as amended by the 1975 Amendments, required that "[r]ule changes proposed by an exchange must be approved by the Commission as being consistent with the requirements of the Act and the rules and regulations thereunder before the changes can become effective," *id.* at 357, 94 S.Ct. 383, *Drayer* concluded that:

> Whatever the relationship of [Rule 347] to the objective of investor protection, it is germane to the goal of market efficiency, reflected in § 6(b) and throughout the 1975 amendments, and to the objective of fair administration of the Exchange, implicated in § 6(b) and an explicit standard of § 19(c). Registered representatives play an important role in the flow of business on securities exchanges. The arbitration provision enables member firms to rid themselves of registered representatives who, as they believe, are dishonest or ineffective, or who have violated rules of the NYSE, including the "know-your-customer" rule, without subjecting themselves to lengthy and costly litigation—including, as here, a request for punitive damages. It is likewise in the interest of fair administration and market efficiency, as well as in the public interest, that honest and ethical registered representatives should have speedy, cheap and effective remedies against their employers. At least, the NYSE is entitled to think this in the absence of any indication otherwise from the SEC.

Id. at 358 (citations and footnote omitted). *Drayer* thus expressly departed from *Ware,* at least in part, because (1) it concluded that the 1975 Amendments *added* "market efficiency" and "fair administration of the Exchange" to the purposes of the Exchange Act; and (2) compulsory arbitration implicated these "new" purposes. *See id.* ("With these provisions now the 'measure of congressionally delegated authority for self-regulation in the national interest,' Rule 347 would seem to fall within them." (quoting *Ware,* 414 U.S. at 134, 94 S.Ct. 383)).

Drayer also suggested another theory, albeit implicitly, for why the NYSE rule was back within the "shadow of the federal umbrella" after the 1975 Amendments. Unlike the original Exchange Act, which authorized SEC oversight of SRO rulemaking only with regard to twelve discrete subject areas and "similar matters," "the amended Act contains no subject matter restrictions on this authority." *Id.* at 357; *see also id.* at 356 n. 9. On this reading, the "shadow of the federal umbrella" described by *Ware* referred to the substantive breadth of the SEC's supervisory authority over SROs, and not to the substantive purposes of the Exchange Act as a whole. As such, in holding the NYSE compulsory arbitration rule to be outside the "shadow of the federal umbrella," this reading suggests that *Ware* held not that it was unrelated to the purposes of the Exchange Act, but only that it was outside the discrete realm of SEC oversight. Because the 1975 Amendments expanded SEC supervision to cover virtually all areas of Exchange Act self-regulation, this theory posits the alternative argument that, even if the purposes of the Exchange Act were not altered, areas that were not within the "shadow" prior to 1975 could be thereafter. I consider both of these arguments in turn.

U.S.C.C.A.N. 321, 342; *see also Shearson/Am. Express Inc. v. McMahon,* 482 U.S. 220, 236–37, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987). Given that *Ware* explicitly held that the NYSE compulsory arbitration rules were binding only to the extent that they did not conflict with state law, this provision, especially in light of the addition of "or participant in" by the 1975 Amendments, may well be read as codifying that result.

A

The first theory, and the one on which the Second Circuit principally relied, is, in my view, the less plausible of the two. Recall that *Ware* identified two principal purposes behind SRO rulemaking through the Exchange Act—fair dealing and investor protection.[9] The Second Circuit's response in *Drayer* was that "market efficiency" and "fair administration of the Exchange" were additional purposes *added* by the 1975 Amendments, thereby expanding the permissible substantive scope of SRO rules beyond that recognized in *Ware. See, e.g.,* 572 F.2d at 358. Seven of the nine provisions of the amended Exchange Act cited in *Drayer* in supprt of the "new purposes" theory arguably went to the "market efficiency" point, and the remaining two addressed the "fair administration of the Exchange" ideal. *See id.* (citing Exchange Act §§ 2, 6(b), 11A(a)(1)(C), 15A(b)(6), 15A(b)(9), 17A(a)(1), 19(c), 19(f), 23(a)(2)).

"[F]air administration" as a *new* statutory purpose cannot pass muster.[10] Section 19(b) of the Exchange Act as originally enacted had already provided "insur[ing] fair administration of [the] exchange" as one basis for the SEC to alter or supplement an SRO's rules. *See* Exchange Act § 19(b), 48 Stat. at 898. In other words, the version of the Exchange Act before the Court in *Ware* already included this "fair administration" concept as an animating principle with regard to SEC oversight. The Court in *Ware* did not view that concept as informing the preemption analysis. Instead, the Court held that rules concerning "an exchange's housekeeping affairs" or "[c]onvenience in exchange management" were not preemptive. *Ware,* 414 U.S. at 136, 94 S.Ct. 383.

As to "market efficiency," the alternative added Exchange Act purpose posited in *Drayer,* a close reading of the text of the Amendments and the relevant legislative history suggests that instead of adding "market efficiency" as a new independent purpose of the Exchange Act, the 1975 Amendments clarified what "fair dealing" and "investor protection" actually meant under the original Exchange Act.

1

For its conclusion that "market efficiency" was added to the Exchange Act as a new purpose justifying the preemptive force of the employer-employee arbitration rule, *Drayer* relied on seven provisions of the Exchange Act, as amended. *See* 572 F.2d at 358 ("Whatever the relationship of this rule to the objective of investor protection, it is germane to the goal of market efficiency, reflected in § 6(b) and throughout the 1975 amendments, see, e.g., §§ 2; 11A(a)(1)(C); 15A(b)(6); (9); 17A(a)(1); 19(f); 23(a)(2)...."). Five provide, at best, only weak support for *Drayer's* conclusion that "market efficiency" was a "new" purpose added by the 1975 Amendments. For example, section 11A(a)(1)(C), 15 U.S.C. § 78k–1(a)(1)(C), provides only that "[i]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure" five different goals concerning the establishment of a national

9. To a certain degree, the Court had already held as much in *Silver,* 373 U.S. at 352, 83 S.Ct. 1246 (''Instead of giving the Commission the power to curb specific instances of abuse, the Act placed in the exchanges a duty to register with the Commission, and decreed that registration could not be granted unless the exchange submitted copies of its rules, and unless such rules were 'just and adequate to insure fair dealing and to protect investors.' '' (citations omitted)).

10. As I explain below, the ''fair administration'' argument has more pull under *Drayer's* second theory—as relating to the expanded substantive breadth of SEC oversight over SRO rulemaking.

securities market, including the "economically efficient execution of securities transactions." 15 U.S.C. § 78k–1(a)(1)(C)(i). Similarly, new section 17A(a)(1)(A) of the Exchange Act provides that "[t]he prompt and accurate clearance and settlement of securities transactions, including the transfer of record ownership and the safeguarding of securities and funds related thereto, are necessary for the protection of investors and persons facilitating transactions by and acting on behalf of investors." 15 U.S.C. § 78q–1(a)(1)(A). Two of the cited provisions speak only of the extent to which SEC and SRO rules should not unnecessarily burden competition. *See* Exchange Act §§ 15A(b)(9), 23(a)(2), 15 U.S.C. §§ 78*o*–3(b)(9), 78w(a)(2). Another provides nothing more relevant than an abstract reference to "the purposes of this title." Exchange Act § 19(f), 15 U.S.C. § 78s(f).

Two provisions, however, provided somewhat firmer footing for the market efficiency argument: Section 2 of the Exchange Act, 15 U.S.C. § 78b, and the revisions to the registration requirements for associations in section 15A(b)(6) of the Exchange Act, 15 U.S.C. § 78*o*–3(b)(6).[11] These sections require closer scrutiny.

Section 2 of the Exchange Act, as enacted in 1934, provided that:

> transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions . . . .

Exchange Act § 2, 48 Stat. at 881–82. The revision to section 2 in the 1975 Amendments added "to remove impediments to and perfect the mechanisms of a national market system for securities and a national system for the clearance and settlement of securities transactions and the safeguarding of securities and funds related thereto" after "to require appropriate reports." *See* Securities Act Amendments of 1975 § 2, 89 Stat. at 97, 15 U.S.C. § 78b. This provision might have indicated an intent to codify "market efficiency" as a *new* purpose of the Exchange Act, but for the extent to which the amendments to sections 11A(c) and 17A(a)(1)(A), already discussed above, linked these goals to "investor protection." *See* Exchange Act §§ 11A(a)(1)(C), 17A(a)(1)(A), 15 U.S.C. §§ 78k–1(a)(1)(C), 78q–1(a)(1)(A). Given those later provisions, however, the addition of the "national market system" language to section 2 by the 1975 Amendments supports the contrary conclusion—that the 1975 Amendments meant to clarify the scope of the Act, not to broaden it.

All that is left, then, to support *Drayer's* assertion that "market efficiency" became a *new* purpose of the Exchange Act through the 1975 Amendments are the revised registration requirements. Most of the language in these requirements, however, had its origins in the Maloney Act of 1938, *not* in the 1975 Amendments.[12] With

11. *Drayer* only cited the amended registration requirements for *associations,* but the 1975 Amendments similarly rewrote the registration requirements for exchanges as well. *See* Exchange Act § 6(b)(5), 15 U.S.C. § 78f(b)(5).

12. An important distinction, albeit one immaterial to this analysis, is that the Maloney Act

only that language which was not included in the Exchange Act after 1938 emphasized, the 1975 Amendments rewrote sections 6(b)(5) and 15A(b)(6) of the Exchange Act to require that:

> The rules of the [SRO] are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, *to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities,* to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, [to fix minimum profits, to impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members [13]], *or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the* [SRO].

15 U.S.C. §§ 78f(b)(5), 78*o*–3(b)(6) (emphasis added).[14] The latter of the two new passages closed the procedural preemption loophole in the pre–1975 version of the Act, by barring the possibility that SROs could promulgate rules "not related to the purposes of [the Exchange Act] or the administration of the [SRO]." To conclude that we may discern, from the former addition, a clear congressional intent to add a "new" market efficiency ideal to the Exchange Act seems at best a dubious proposition, particularly in light of the extent to which the other amended provisions tied these concepts to "investor protection."

2

The relevant legislative history behind the 1975 Amendments is not much more illuminating, though it seems to run, at least to some degree, against *Drayer's* expansion-of-statutory-purpose thesis. One of the major impetuses for the Amendments was concern that the SROs were not sufficiently subject to federal regulation, by either Congress or the SEC. *See, e.g.,* S.Rep. No. 94–75, at 2 ("Meaningful reform of this country's securities trading mechanism will ... be impossible unless there is also reform of the method and manner by which the self-regulatory organizations operate and in the way that the SEC oversees the performance of their regulatory responsibilities."), *reprinted in* 1975 U.S.C.C.A.N. at 181. Thus, a principal purpose of the 1975 Amendments was to provide more SEC oversight over SRO rules. *See, e.g., id.* at 28–30, *reprinted in* 1975 U.S.C.C.A.N. at 207–08.

As the authoritative Senate Report accompanying the Amendments explained:

> The basic goals of the Exchange Act *remain* salutary and unchallenged: to provide fair and honest mechanisms for the pricing of securities, to assure that dealing in securities is fair and without

applied only to "associations." *See ante* at 1123 n.6. Thus, unlike the NASD, the NYSE, the SRO at issue in both *Ware* and *Drayer,* was not subject to many of these registration requirements prior to 1975.

13. This bracketed material appears only in the registration requirements for associations—section 15A(b)(6), 15 U.S.C. § 78*o*–3(b)(6).

14. For the language from which this comparison was made, *see* Maloney Act of 1938, 52 Stat. at 1071 (formerly codified at 15 U.S.C. § 78*o*–3(b)(7) (1970)). The pre–1975 provisions placed the language in somewhat different order; I have here only indicated that language which was added in its entirety.

> undue preferences or advantages among investors, to ensure that securities can be purchased and sold at economically efficient transaction costs, and to provide, to the maximum degree practicable, markets that are open and orderly. S. 249 is an important step in assuring that the securities markets and the regulations of the securities industry remain strong and capable of fostering these fundamental goals under changing economic and technological conditions.

Id. at 3, *reprinted in* 1975 U.S.C.C.A.N. at 182 (emphasis added); *see also id.* at 22, *reprinted in* 1975 U.S.C.C.A.N. at 200 ("S. 249 contains a number of provisions which would *clarify* the scope of the self-regulatory responsibilities of national securities exchanges and registered securities associations . . . and the manner in which they are to exercise those responsibilities. The bill would also *clarify and strengthen* the Commission's oversight role with respect to the self-regulatory organizations." (emphases added)). Thus, the intent behind the Amendments, according to the Senate Report, was *not* to expand the field in which SROs could promulgate rules but "to strengthen the total regulatory fabric." *Id.* at 23, *reprinted in* 1975 U.S.C.C.A.N. at 202; *see also id.* at 27, *reprinted in* 1975 U.S.C.C.A.N. at 205 ("The Committee believes that the statutory pattern governing the scope of the NASD's authority is basically sound.").

Moreover, the Senate Report suggested that, if anything, the Amendments were meant to *narrow* the substantive scope of SRO rulemaking within the fixed confines of the Act:

> The bill would eliminate present Section 6(c) and the open-ended authority it grants to the exchanges, and it would limit by Sections 6(b)(5) and 15A(b)(6) the scope of the self-regulatory organizations' authority over their members to matters related to the purposes of the Exchange Act. The growing diversification of securities firms into non-securities activities has raised, and will continue to raise, significant questions about the adequacy of the present regulatory structure. However, the diversification of securities firms should not automatically extend the jurisdiction of the self-regulatory agencies. Until it is specifically demonstrated to the Congress that the non-securities activities of firms which are members of self-regulatory agencies should be limited or regulated in the public interest, such firms should be free to undertake and pursue these activities in the same manner as other business organizations, subject only to those regulatory limitations necessary to assure protection of public investors and the public interest.

Id. at 28, *reprinted in* 1975 U.S.C.C.A.N. at 206–07. Although this passage relates more directly to the resolution of the procedural preemption question described above, *see ante* at 1141–42, this language, and the Senate Report as a whole, suggests that an area of regulation unrelated to the purposes of the Exchange Act before the Amendments *remained* unrelated afterwards.

3

Finally, even if these amendments can be said to have created a new "purpose" for supervised self-regulation under the Exchange Act, which I doubt, I have a hard time understanding how employee/employer arbitration is related to "*market* efficiency." True, arbitrating rather than litigating employer-employee disputes may in some sense make the market for registered securities employees more efficient, by decreasing the transaction costs involved in discharging such employees and replacing them with others. But, as the legislative language and history just discussed highlights, the Exchange Act regulates the *securities* market, not the

employment market. It is plain from the language of the statute that it is the facilitation of transactions within a *national securities* market with which the statute is concerned.[15]

It is therefore difficult to conclude, as *Drayer* did, that employee/employer arbitration disputes such as those at issue there, in *Ware,* and in this case, are now within the "shadow of the federal umbrella" solely because they implicate "market efficiency."

B

A more subtle, alternative ground for *Drayer's* conclusion was that *Ware's* concept of the "federal umbrella" described not the purposes of the Exchange Act but the substantive breadth of the SEC's supervisory authority over SROs under the original language of the Exchange Act. This premise suggests that the Amendments necessarily substantively broadened the "shadow of the federal umbrella" at the core of *Ware not* by altering the core purposes of the Exchange Act, but by expanding the substantive scope of the SEC's oversight. Because it is beyond question that the 1975 Amendments greatly increased the scope of SEC supervision over SROs, it is at this point where I find resolution of this case difficult. *Ware,* in my view, seems susceptible of two mutually exclusive interpretations.

What is unclear is the relationship between *Ware's* assertion that the NYSE's compulsory arbitration rule did not implicate the core purposes of the Exchange Act, and its partial reliance on the fact that the SEC lacked oversight over such a rule under the pre–1975 Exchange Act. *See, e.g.,* 414 U.S. at 135 n. 14, 94 S.Ct. 383 ("None of the subject matter categories suggests that the Commission has review authority with respect to a rule requiring arbitration of employer-employee disputes."). At some points in *Ware,* it appears that the Court meant, through the term "federal umbrella," to refer only to the limited substantive scope of SEC oversight over SRO rules. At other points, the *Ware* Court seemed plainly to be considering the broader purposes of the Exchange Act, without regard to the precise scope of SEC oversight. Because the SEC's oversight authority now occupies the entire field of Exchange Act self-regulation, as it did not before 1975, it now matters, as it did not at the time of *Ware,* whether the "shadow of the federal umbrella" was cast only as far as SEC oversight, or covered the whole realm of authorized SRO self-regulation.

As I have already discussed, *Ware was* clear that arbitration did *not* implicate "fair dealing" or "investor protection," the two central purposes of the Exchange Act identified in *Silver.* What *Ware* was less clear about was the relationship between arbitration and the concept of "fair administration of the Exchange." *See id.* at 136–37, 94 S.Ct. 383 (quoted *ante* at 1143–44).

"Fair administration" appeared in the 1934 Act only in section 19(b), which, as noted above, provided for twelve subject-matter areas (and "similar matters") over which the SEC could exercise oversight by "alter[ing] or supplement[ing] the rules of [the] exchange." The SEC could alter or

15. As this discussion should make clear, it is entirely possible that application of the SRO arbitration rules in other contexts, such as arbitration disputes between the SRO and its members, or between members and investors, *would* come within the statutory purposes. *See, e.g., Wilmot v. McNabb,* 269 F.Supp.2d 1203, 1206–07 (N.D.Cal.2003); *Mayo,* 258 F.Supp.2d at 1105–12. My concern here is only with the NASD's arbitration rules as they pertain to internal employment disputes between an SRO member and one of its employees.

supplement rules related to those subject matters, however, if the change was "necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange." Exchange Act § 19(b), 48 Stat. at 898. Without referring to the "fair administration of such exchange" language in the then-extant section 19(b), *Ware* concluded that "[t]here is no revelation in the Act or in any Commission rule or regulation that nationwide uniformity of an exchange's housekeeping affairs is necessary or desirable." 414 U.S. at 136, 94 S.Ct. 383. This conclusion may well have been premised on the understanding that "fair administration of such exchange" does *not* include such "housekeeping affairs" as the manner in which members of the exchange settle disputes with their employees.

"Fair administration of such exchange" could well be interpreted—indeed, were we writing on a clean slate, I would so interpret it—as pertaining to exchange-wide administrative matters. The pre–1975 version of section 19(b), for example, listed as within the SEC's oversight authority matters including "hours of trading," and "the time and method of making settlements, payments, and deliveries." The internal affairs of *members* of the exchanges and associations, in contrast, *Ware* may well have concluded, are not within the scope of "fair administration of such exchange," and are thus outside the Act's "federal umbrella." On the other hand, *Ware* may have reflected only the conclusion that "housekeeping affairs" concerning members of exchanges, as opposed to the exchanges as a whole, were not among the listed areas of SEC oversight.

Neither *Drayer* nor the majority address what *Ware* meant by "housekeeping affairs." Neither explains why *Ware's* holding that "housekeeping affairs" were beyond the area in which there is a need for national uniformity was altered by the 1975 Amendments. Both *Drayer* and the majority do appear, without so stating, to *assume* that the "housekeeping affairs" are within the "federal umbrella" after 1975 because of the provisions that allow—but do not *always* require—SEC oversight of SRO administrative rules. *See, e.g.,* Exchange Act § 19(b)(3)(A)(ii), (c), 15 U.S.C. § 78s(b)(3)(A)(ii), (c). But this unstated assumption rests on another, similarly unstated, premise—that *Ware* tossed aside the "housekeeping" rules because they were then beyond the SEC's oversight authority, not because they were outside the Act's purposes altogether. If the latter were the case, nothing in the 1975 Amendments would matter. As noted earlier, "fair administration of [the] exchange" was *not* a new addition in 1975.

Ware is indeed ambiguous on this key point. Because my two colleagues have chosen to rely on *Drayer,* however, and because I cannot conclude with any reasonable certainty that the *result* in *Drayer* is necessarily wrong given the above-articulated concerns, the only prudent course of action for me is to set out my views in detail, as I have done, and to concur in the judgment, while remaining *dubitante. See* LON L. FULLER, ANATOMY OF THE LAW 147 (1968) ("[E]xpressing the epitome of the common law spirit, there is the opinion entered *dubitante*—the judge is unhappy about some aspect of the decision rendered, but cannot quite bring himself to record an open dissent.").



Title	**Arbitration: Ethics Standards for Neutral Arbitrators in Contractual Arbitration** (amend Cal. Rules of Court, appen., div. VI, std. 3 and request for comments on current ethics standards for neutral arbitrators in contractual arbitration)
Summary	This proposal would amend the application provision of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration to reflect recent court decisions. In addition, comments are invited on all of the ethics standards.
Source	Administrative Office of the Courts Staff
Staff	Heather Anderson, Senior Attorney, 415-865-7691, heather.anderson@jud.ca.gov Alan Wiener, Attorney, 818-558-3051, alan.wiener@jud.ca.gov
Discussion	Code of Civil Procedure section 1281.85, which was enacted in September 2001, required the Judicial Council of California to adopt ethics standards for all neutral arbitrators serving in arbitrations pursuant to an arbitration agreement. This section also established parameters for the scope and content of the ethics standards: > These standards shall be consistent with the standards established for arbitrators in the judicial arbitration program[1] and may expand but may not limit the disclosure and disqualification requirements established by this chapter.[2] The standards shall address the disclosure of interests, relationships, or affiliations that may constitute conflicts of interest, including prior service as an arbitrator or other dispute resolution neutral entity, disqualifications, acceptance of gifts, and establishment of future professional relationships.

[1] The judicial arbitration program is governed by Code Civ. Proc., §§ 1141.10–1141.31, and by Cal. Rules of Court, rules 1600–1618. Arbitrators in the judicial arbitration program are also subject to the provisions of Cal. Code Jud. Ethics, canon 6D.

[2] That is, chapter 2, Enforcement of Arbitration Agreements, Code Civ. Proc., §§ 1281–1281.95. Disclosure and disqualification requirements in this chapter are set out in §§ 1281.9, 1281.91, and 1281.95.

In April 2002, the Judicial Council adopted the Ethics Standards for Neutral Arbitrators in Contractual Arbitration.[3] As provided in Code of Civil Procedure section 1281.85, all persons serving as neutral arbitrators pursuant to an arbitration agreement are required to comply with these ethics standards. The subjects addressed by the standards include: disclosure of interests, relationships, or affiliations that may constitute conflicts of interest; disqualification; acceptance of gifts; establishment of future professional relationships; conduct of the proceeding; ex parte communications; confidentiality; compensation; and marketing.

1. Amendment to Standard 3. Application and effective date

Since the Judicial Council adopted these ethics standards, there have been several cases involving their application to arbitrators serving in securities arbitrations for the National Association of Securities Dealers (NASD). Earlier this year, both the California Supreme Court in *Jevne v. Superior Court* ((2005) 35 Cal.4th 935) and the United States Court of Appeal for the Ninth Circuit in *Credit Suisse First Boston Corp. v. Grunwald* ((9th Cir. 2005) 400 F.3d 119) held that the federal Securities Exchange Act preempts application of the California ethics standards to NASD arbitrators. The courts concluded that NASD arbitrators are governed by arbitration rules that were approved by the United States Securities and Exchange Commission (SEC) under federal law and that the California standards relating to disqualification are in conflict with the SEC-approved rules.

To reflect these court decisions, staff is proposing that standard 3, which addresses the application of the standards, be amended to specifically exempt arbitrators serving in an arbitration proceeding governed by rules adopted by a securities self-regulatory organization and approved by the United States SEC under federal law. We solicit your comments on this proposed amendment.

2. Comments on all Ethics Standards for Neutral Arbitrators in Contractual Arbitration

In addition, we invite your comments on all of the ethics standards. In December 2002, following a public comment period, the Ethics Standards for Neutral Arbitrators in Contractual Arbitration were substantially revised. Many of those who commented on the standards at that time suggested that the Judicial Council establish a method for ensuring ongoing review and

[3] These standards were adopted as division VI of the appendix to the California Rules of Court.

amendment of the standards. Those commentators noted that new issues were likely to arise as experience with the standards accumulated and as new statutes affecting arbitration were adopted. To address the commentators' concerns, the council directed staff to solicit comments on the standards again after January 1, 2004.

In fulfillment of the council's directive, staff is now seeking comments on all of the ethics standards. We particularly request suggestions for ways in which any of the standards can be improved. The text of the standards can be obtained from the California Courts Web site at *www.courtinfo.ca.gov/rules/appendix/appdiv6.pdf*. If you would like a hard copy of the standards, please request it from Romunda Price at romunda.price@jud.ca.gov.

All comments will be carefully reviewed and considered. If it is determined that additional amendments to the standards are necessary, recommendations for such amendments will be presented to the Judicial Council. The comments received through this process will then become part of the public record of the council's action.

While we welcome your comments on any aspect of the standards, it is important to note that the council's authority to modify certain provisions in the standards is limited. The standards must comply with statutory direction given to the council under section 1285.85, including the stricture that the standards may expand but not limit the disclosure and disqualification requirements established by statute. As noted in the comments to standards 7 and 10, which appear following the text of the standards in both the published volume of the rules of court and on the California Court website listed above, many of the specific disclosure and disqualification provisions in these standards simply embody statutory requirements.

This invitation to comment is being sent to the California Dispute Resolution Council; the Association for Conflict Resolution; the National Academy of Arbitrators; the College of Commercial Arbitrators; the Center for Public Resources; the American Arbitration Association, JAMS, and all other arbitration provider organizations of which we are aware. It also is being sent to the California Judges Association; Public Citizen; the Consumers Union; the Council of Better Business Bureaus; the California Chamber of Commerce; the American Corporate Counsel Association; the State Bar of California; local bar associations in California; the American Bar Association Section on Dispute Resolution; and all those who commented on the standards circulated for comment in January and May

2002.

We ask that you please send a copy of this invitation to any other person or entity that you think might be interested in these standards, or let us know if there are others to whom we should distribute this information. We want to make every effort to ensure that all interested persons and entities are made aware of this invitation to comment.

Attachment

Standard 3 of division VI, Ethics Standards for Neutral Arbitrators in Contractual Arbitration, of the appendix to the California Rules of Court would be amended, effective July 1, 2006, to read:

Standard 3. Application and effective date

(a) Except as otherwise provided in this standard and standard 8, these standards apply to all persons who are appointed to serve as neutral arbitrators on or after July 1, 2002, in any arbitration under an arbitration agreement, if:

(1) The arbitration agreement is subject to the provisions of title 9 of part III of the Code of Civil Procedure (commencing with section 1280); or

(2) The arbitration hearing is to be conducted in California.

(b) These standards do not apply to:

(1) Party arbitrators, as defined in these standards; or

(2) Any arbitrator serving in:

(A) An international arbitration proceeding subject to the provisions of title 9.3 of part III of the Code of Civil Procedure;

(B) A judicial arbitration proceeding subject to the provisions of chapter 2.5 of title 3 of part III of the Code of Civil Procedure;

(C) An attorney-client fee arbitration proceeding subject to the provisions of article 13 of chapter 4 of division 3 of the Business and Professions Code;

(D) An automobile warranty dispute resolution process certified under California Code of Regulations title 16, division 33.1;

(E) An arbitration of a workers' compensation dispute under Labor Code sections 5270 through 5277;

(F) An arbitration conducted by the Workers' Compensation Appeals Board under Labor Code section 5308;

(G) An arbitration of a complaint filed against a contractor with the Contractors State License Board under Business and Professions Code sections 7085 through 7085.7; ~~or~~

(H) An arbitration conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements.; or

(I) An arbitration proceeding governed by rules adopted by a securities self-regulatory organization and approved by the United States Securities and Exchange Commission under federal law.

(c) Persons who are serving in arbitrations in which they were appointed to serve as arbitrators before July 1, 2002, are not subject to these standards in those arbitrations. Persons who are serving in arbitrations in which they were appointed to serve as arbitrators before January 1, 2003, are not subject to standard 8 in those arbitrations.

Comment to Standard 3

With the exception of standard 8, these standards apply to all neutral arbitrators appointed on or after July 1, 2002, who meet the criteria of subdivision (a). Arbitration provider organizations, although not themselves subject to these standards, should be aware of them when performing administrative functions that involve arbitrators who are subject to these standards. A provider organization's policies and actions should facilitate, not impede, compliance with the standards by arbitrators who are affiliated with the provider organization.

Subdivision (b)(2)(I) is intended to implement the decisions of the California Supreme Court in *Jevne v. Superior Court* ((2005) 35 Cal.4th 935) and of the United States Court of Appeals for the Ninth Circuit in *Credit Suisse First Boston Corp. v. Grunwald* ((9th Cir. 2005) 400 F.3d 1119).

ALTERNATIVE RESOLUTION CENTERS®
A LIMITED LIABILITY COMPANY

October 20, 2006

Audrey Hollins
Office of Professional Competence,
Planning and Development
THE STATE BAR OF CALIFORNIA
180 Howard Street
San Francisco, California 94105

Re: Proposed State Bar Rule 2.4

Dear Ms. Hollins:

On behalf of Alternative Resolution Centers, I would like to offer my input in response to the "Proposed Rules" for mediators & arbitrators currently before your committee.

I support and endorse the opinions expressed by JAMS, ADR Services and Judicate West without reservation. Making reference to the proposed rules regarding compensation, I respectfully suggest they raise significant constitutional issues including but not limited to Equal Protection & Interstate Commerce.

Thank you for providing the opportunity for comment and also request that we be advised of any scheduled hearings addressing these issues.

Sincerely,

Steven Davis
Chief Executive Officer

Rule 2.4

CDRC
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November 1, 2006

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule of Professional Conduct 2.4

Dear Ms. Hollins:

We write to register our objections to proposed State Bar Rule of Professional Conduct 2.4, and to urge that it not be adopted.

The California Dispute Resolution Council is a nonprofit membership organization founded in 1994 to advocate for fair and accessible alternative dispute resolution processes. The membership of the CDRC consists of more than 300 alternative dispute resolution neutrals and more than 20 organizations that make ADR services available to disputants. Many of our individual members serve as mediators as well as arbitrators. Many of our members are lawyers, but many others are not.

The CDRC's advocacy is governed by a set of *Dispute Resolution Principles* adopted in 1995 (see http://www.cdrc.net/pg1.cfm). Among other matters, the *Dispute Resolution Principles* provide that parties should have access to as broad an array of dispute resolution neutrals as possible. Thus, the *Principles* provide that, "To the maximum practical extent, parties should be free to select providers of ADR services for their disputes."

The CDRC is concerned that proposed Rule 2.4 would deter otherwise well-qualified lawyers from serving as arbitrators and mediators. Thus, contrary to our *Dispute Resolution Principles*, the proposed rule will adversely affect the pool of potential dispute resolution neutrals from which parties can select. We urge, accordingly, that proposed Rule 2.4 not be adopted.

Our specific concerns are summarized as follows:

1. Proposed Rules 2.4(c) and (d) would significantly expand the applicability of both the Rules of Conduct for Mediators in Court-Connected Mediation Programs and also the Ethics Standards for Neutral Arbitrators in Contractual Arbitration. The proposed rule would put these rules and standards to a use for which they were neither intended nor designed.

2. The State Bar already has the power to discipline an attorney for conduct while acting as a dispute resolver without adding a new rule. A new disciplinary rule which partially incorporates other rules and standards which are themselves only applicable to a limited class of persons in limited situations would be confusing and unwise.

3. The proposed rule would create a regulatory anomaly by subjecting lawyers to standards different from peers with whom they may serve as dispute resolution neutrals on the same case. The confusion this would cause would be unfair to both neutrals and parties.

4. The proposed rule would unfairly expose lawyers who serve as ADR neutrals to the burden of responding to State Bar disciplinary investigations triggered by vindictive individuals dissatisfied with the outcome of their alternative dispute resolution process.

5. Subdivision (b) of proposed Rule 2.4 would substantially impinge upon the roles of mediators and arbitrators. Where parties are unrepresented, it could lead to the very thing the rule seeks to avoid, i.e., it could induce parties to rely upon the 'advice' that this subdivision requires the neutral to give.

6. Enforcement of subdivisions (b) and (c) would be impossible in many cases because of conflicts with mediation confidentiality provisions of the Evidence Code and California Supreme Court rulings.

7. Subdivision (a) of proposed Rule 2.4 at least in part misapprehends the role of an arbitrator. Unlike mediators, arbitrators do not assist parties in resolving disputes; arbitrators decide disputes.

8. The combined effect of the foregoing will be to deter lawyers from a valuable public service, and thus preclude members of the public from access to many of those best qualified to serve them as dispute resolution neutrals.

Expanded Applicability/Unintended Use

The Rules of Conduct for Mediators in Court-Connected Mediation Programs are currently applicable only to mediators when acting in a court-connected mediation program, and the Ethics Standards for Neutral Arbitrators in Contractual Arbitration are currently applicable only to arbitrators in private contractual arbitration. Neither of these regulatory schemes was drafted to function as a yardstick for attorney discipline, any more than the standards of any other profession were.

The standards of conduct for other activities in which lawyers may happen to engage, such as codes of conduct governing accountants, real estate brokers and agents, doctors, design professionals and the like, have never been expressly incorporated in the Rules of Professional Conduct. There is no compelling reason to change that practice.

Subdivision (b) of the proposed rule is also problematic. Its mandate that mediators must "explain" certain matters could be construed to create a duty to continue explaining until the party in fact understands. Ironically, this creates the very problem this portion of the rule is supposedly trying to alleviate, i.e., it tends to induce the party (particularly the unrepresented party) to rely upon the attorney neutral for advice. When a party is represented by counsel but does not appear to the neutral to "understand the lawyer's role in the matter," subdivision (b) could be interpreted as instructing an attorney mediator in some situations to offer advice which may be unwelcome by the attorney, or even counter to the attorney's advice to his or her own client. In any event, imposing a duty upon a lawyer to advise a person that the lawyer cannot advise that person is an oxymoron which the Rules of Professional Conduct should avoid.

Subdivision (b) also contains a troubling phrase concerning what the mediator "knows or reasonably should know." The apparent need for the disciplinary authority to divine a mediator's level of knowledge about the level of understanding of one or more of the

parties to a mediation is incompatible with the strict mediation confidentiality provisions of the Evidence Code and California Supreme Court rulings. A provision which directly conflicts with established law has no place in the Rules of Professional Conduct.

The letter submitted by the State Bar's own ADR Committee addresses the problems regarding mediation confidentiality and Rule 2.4 in detail. We adopt and support those comments, so we will not repeat them here.

Regulatory Anomaly

The proposed rule would create dual standards of conduct for lay as distinguished from lawyer dispute resolvers. This contravenes the CDRC *Dispute Resolution Principles*.

Many arbitrations are heard by panels of three arbitrators including both lawyers and others who are not lawyers. It would be anomalous to subject lawyers serving on arbitration panels with non-lawyers to discipline to which their colleagues are not exposed.

Similarly, many mediations are conducted by individuals who are not lawyers. In particular, countless mediations are administered by community mediation agencies funded in part by the Dispute Resolution Programs Act. These mediations normally are conducted by pairs of volunteers serving as a team. It would be anomalous to subject lawyers who volunteer as community mediators to discipline to which their non-lawyer team members are not.

This disjunction in applicable standards can only have the effect of distorting and thus adversely affecting both the relationships among members of an arbitration panel or a mediation team, as well as the relationships between the neutrals and the parties.

The regulatory schemes the proposed rule seeks to incorporate are arduously lengthy, and very detailed. They were not conceived and drafted as disciplinary rules for lawyers, and one should not assume they can be automatically 'plugged in' to Rules of Professional Conduct without first undergoing the same extensive process of convening and consulting the stakeholders which gave rise to these rules and standards in the first place. I was one of the drafters of Rules of Court 1620, et seq., and the only 'punishment' for violation of those rules that was ever contemplated by our working group was reprimand or removal from the court's list of panel members. That is a world away from the very serious matter of instituting attorney disciplinary proceedings. One would like to assume that State Bar investigators could tell the difference between petty and serious violations of these rules

and standards. However, when faced with the prospect of being hauled before the State Bar by disaffected parties for alleged breach of what are in many instances very broadly-stated aspirational principles, many good lawyers will simply throw up their hands and stop offering their services as ADR neutrals, just to be on the safe side.

Unfair Burden

The proposed rule as phrased could tend to set up the false hope in consumers that a cause of action for damages or equitable relief could be predicated upon its breach. This contravenes current law, and would be detrimental to consumers and practitioners alike.

Legitimate complaints about individuals who serve as dispute resolution neutrals have been extremely rare. While there are no reliable statistics, anecdotal evidence and the experience of our members suggests that attempts by disappointed persons to improperly manipulate the process or agitate for a different result by unfairly accusing the neutral of misconduct occur at least as frequently as legitimate complaints against neutrals. Although relatively rare (at least for now), these attempts do subject lawyers who are willing to serve in this capacity to the burden and expense of responding and defending their conduct.

Just like other dispute resolution neutrals, lawyers are already subject to potential for removal from listings of their availability for service, and are already subject to claims or court proceedings for which they may or may not be protected, or insured. To create an additional forum in which disappointed or vindictive parties may pursue such 'complaints' is unwise. It will increase the cost of malpractice insurance, which in turn will increase the cost of ADR processes to consumers, and it will surely have the overall effect of deterring otherwise qualified lawyers from serving the public.

Misleading Implications

Another reason to reject the proposed rule is to avoid any implication that acting as a dispute resolution neutral constitutes the practice of law. Any implication that arbitrating or mediating constitutes the practice of law is in direct contravention to the CDRC *Dispute Resolution Principles*, and we strenuously object to any such implication.

The State Bar already has the power to regulate the conduct of an attorney regardless of the nature of the activity in which that attorney is engaged. Why diminish or limit that power by incorporating only fragments of one particular set of professional rules among

many? Lawyers engage in various other professional activities, such as accounting, real estate and securities brokerage, medical and dental practice, architecture and engineering to name a few. Adopting a rule such as this for one activity or profession and not others could be misinterpreted as limiting the State Bar's regulatory scope.

Miscellaneous

We note that the proposed rule fails to make the important distinction between "parties" to a mediation and "participants" in a mediation which Rules of Court 1620, et seq. are careful to make. The delicate balance of interpersonal relationships that a neutral must deal with in mediation often involves participants as intimately as it does parties. The rule as currently drafted could cause unnecessary confusion in this regard. This is yet another example of the importance of not putting a rule such as this into effect too hastily, before the stakeholders have had a chance to weigh in with due deliberation.

Subdivision (a) of proposed Rule 2.4 at least in part misapprehends the role of an arbitrator. Unlike mediators, arbitrators do not assist parties in resolving disputes; arbitrators decide disputes.

As a final comment, we note that while not a perfect solution, at a minimum proposed subdivisions (c) and (d) should be dropped. References to the court-connected mediator rules and the contractual arbitration standards which the proposed rule attempts to incorporate, along with references to other potentially applicable ethical standards and rules of conduct, would be better mentioned in comment than in the language of the rule per se.

We thank you for the opportunity to comment on the proposed revisions to the Rules of Professional Conduct.

Very truly yours,

JOHN S. BLACKMAN
President
California Dispute Resolution Council

ADR SERVICES, INC.

Judge Michael D. Marcus (Ret.)

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October 27, 2006

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, California 91405-1639

Dear Ms. Hollins:

Re: Proposed Rule of Professional Conduct 2.4: Lawyer as Third-Party Neutral

I write in opposition to proposed Rule of Professional Conduct 2.4 because the breach of ethical standards as to mediators and arbitrators should not be the basis for discipline.

Proposed rule 2.4, subsection (c), provides that all lawyers serving as neutrals in any mediations or settlement conferences shall comply with rules 1620.5, 1620.6(b) and (d), 1620.8 and 1620.9 of the Judicial Council Standards for Mediators in Court Connected Mediation programs. Yet the purpose of the preceding rules, which is found in rule 1620 of the Judicial Council Standards, does not appear to have a discipline goal; instead, these rules, while merely promulgated to "(a) establish the minimum standards of conduct for mediators in court-connected mediation programs for general civil cases," (at the same time) "(b) … *are not intended to:*

> *(1) Establish a ceiling on what is considered good practice in mediation or discourage efforts by courts, mediators, or others to educate mediators about best practices;*
>
> *(2) Create a basis for challenging a settlement agreement reached in connection with mediation; or*
>
> *(3) Create a basis for a civil cause of action against a mediator.*"

(Emphasis added.)

From the above language, it is obvious that the Judicial Council did not want the mediation standards to be used in a pro-active manner by an aggrieved litigant or attorney to reverse the results of a court-connected mediation or subject the mediator in that situation to legal harassment. (Note, too, that, pursuant to *Howard v. Drapkin* (1990) 222 Cal.App.3d 843, 858-860, 861, a neutral who performs dispute resolution services for the court is protected by absolute quasi-judicial immunity.) There is no reason why mediators who have been privately retained, rather than provided by the court, should not also be subject to the same deference. To provide otherwise is a potential due process violation.

Next, a literal application of rule 1620.5, as required in subsection (c), extends the reach of the discipline process beyond its existing scope. The critical part of 1620.5 for this purpose is

subdivision (b)(1)(B)(2) which states that "A mediator's duty to disclose is a continuing obligation, from the inception of the mediation process through its completion. Disclosures required by this rule must be made as soon as practicable after a mediator becomes aware of a matter that must be disclosed. To the extent possible, such disclosures should be made before the first mediation session, but in any event they must be made within the time required by applicable court rules or statutes." "[A]s soon as practicable" is too vague to have a common understanding and, therefore, should not be the basis for potential discipline.

Furthermore, the existing Rules of Professional Conduct and the State Bar Act have chiefly regulated attorney conduct as it might affect present and potential clients. (See, for example, rules 1-300, 1-310, 1-311, 1-320, 2-100, 2-200, 3-110, 3-120, 3-200, 3-210, 3-300, 3-310, 3-320, 3-400, 3-500, 3-510, 3-600, 3-700, 4-100, 4-200, 4-210 and 4-400.) The remaining rules and statutes generally apply to situations where an attorney has been convicted of a crime (Business and Professions Code sections 6101 et seq.), committed an act of moral turpitude towards a third, non-client party (Business and Professions Code section 6106), refused to comply with a lawful order of the court (Business and Professions Code section 6103) or committed certain egregious acts before the court or during trial. (See Rules of Professional Conduct 5-200, 5-210, 5-220, 5-300, 5-310 and 5-320.)

The common denominator of the above rules and statutes is that single acts of simple negligence can not be the basis for discipline. (See, for example, *Read v. State Bar* (1991) 53 Cal.3d 394, 411; *In the Matter of Ward* (Review Department 1992) 2 Cal. State Bar Ct. Rptr. 47, 57 and *In the matter of Fonte* (Review Department 1994) 2 Cal. State Bar Ct. Rptr. 752, 757, holding that simple negligence does not constitute the failure to perform competently in violation of rule 3-110(A).) Thus, the addition of a rule as to mediators and arbitrators, which could lead to the possibility of discipline for the unintentional but negligent failure to advise about a matter that might potentially affect his or her impartiality, would create a dramatic policy shift from existing discipline law.

It is important to note, as well, that mediators, as opposed to arbitrators, are engaged in a non-adjudicative function and have no power whatsoever over the parties. (See *Travelers Casualty and Surety Company, et al. v. Superior Court* (2005) 126 Cal.App.4th 1131.) Accordingly, the client, with the assistance of his/her respective attorney (if they have such representation) is in full control of what decision to make regarding the terms of any settlement or to refuse settlement and proceed to trial.

A further reason for not placing mediation standards in the Rules of Professional Conduct is that, as a practical matter, the enforcement of any violation would be extremely difficult, if not impossible, since the California Supreme Court has expressed in strong language that all communications in mediations, absent legislative change to the Evidence Code, must be confidential. *Foxgate Homeowners' Asociation v. Bramalea California, Inc.* (2001) 26 Cal.4th 1 provides that "Neither a mediator nor a party may reveal communications made during mediation" (*id.* at p. 4) and that Evidence Code section 1121 prohibits both mediators "and anyone else from submitting a document that revealed communications during mediation and (bars) the court from considering them." (*Id.* at p. 13.) The opinion, for the purpose of this discussion, also holds that:

> Although a party may report obstructive conduct to the court, none of the confidentiality statutes currently make an exception for reporting bad faith conduct or for imposition of sanctions under that section when doing so would require disclosure of communications or a mediator's assessment of a party's conduct although the Legislature presumably is aware that Code of Civil Procedure section 128.5 permits imposition of sanctions when similar conduct occurs during trial proceedings. FN. 13.
>
> FN.13. The conflict between the policy of preserving confidentiality of mediation in order to encourage resolution of disputes and the interest of the state in enforcing professional responsibility to protect the integrity of the judiciary and to protect the public against incompetent and/or unscrupulous attorneys has not gone unrecognized. (Citations omitted.) As noted, however, any resolution of the competing policies is a matter for legislative, not judicial, action.
>
> Therefore, we do not agree with the Court of Appeal that the court may fashion an exception for bad faith in mediation because failure to authorize reporting of such conduct during mediation may lead to 'an absurd result' or fail to carry out the legislative policy of encouraging mediation. The Legislature has decided that the policy of encouraging mediation by ensuring confidentiality is promoted by avoiding the threat that frank expression of viewpoints by the parties during mediation may subject a participant to a motion for imposition of sanctions by another party or the mediator who might assert that those views constitute a bad faith failure to participate in mediation. Therefore, even were the court free to ignore the plain language of the confidentiality statutes, there is no justification for doing so here.

(*Id.* at p. 17.)

Foxgate, therefore, allows attorneys to report mediation misconduct, such as the failure to appear at a mediation or some untoward conduct that may occur in a public place during the mediation; but all communications during the mediation process, no matter how scurrilous or misleading, are protected until the legislature says otherwise

Finally, subdivision (d) of rule 2.4 incorporates the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration to persons acting as neutral arbitrators pursuant to an arbitration agreement. In great part, those rules are intended to assure that the arbitrator advises the parties of any potential matters that might affect his or her impartiality. These standards should also not be established as a Rule of Professional Conduct to the extent that they would also make simple acts of negligence disciplinable.

Yours truly,

Michael D. Marcus

ORANGE COUNTY BAR ASSOCIATION

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MEMORANDUM

Date: December 1, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct of The State Bar of California

From: Orange County Bar Association ("OCBA")

Re: Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California Developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

Subj: Proposed Rule 2.4: Lawyer as Third Party Neutral

Founded over 100 years ago, the Orange County Bar Association has over 9,800 members, making it the second largest voluntary bar association in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared jointly by the Professionalism & Ethics and Administration of Justice Committees.

The OCBA respectfully submits the following concerning the subject proposed Rule:

*****

Comment:

We do not quarrel with the standards incorporated into Rule 2.4, subdivisions (c) and (d), and agree that these are appropriate standards for mediators and arbitrators to follow, even in private, as opposed to court-sponsored mediations. But we question whether lawyers should be subject to discipline for violating these standards, which is the effect of subdivisions (c) and (d). First, where the arbitration or mediation is voluntary, as opposed to court-sponsored, and the parties are represented by counsel, counsel normally investigate a neutral's background before choosing him or her. To impose discipline on a lawyer-neutral when analogous punishment would not be imposed on nonlawyers might discourage lawyers from acting as neutrals. Second, as we read the proposed rule, it does not include a requirement that the violation be *knowing* for discipline to be imposed. And finally, we raise the question whether mediators and arbitrators should be both subject to this rule if adopted, since mediators have no power to impose a ruling on the parties, while arbitrators do.

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HON. REBECCA A. WISEMAN

HON. MARY E. WISS

STANLEY S. BISSEY
EXECUTIVE DIRECTOR

January 12, 2007

Audrey Hollins
Office of Professional Competence,
Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 2.4 (Commission for the Revision of the Rules of Professional Conduct)

Dear Ms. Hollins:

The California Judges Association opposes adoption of Proposed Rule 2.4. Mediators and Arbitrators who are members of the Bar should not be subject to Rules of Professional Conduct whose provisions are in the control of and may be amended by the Judicial Council without State Bar oversight. The State Bar Act authorizes the State Bar to submit proposed Rules and amendments of Rules of Professional Conduct to the Supreme Court for approval which, once approved, are not subject to change except by following the same process. Here, Proposed Rule 2.4 would authorize prospective disciplinary action predicated on the Judicial Council Standards for Mediators in Court Connected Mediation Programs and Ethics Standards for Neutral Arbitrators in Contractual Arbitration. These Standards and Rules may be amended by the Judicial Council without vetting by the State Bar and without the oversight of the Supreme Court. This wholesale incorporation of standards of professional conduct is without precedent and carries the potential for unintended consequences.

A substantial body of law as well as self-imposed private ethical standards insure impartiality, disclosure and many other aspects of ethical conduct by neutrals. Private mediators and arbitrators have no disagreement with the goal of Commission to advance the integrity of the process, but we are unaware of any significant problem that needs to be addressed by Proposed Rule 2.4. More specifically,

1. Proposed Rule 2.4(c) encompasses two distinct segments of the practice of mediation in California – Court-connected mediation programs which are regulated by CRC 1620 *et seq.* and private mediations which are arranged and conducted without court involvement. Court-connected mediations are adequately regulated by the existing CRC provisions and do not require State Bar discipline as an overlay to individual courts' control of the conduct of mediators (both attorneys

Rule 2.4

and non-attorneys) who are selected and appointed by those courts to provide services in their programs.

Private mediations are generally initiated by counsel who select and arrange for the compensation of the mediator. Private mediators generally follow the Standards of Conduct for Mediators (AAA/ABA) and/or standards adopted by particular providers (*e.g.*, JAMS Ethics Guidelines for Mediators); further regulation is unwarranted. More importantly, the CRC ethics provisions were created specifically for court-connected mediations, which differ significantly from private mediations, and the CRC regulatory provisions were not intended nor are they appropriate to apply to private mediations. Application of the CRC standards to private mediators is beyond the defined scope of those rules. The Committee which created those Standards would be astonished to learn that their carefully crafted rules will now apply to private market mediations and mediators whose characteristics were never considered by that committee.

In either case, the discipline process would be severely constrained by the rules of confidentiality which apply to all mediations in California (Cal. Evid. Code § 1115 *et seq.*)

This provision would also place control in the Judicial Council over private mediator conduct and allow the scope of State Bar discipline to be defined by Judicial Council changes to the CRC provisions without any input or authority from the State Bar. Nor is there any legislative grant of authority for this Judicial Council control of State Bar regulation of lawyers. (Compare Canon 6D, which is applied to court-appointed referees and temporary judges through Rules of Professional Conduct, Rule 1.710; the Supreme Court controls the content of the Canons of Judicial Ethics and maintains authority over the Rules of Professional Conduct under the State Bar Act; changes to Canon 6D therefore are within the complete control of the body with ultimate authority over such provisions.)

If it is determined that Provision (c) is to be adopted, at the least, any provision as to marketing (CRC Rule 1620.8) and compensation (CRC Rule 1620.9) should not be applied to private mediators.

2. Proposed Rule 2.4(d) is apparently intended to apply to private arrangements between parties and arbitrators (perhaps through arbitral institutions). Arbitrator conduct is regulated by the California Arbitration Act and related legislatively authorized Judicial Council rules. Arbitrators also are expected generally to follow the Code of Ethics for Arbitrators in Commercial Disputes (AAA/ABA). This complex regulatory construct is subject to court review on petitions to confirm or vacate arbitration awards and the right of parties to bring civil actions against arbitrators (subject to the common law quasi-judicial immunity arbitrators enjoy, *see, e.g.*, *Baar v. Tigerman*, 140 Cal. App. 3d 979 (1983)). State Bar regulation of the same conduct is unwarranted and duplicative. (The few arbitrations that are initiated through the court by petition to compel arbitration and in which the arbitrator is appointed by the court (Cal. Code Civ. Proc. §. 1281.6) should not be treated differently than other arbitrations that are purely private.)

If it is determined that Provision (d) is to be adopted, at the least, any provision as to marketing (Standard 17) and compensation (Standard 16) should not be applied to arbitrators in contractual arbitrations.

Because Proposed Rule 2.4 fails to make the distinction between "court connected" and private mediation and arbitration. That omission may cause confusion and induce parties to resort to the State Bar for redress of what is essentially a contractual issue. To that extent, the Proposed Rule requires clarification as proposed by the addition of another subparagraph as follows:

> (e) The foregoing provisions of subparagraphs (a), (b), (c) (d), pertaining to "compensation" and "marketing", are inapplicable to private mediation and arbitration. "Private mediation and arbitration" are defined as mediations and arbitrations where the selection of the mediator or arbitrator is made by an institutional provider of dispute resolution services, the parties or by the court pursuant to Code Civ. Proc. § 1281.6 and the compensation of the mediator and arbitrator is established by contract between the neutrals and the parties without any judicial determination.

We also endorse the comments of the ADR Services, Inc. (letter dated October 13, 2006), JAMS (letter dated October 6, 2006) and The State Bar Committee on Alternative Dispute Resolution (letter dated October 4, 2006). We appreciate being given the opportunity to provide our views.

Very truly yours,

Scott L. Kays
President

SLK:gk

c: CJA ADR Committee:
Hon. Daniel M. Hanlon, Chair
Richard Chernick, Esq.
Hon. Jill C. Fannin
James O. Heiting, Esq.
Hon. James E. Herman
Hon. John W. Kennedy, Jr.
Hon. Harry W. Low
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March 14, 2007

Audrey Hollins
Office of Professional Competence,
Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re.: Proposed Rule 2.4 (Commission for the Revision of the Rules of Professional Conduct)

Dear Ms. Hollins:

The California Judges Association (CJA), once again, opposes Proposed Rule 2.4. CJA stated its opposition in its letter of January 12, 2007 to the Commission. This was in preparation for the January meeting of the Commission. At that meeting, the vast majority, if not all, of the public speakers stated their opposition to the proposed rule applying to members of the Bar who serve as mediators and arbitrators. We pointed out that the retired judges of California who perform services as an ADR neutral are currently members of the Bar.

It is our understanding that Proposal D2 of Proposed Rule 2.4, as well as other proposals, will be considered at the Commission's meeting on March 16, 2007. Proposal D2 of Proposed Rule 2.4 again places court-connected mediation regulated by CRC 1620 *et seq.* with private mediation arranged, contracted and conducted without any court involvement. Application of these CRC standards to private mediation is beyond the defined scope of those Rules.

The Rule as set out on Proposal D2 still does not adequately take into account constraints imposed by the rules of confidentiality which apply to all mediations in California. (Evid. Code sections 1115 *et seq.)*

We again urge that in so far as Proposal D2 purports to govern compensation and marketing that such provisions not apply to private mediators and arbitrators where the selection of the mediator or arbitrator is made by an institutional provider of dispute resolution services, the parties or the Court pursuant to Code of Civil Procedure section 1281.6 and the compensation of the neutral is established between the neutral and the parties without any judicial determination.

Finally, Proposal D2 purports to delegate to the Board of Governors, without Supreme Court vetting, standards from a vast variety of sources including but not limited to the Judicial Council Standards. The consequences of modification or changes to the rules or standards are not provided or adequately considered.

We urge the Commission that if the Proposed Rule 2.4 is deemed necessary that it be adopted only with the originally proposed paragraphs 2.4 (a) and (b) as set forth in the proposed Rule at the January hearing. However, CJA maintains that the Rule as proposed, and particularly as set forth in Proposal D2, is not necessary and should not be adopted.

We appreciate the opportunity to provide our views.

Very Truly Yours,



Hon. Scott L. Kays
President

SLK:gk

JAMES R. MADISON
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March 14, 2007

Harry B. Sondheim, Esq.
16115 Northfold Street
Pacific Palisades, CA 90272

Re: Proposed State Bar Rule of Professional Conduct 2.4

Dear Mr. Sondheim:

As a former president of the California Dispute Resolution Council ("CDRC"), I have been asked to comment on its behalf on the most recent variations of the above-described proposed rule, which are to be considered at the March 16 meeting of the Rules Revision Commission.

As you may be aware, the CDRC is a non-profit organization of dispute resolution neutrals and providers dedicated to advocating for fair, effective and accessible ADR processes in California.

By way of personal background, I have been an arbitrator for more than 40 years and a mediator for more than 20. When I was with Orrick, Herrington & Sutcliffe from 1960 through 1995, I also represented consumers of arbitration and mediation services. I served on the Committee of Experts in Arbitration Ethics which advised the Judicial Council in formulating the Ethics Standards for Neutral Arbitrators in Contractual Arbitrations. I also serve at present as a member of the Working Group chaired by Justice Ruvolo on Uniform Procedures for Addressing Complaints about Court-Program Mediators, which, when finalized, will supplement Rules of Court 3.865-3.867. Finally, I teach arbitration and arbitrator ethics.

1. The CDRC's preference remains, as it has been, that no form of Rule 2.4 should be adopted. Its reasoning is threefold.

a. No persuasive argument has yet been advanced for establishing a Rule of Professional Conduct directed specifically at lawyers who serve as arbitrators or mediators. Even though arbitration has been used as a mode of

alternative dispute resolution in California for more than 100 years and the period of use of mediation is fast approaching three decades, no showing has been made that during either of these periods any lawyer has engaged in conduct as an arbitrator or mediator that would merit State Bar discipline.

b. Appropriate sanctions already are available for lawyers who violate either the Ethics Standards for Arbitrators or the Rules of Conduct for Mediators.

(1). Under the Laughon case and Section 1286.2(a)(6) of the Code of Civil Procedure, for example, a party has an absolute right to vacatur of an arbitration award for failure of an arbitrator to make a disclosure required by Ethics Standard 7.

(2). Moreover, although Barr v. Tigerman, 140 Cal. App. 3d 979 (1983), said that an arbitrator had the same immunity as a sitting judge from civil suit for damages when acting in his or her quasi-judicial capacity, it upheld a suit for breach of contract; and the more recent case of Morgan Phillips v. JAMS/Endispute, 140 Cal. App. 4th 979 (2006), suggested a broader ambit of personal liability.

(3). Also, at least with respect to arbitrators, the American Arbitration Association, for which I am a panelist, reserves the right to remove from its panels an arbitrator who violates the Ethics Standards, and I suspect that inquiry would show other providers do also.

(4). Courts are authorized to remove mediators from their panels for violation of the Rules of Conduct for Mediators in Court-Connected Mediations. Even this mild sanction has rarely been justified. In Los Angeles County, for example, where some 35,000 court-connected mediations take place each year, the CDRC understands that the number of mediators removed from the court panel averages possibly one per year.

(5). Adoption of Rule 2.4 would make a mockery of Rules 3.865, 3.866, 3.867 and the efforts of the Working Group to devise a procedure for dealing with complaints about mediators in court-connected

mediations. The overwhelming majority of mediators on court panels are lawyers, and why would any unhappy mediation participant want to bother with a complaint to a court when the leverage of a State Bar investigation is available.

(6). Perhaps more significantly, although mediators would like to suppose they are immune from civil liability, no California case has upheld such immunity.

(7). Finally, the CDRC understands that, even without a rule addressing the conduct of ADR neutrals specifically, the State Bar presently has the power to discipline a lawyer for conduct meriting such discipline, even when not associated with the practice of law, such as if the lawyer is engaging in real estate brokerage or operating a restaurant or, in my personal case, acting as a soccer referee.

c. Adoption of a rule which makes lawyers a more tempting target than non-lawyers for those who are unhappy with the outcome of ADR proceedings will create an incentive for parties to prefer lawyers over non-lawyers in selecting ADR neutrals and, thus, tend to make membership in the State Bar a prerequisite to service. This is contrary to the Dispute Resolution Principles governing the advocacy of CDRC. In the interest of keeping service as an arbitrator or mediator open to all qualified individuals so as to maximize the options open to disputants, the CDRC's Dispute Resolution Principles, which were adopted in 1995, provide that "ADR providers should not be required to possess specific academic degrees or professional licenses."

2. If the Commission is determined to adopt Rule 2.4 in some form, the CDRC urges that it be limited to subparts (a) and (b).

a. In this connection, the CDRC believes that the phrase "or other matter" should be deleted from proposed subpart (a) and that the phrase "or in the arrangement of a transaction" be deleted from the proposed comment (1).

(1). The former phrase appears to be included in contemplation of the latter. However, arbitrators decide disputes; mediators and neutral evaluators assist parties in their resolution. ADR neutrals do not "arrange transactions." They would be involved in a conflict of interest if they did.

(2). If the language to which the CDRC objects is intended to reach individuals who practice collaborative law, that category is distinct from and should not be regulated by the same Rule as ADR neutrals.

b. The CDRC also believes that the first clause of the second sentence of subpart (b), which reads, "When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter," should be deleted. A lawyer who is serving as an ADR neutral should in all instances explain to parties the distinction between his role or hers as a neutral and the role of a lawyer who represents a client. In other words, the duty of explanation should not be limited to cases in which a party is not represented.

3. If the Commission is determined to adopt a more expansive form of Rule 2.4 than one including only proposed subparts (a) and (b), the CDRC believes:

a. A mode of culpability should be included as a prerequisite for any State Bar discipline.

(1). As in the Laughon case above, an arbitrator may be held to have violated an Ethics Standard even without being negligent.

(2). The CDRC understands that a lawyer who is representing a client is not exposed to State Bar discipline merely for being guilty of malpractice without more.

(3). The CDRC believes that a lawyer who is not acting as such should not have a greater exposure to State Bar discipline than one who is acting as a lawyer.

(4). The CDRC believes, accordingly, that a purposeful or least knowing or at the very least reckless violation of a mediator rule of conduct or arbitrator ethical standard should be required as a condition of any State Bar discipline.

b. Proposed subpart (c) should be omitted.

(1). Service as an ADR neutral does not constitute the practice of law, and there is no more basis for a lawyer serving as an ADR neutral to be obligated to promote respect and confidence in the legal profession than, as above, a lawyer acting as a real estate broker, operating a restaurant or serving as an athletic official.

(2). The subjective phraseology "manner that promotes respect and confidence in the legal profession" would make lawyer ADR neutrals open season for anyone who is unhappy with the outcome of an ADR process.

c. Proposed subpart (d) should either include (i) the standards a lawyer neutral is required to observe at risk of discipline in haec verba or, if that is thought to make any rule too extensive, (ii) incorporate specific ethics standards or rules of conduct by reference.

(1). ADR neutrals and parties as well should have a clear expectation of what will justify a State Bar complaint.

(2). Delegating the Supreme Court's oversight of Rules of Professional Conduct to the Board of Governors would subvert the rule making process.

(3). To the extent there may be concern about the Judicial Council, in effect, amending the RPC, this may be obviated by incorporating ethics standards or rules of conduct as they exist on a specific date.

d. Because they are subjective and would invite groundless complaints, Rules 3.855(a) and (f) should not be made part of any standard.

e. Rule 3.854 should not be made part of any standard. No standard should incorporate any provision which cannot be enforced without violating mediation confidentiality.

f. The terminology "Judicial Council Standards for Mediators in Court Connected Mediation Programs" should not be used. The correct title of Article 2 of Chapter 3 of the Rules of Court is "Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases."

g. Standards 5, 6, 8 and 10 of the Ethics Standards for Neutral Arbitrators should not be part of any standard.

(1). Standards 5 and 6 are subjective and would invite groundless complaints.

(2). Standard 8 is in general the obligation of a provider organization and not susceptible of compliance by an arbitrator.

(3). Compliance with Standard 10 is within the control of parties to arbitrations and not arbitrators.

h. If Standard 16 is to be included, it should be included with respect to all arbitrations and not just court-annexed or judicial arbitrations.

On behalf of the CDRC, I will appreciate you and your colleagues considering the foregoing.

Sincerely,

James R. Madison

ESTABLISHED 1929

CALIFORNIA JUDGES ASSOCIATION
The Voice of the Judiciary

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STANLEY S. BISSEY
EXECUTIVE DIRECTOR

June 4, 2007

Audrey Hollins
Office of Professional Competence,
Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 2.4 (Commission for the Revision
Of the Rules of Professional Conduct)

Dear Ms. Hollins:

The California Judges Association (CJA) through its ADR Committee has taken the opportunity to review the Official Comments to Rule 2.4. We appreciate the Commission's modification, but would prefer that Rule 2.4 not be approved in any form as not all of our members believe the Rule is justified or necessary.

We offer the following editing suggestions to the Commentary. In paragraph #3, the fourth sentence begins "For some parties, particularly parties who frequently use . . ." We would suggest adding the word "unrepresented" and striking the words "particular parties" to read "For some unrepresented parties who frequently use dispute-resolution process, . . ." And in the next sentence we would suggest changing "will" to "may" so as to read "For others, particularly those who are using the process for the first time, more information may be required."

We also take the position that paragraphs #4 and #5 are redundant and unnecessary. The citation to a unique case such as *Cho v. Superior Court* does not really stand for a general proposition in the context of the Rule and we recommend striking the reference.

We appreciate the opportunity to present our views.

Sincerely,

Scott J Kays

Hon. Scott L. Kays
President

SLK:gk

Rule 2.4

THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

July 31, 2006

Members of the Board Committee on Regulation, Admission & Discipline Oversight

Members of the Special Commission for the Revision for the Revision of the Rules of Professional Conduct

Re: Proposed Rules 2.4.1 and 2.4.2

Dear Members:

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 Rules 2.4.1 regarding Lawyer as Temporary Judge, Referee and 2.4.2 regarding Court Appointed Arbitrator and Lawyer as a Candidate for Judicial Office. COPRAC supports the adoption of these proposed Rules as drafted.

Thank you for consideration of our opinion in this matter.

Sincerely,

Steven Lewis
Chair
State Bar of California
Committee on Professional Responsibility and Conduct



THE RESOLUTION EXPERTS

October 6, 2006

The Commission for the Revision of the Rules of Professional Conduct
c/o Randall Difuntorum
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Comments of JAMS Re: Proposed Rule 2.4 and 2.4.1 to the Rules of Professional Conduct of the State Bar of California.

Dear Mr. Difuntorum:

For the reasons set forth below JAMS disagrees with Proposed Rule 2.4 (c) and (d).

The primary problem with the Proposed Rule is that it attempts to establish rules for mediators in a "one size fits all" manner without considering the true landscape of the world of alternative dispute resolution. In California, mediation is practiced by both lawyers and non-lawyers alike. Some lawyer mediators and other non-legal professionals mediate small disputes involving unrepresented parties (such as in family law or community-based matters.) However, most of the cases that are mediated today involve parties who are represented by counsel and in many cases, a lawsuit has already been filed in state and federal court. It is almost always the *lawyers* who determine that mediation would be a useful process, and *they* retain the mediator, typically a lawyer or former judge. In those circumstances, the "clients" of the mediators are the lawyers who select and retain them. The "parties" as defined in the California Rules of Court are actually the clients of the lawyers. If the intent of the Proposed Rule is to protect the general public (i.e. unrepresented parties), then it should be limited to that audience.

To be specific, JAMS disagrees with Proposed Rule 2.4(c) and (d) for the following reasons:

1. Any Rule of Professional Conduct should differentiate between the mediation of filed civil actions where the parties are represented and unfiled disputes or small claims matters where the parties are unrepresented.

2. 2.4(c) attempts to elevate Rules of Court , Rule 1620—which was designed for court-connected programs only—to a Rule of Professional Conduct. It was never intended for this purpose. Most lawyer mediators and ADR Providers did not engage in the discussions when these rules were promulgated because they do not participate in the court-connected programs. It is misguided to now attempt to use them for disciplinary purposes.

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3. While JAMS has no specific comment regarding the sub-paragraphs concerning confidentiality; impartiality, conflicts, disclosure and withdrawal; competence; and marketing, it should be noted that these sections presuppose a lack of sophistication that may be present in a court connected program, but not to sophisticated lawyers involved in high stakes cases. In addition, it is unwise to institute a burdensome disclosure process for a mediator who has no power to bind parties (represented or unrepresented) to any decision.

4. With respect to Proposed Rule 1620.9 concerning compensation, this language could be construed as limiting a private mediator from charging fees in excess of the court program fees. If such fees were charged the mediator could then be subject to discipline. If this is what is intended, it is misguided. In addition, the reference to "contingent" fees is unclear and interferes with client self-determination. Some mediators in large cases will charge alternative fees depending upon whether a case settles. The setting of fees in large complex cases is between the lawyers representing the clients and the mediator and should not require the approval of the State Bar. This is another example of a Rule made for a court program being elevated to a status that was never intended.

5. 2.4(d) attempts to raise the Standards 5-17 to a level that was not intended. In fact, Standard 1(a) provides in part that the Standards are "intended to guide the conduct of arbitrators". 1(d) goes on to say that "These standards are not intended to…create any new civil cause of action." But that is not true—with this Proposed Rule, the State Bar is attempting to use them for disciplinary purposes. As anyone in the ADR business knows, these Standards are exceedingly complex and difficult to understand. It is simply unfair to any arbitrator to now say that a violation could result in State Bar discipline, which is the equivalent of a new civil cause of action.

JAMS recommends that State Bar Special Commission for the Revision of Rules of Professional Conduct delete Rules 2.4(c) and (d) in their entirety.

Very truly yours,



John Welsh
Executive Vice President, General Counsel

THE STATE BAR OF CALIFORNIA
PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

This form allows you to submit your comments by entering them in the text box below and/or by uploading files as attachments. You should discuss only **one** Rule per comment submission form. Select the proposed Rule from the drop down list.

Comments submitted are regarded as public record.

DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Phillip Feldman

Professional Affiliation Various but independent

*** City** Sherman Oaks

*** State** California

*** email address** StateBarDefense@aol.com

A copy of your response will be sent to this email addres

Rule 2.4.1

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator [1

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
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- ○ AGREE ONLY IF MODIFIED

Enter your comments here. To upload files proceed to the ATTACHMENTS section below.

It has long been the rule that different rules are needed for judicial decision makers than advocates and practitioners of the law. Part-time judges and referees, like commissioners ought be treated the same as their full time brethren. Putting on the robe is different that representing a client and ought not be under the auspices of the State Bar Court but under the same disciplinary group whose members the lawyers are "pinch hitting" for. It is inconsistent to act like and be a judicial officer and be subject to rules other than those of full time judges. Expedience and budgets are poor reasons to denigrate volunteers who help reduce case loads etc.

Likewise, a lawyer who sits as a third party neutral (and many do that on a full time basis) ought be subject to the same rules as other third party neutrals and ought be subject to the same body which ought monitor third party neutrals (whether independent or civil service).

The above views are those of a lawyer with 25 years as a Judge Pro Tem in multiple courts and 30 years as an arbitrator as well as multiple stints as a referee.

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Rule 2.4.1

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THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

July 31, 2006

Members of the Board Committee on Regulation, Admission & Discipline Oversight

Members of the Special Commission for the Revision for the Revision of the Rules of Professional Conduct

Re: Proposed Rules 2.4.1 and 2.4.2

Dear Members:

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 Rules 2.4.1 regarding Lawyer as Temporary Judge, Referee and 2.4.2 regarding Court Appointed Arbitrator and Lawyer as a Candidate for Judicial Office. COPRAC supports the adoption of these proposed Rules as drafted.

Thank you for consideration of our opinion in this matter.

Sincerely,

Steven Lewis
Chair
State Bar of California
Committee on Professional Responsibility and Conduct

THE STATE BAR OF CALIFORNIA

— COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION

180 Howard Street
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October 4, 2006

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Proposed New Rule 2.4

Dear Ms. Hollins:

The State Bar's Committee on Alternative Dispute Resolution has been following the work of the Commission for the Revision of the Rules of Professional Conduct with respect to Proposed Rule 2.4 (formerly known as Proposed Rule 1-720) of the Rules of Professional Conduct (the "Proposed Rule"). On February 18, 2004 we wrote to the Commission to express our opposition to the Proposed Rule, albeit in an earlier draft form.

After that letter was written, the Commission continued to work on the Proposed Rule and narrowed the scope to a considerable extent. Only selected portions of the Judicial Council Standards for Mediators in Court Connected Mediation Programs ("Mediator Standards") and the Ethics Standards for Neutral Arbitrators in Contractual Arbitration ("Arbitrator Standards") are now included. Nevertheless we continue to have serious concerns about the Proposed Rule.

On April 25, 2006, we again wrote to the Commission, urging it reconsider paragraphs (C) and (D) of Proposed Rule 1-720 (now paragraphs (c) and (d) of Proposed Rule 2.4), rather than soliciting public comment on the Proposed Rule.

Now that Proposed Rule 2.4 has been released for public comment, we write to reiterate our concerns and also to voice a concern about paragraph (b). In so doing, we wish to state that we support the goal of Proposed Rule 2.4. We believe that all attorney-neutrals should adhere to the minimum standards of conduct promulgated by the Judicial Council as well as to the aspirational standards of professional organizations of lawyers and ADR providers. These include the Model Standards of Conduct for Mediators adopted by the American Arbitration Association, American Bar Association and Association for Conflict Resolution, and the Code of Ethics for Arbitrators in Commercial Disputes prepared by a joint committee of the American Arbitration Association and American Bar Association. Our concern is simply that the Judicial Council standards should not become a basis for attorney discipline in California.

SUMMARY OF COMMENTS

Our concerns are summarized as follows:

1. Enforcement of paragraphs (b) and (c) would be impossible in many cases, because of the confidentiality of mediation.
2. The State Bar disciplinary process was not intended to be a remedy for violation of the Mediator Standards.
3. The State Bar should not attempt to enforce as attorney disciplinary rules ethical standards designed for other professions.
4. The Proposed Rule would create two classes of neutrals and would expose attorney-neutrals to the filing of frivolous complaints for violation of the Rules of Professional Conduct.
5. New civil causes of action may be created, contrary to the intent of the Standards and the Rules of Professional Conduct.
6. The Proposed Rule may discourage attorneys from serving as neutrals on a volunteer basis.

DISCUSSION

1. Enforcement of Paragraphs (b) and (c) Would Be Impossible in Many Cases Because of the Confidentiality of Mediation.

All communications during the course of a mediation or a mediation consultation are confidential. *(See Evid. Code §§1119 and 1122.)* The statutes express a strong public policy of this State.[1]

The term "mediation consultation" is defined as "a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator." (*See Evid. Code § 1115(c).*)

Because of the confidentiality of mediation, enforcement of certain parts of paragraphs (b) and (c) of the Proposed Rule would as a practical matter be impossible in many cases. We refer in particular to rule 1620.5 concerning the mediator's

[1] As stated in *Foxgate Homeowners' Association v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14, "The legislative intent underlying the mediation confidentiality provisions of the Evidence Code is clear. The parties and all amici curiae recognize the purpose of confidentiality is to promote 'a candid and informal exchange regarding events in the past .... This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.' (Nat. Conf. of Comrs. on U. State Laws, U. Mediation Act (May 2001) § 2, Reporter's working notes, ¶ 1; see also Note, Protecting Confidentiality in Mediation (1984) 98 Harv. L.Rev. 441, 445. ['Mediation demands ... that the parties feel free to be frank not only with the mediator but also with each other.... Agreement may be impossible if the mediator cannot overcome the parties' wariness about confiding in each other during these sessions.'].)"

impartiality and rule 1620.6 regarding truthful representation of the mediator's background to the participants. To the extent that the mediator's statements during the mediation or mediation consultation would be put at issue, testimony from the mediator and the participants in the mediation would be necessary in order to investigate, prosecute, and defend against an alleged violation of the Proposed Rule. However, it may be impossible to obtain that testimony.

We believe that the recent experience of the Judicial Council in dealing with enforcement of the Mediator Standards is instructive. Those standards were adopted in 2002, effective January 1, 2003. As part of the adoption of those standards, California Rules of Court, Rule 1622(a) was also adopted. That rule requires superior courts to "establish procedures for receiving, investigating, and resolving complaints that mediators who are on the court's list or who are recommended, selected, appointed, or compensated by the court failed to comply with the [Mediator Standards]." The rules of court did not specify how superior courts should address complaints against mediators in a manner consistent with the mediation confidentiality statutes. Several courts requested guidance.

In 2005 the Judicial Council amended rule 1622 and adopted new rules for all courts to follow concerning complaints against mediators on their panels for alleged violation of the Mediator Standards. First, in recognition of the confidentiality of mediation, the new rules provide that the complaint process must be confidential. (*Cal. Rule of Court 1622.2*) Second, the rules require mediators in court-connected mediations to agree that if an inquiry or a complaint is made about the conduct of the mediator, mediation communications may be disclosed solely for purposes of the complaint process. (*Cal. Rule of Court 1621(b).)* This rule is intended to ensure that the absence of a mediator's agreement to disclosure of mediation communications does not impede the resolution of a complaint against the mediator. Finally, the rules require that the mediator obtain contact information from all participants, retain such information for two years, and provide it to the court upon request. (*Cal. Rule of Court 1621(a).*) This procedure enables the court designee handling a complaint to contact participants and request information. However, in order to investigate and process a complaint against a mediator, the court must not only contact all of the participants and ask for their cooperation; the court must also obtain waivers of confidentiality. In the absence of waivers from *all* participants, the matter cannot proceed.[2] (*See Evidence Code §1122.*) The ADR Committee anticipates that, although a party who has a complaint against a mediator may agree to waive confidentiality, the opposing party in the mediation is unlikely to have the same incentive, and therefore may not agree to the

[2] The Council had originally proposed that the mediator present the parties, at the outset of the mediation, with a form whereby they could elect to waive confidentiality in the event that a complaint were later to be made against the mediator for violation of the Mediator Standards. The Council withdrew this proposal after receiving a multitude of comments to the effect that it would have a chilling effect on the mediation process.

waiver. Thus, confidentiality will remain a major obstacle to the investigation of complaints against mediators, even with the newly adopted court procedures.[3]

The Commission should not assume that the State Bar would or even could choose to follow the same process that the Judicial Council has laid down for the courts. As noted above, the ADR Committee does not believe that process will prove to be an effective means of dealing with mediation confidentiality. Moreover, a confidential complaint process would be contrary to the State Bar's disciplinary system, which requires open hearings. The likely result would be that, even though the Mediator Standards would become applicable to attorney-mediators, enforcement would prove to be illusory in a great many cases. Complaining parties would be disappointed to learn that they had no actual recourse. The mediator may also be put in an untenable position. Paragraph (c) of the Proposed Rule incorporates California Rule of Court 1620.4, which requires a mediator to comply at all times with the applicable law concerning confidentiality. A mediator who is accused of violating one of the other provisions of paragraph (c) would – in the absence of confidentiality waivers from all the participants – be unable to present any confidential mediation communications in his or her own defense, without independently violating the Proposed Rule.

We believe that all that would effectively be accomplished by paragraphs (b) and (c) would be the inclusion of rules 1620.8 [marketing] and 1620.9 [gifts]. It does not seem to be worthwhile to create a disciplinary system for attorney-mediators that could only be used to enforce those standards. As discussed below, however, the ADR Committee does not believe that *any* of the Mediator Standards should become a basis for attorney discipline in California.

2. <u>The State Bar Disciplinary Process Was Not Intended to be a Remedy for Violation of the Mediator Standards</u>.

The purpose of the Mediator Standards is to set minimum standards of conduct for mediators in the court programs and to promote public confidence in the mediation process and the courts. Courts that receive complaints against mediators (and it is noteworthy that there have been exceedingly few) will, if necessary, counsel the

[3] Some may view the confidentiality of mediation as an obstacle to be removed, but the absoluteness of mediation confidentiality was the result of a deliberate policy choice on the part of the Legislature. See *Rojas v. Superior Court* ((2004) 33 Cal.4th 407, 422: "More broadly, the Court of Appeal's construction is inconsistent with the overall purpose of the mediation confidentiality provisions. As noted above, 'confidentiality is essential to effective mediation,' (*Foxgate, supra*, 26 Cal.4th at p. 14) and to 'ensur[e] confidentiality, [our] statutory scheme . . . unqualifiedly bars disclosure of' specified communications and writings associated with a mediation 'absent an express statutory exception.' (*Id.* at p. 15.) In making its 1997 recommendation, the Commission explained that the then-existing 'statutory scheme' regarding mediation confidentiality 'ha[d] ambiguities that cause[d] confusion.' (Recommendation on Mediation Confidentiality, *supra*, 26 Cal. Law Revision Com. Rep., *supra*, at p. 414.) The changes the Commission recommended, which the Legislature adopted, were designed to 'eliminate[]' these ambiguities in order '[t]o further the effective use of mediation' by ensuring the 'candor' that 'is crucial to [its] success.' (*Id.* at p. 431.)"

mediator and perhaps suggest additional training. In an extreme case, the court may remove the mediator from the panel. In no event would a violation of the Mediator Standards affect an attorney-mediator's ability to practice law.[4]

3. The State Bar Should Not Attempt to Enforce As Attorney Disciplinary Rules Ethical Standards Designed for Other Professions.

Arbitration and mediation are professions that are separate and distinct from the practice of law. They are practiced both by attorneys and non-attorneys. The fact that attorneys and retired judges frequently serve as arbitrators and mediators does not justify the State Bar in seeking to regulate their activities as arbitrators or mediators.

It is not uncommon for attorneys to engage in the practice of another profession, either concurrently with or after their retirement from the practice of law. For example, attorneys may also practice accountancy or act as licensed real estate brokers. Each of these professions has its own ethical standards, and violation of those standards may cause harm to the public. Yet the State Bar has never to our knowledge sought to enforce the ethical standards of those professions by incorporating them into the Rules of Professional Conduct.[5]

By enforcing the Arbitrator Standards and the Mediator Standards against attorneys, the State Bar would effectively be regulating the conduct of members in the practice of professions over which it would otherwise have no jurisdiction. It would also reinforce the perception that the State Bar views arbitration and mediation as the practice of law. We know that the State Bar has not actually taken this position, and that is well aware that it does not have the authority to define mediation or arbitration as constituting the practice of law. Nevertheless, we feel that it is important to avoid taking any action that would cause both members and the public at large to believe that the State Bar is attempting to extend its own jurisdiction.

Rule 2.4

[4] The ADR Committee also questions the inclusion of "settlement conference" in all of the provisions of paragraph (c), except for those governing confidentiality. The Mediator Standards were designed for mediations, which are governed by statutes and rules that differ from those governing settlement conferences. See *Foxgate*, 26 Cal.4th at 11, fn. 8; *Travelers Casualty and Surety Co. v. Superior Court* (2005) 126 Cal.App.4th 1131

[5] The only situation of which we are aware in which the State Bar has sought to enforce the ethical standards of another profession is current Rule 1-710, which makes attorneys acting as quasi-judicial officers subject to Canon D of the Canons of Judicial Ethics. The Rule is justified because attorneys are not subject to the jurisdiction of the Commission on Judicial Performance.

4. The Proposed Rule Would Create Two Classes of Neutrals and Would Expose Attorney-Neutrals to the Filing of Frivolous Complaints for Violation of the Rules of Professional Conduct.

Under the Proposed Rule, attorney-neutrals will be subject to disciplinary action for violation of the Mediator Standards and the Arbitrator Standards. Non-attorney neutrals would not be subjected to any disciplinary action, except, as discussed above, in the case of violation of the Mediator Standards in a court-connected mediation.

Opportunities will also be created for disappointed parties in arbitrations and mediations to make unfounded complaints against attorney-neutrals. With regard to arbitration, the award of an arbitrator is generally final and not subject to appeal. Arbitrators are not required to follow the law. The grounds for vacating an arbitration award are limited. Left without a judicial remedy, the losing party in the arbitration may instead decide to file a disciplinary complaint against the arbitrator with the State Bar.

The broad nature of certain of the Arbitrator Standards that are included in the Proposed Rule will afford more than ample opportunity for the filing of frivolous complaints. For example, using Standards 5 or 6, the losing party may allege that the arbitrator lacked impartiality. Or, under Standard 7 the claim might be made that the arbitrator failed to disclose a matter "...that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial..."

In the case of mediation, parties may settle cases and then have second thoughts about their decisions. These remorseful litigants may sue their lawyers for malpractice, claiming that they were not properly advised. Mediators may then be joined as defendants in these cases based upon specious allegations of bias or partiality. The Proposed Rule will simply invite such persons to file a complaint with the State Bar as well as fueling their appetites for frivolous litigation.

5. New Civil Causes of Action May Be Created, Contrary to the Intent of the Standards and the Rules of Professional Conduct.

Both the Arbitrator Standards and the Mediator Standards expressly disclaim any intent to create any new civil cause of action. Yet, by incorporating major parts of the Mediator and Arbitrator Standards into the Rules of Professional Conduct, the State Bar may do exactly that. Even if a new cause of action is not technically created, the Proposed Rule could be viewed as defining the standard of care for attorney-neutrals, and is likely to form the basis of a new cause of action. And by creating the perception that arbitration and mediation are the practice of law, the State Bar would open the way for the filing of *legal* malpractice actions against neutrals, or at the very least the filing of actions for alleged malpractice committed by a neutral.[6]

[6] See *Furia v. Helm* (2003) 114 Cal.App.4th 945, wherein an attorney was sued for legal malpractice after he had attempted to act as mediator while also acting as an attorney for a party.

6. The Proposed Rule May Discourage Attorneys from Serving as Neutrals on a Pro Bono Basis.

There are a number of dispute resolution programs throughout the State that operate as non-profit organizations. These organizations provide valuable services for the resolution of disputes of all kinds, including complaints arising from neighborhood situations, domestic violence, family disputes, and the like. They depend upon the services of volunteer neutrals, and many attorneys donate time serving as neutrals in these programs. The Mediator Standards apply *only* to court-connected mediations. By incorporating certain standards into the Rules of Professional Conduct, those standards would apply outside the court-connected context, *and* form the basis of disciplinary action. The exposure to disciplinary action and civil lawsuits because of a complaint by a dissatisfied party is likely to discourage attorneys from continuing to serve community mediation and other programs that operate as non-profit organizations.

In addition, as we have discussed in Point 1 above, every court that has a mediation program is required to have a procedure in place for the handling of complaints against mediators (although the procedure may not prove to be particularly effective.) Therefore, under the Proposed Rule, an attorney-mediator serving in a court-connected mediation might be required to defend his or her actions in *two* disciplinary forums. This exposure, in addition to the exposure to civil liability, may discourage attorneys from volunteering to serve on court mediation panels, particularly in counties such as Los Angeles which require that substantial amounts of *pro bono* time be devoted to cases.

We appreciate the Commission's attention to this letter. If the ADR Committee can be of any further assistance, please feel free to contact us.

Disclaimer

This position is only that of the State Bar of California's Committee on Alternative Dispute Resolution. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Very truly yours,

/s/

John Toker
Chair, 2005-2006
The State Bar of California
Committee on Alternative Dispute Resolution

THE STATE BAR OF CALIFORNIA
PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

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DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Phillip Feldman

Professional Affiliation varied but individual

*** City** Sherman Oaks

*** State** California

*** email address** StateBarDefense@aol.com

A copy of your response will be sent to this email addres

Rule 2.4

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 2.4.2 Lawyer as Candidate for Judicial Office [1-700]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

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ABA 8.2 (b) says it more succinctly and better.

Attachments

You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the next to **Attachment**.

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THE STATE BAR OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

TELEPHONE: (415) 538-2161

July 31, 2006

Members of the Board Committee on Regulation, Admission & Discipline Oversight

Members of the Special Commission for the Revision for the Revision of the Rules of Professional Conduct

Re: Proposed Rules 3.1

Dear Members:

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 3.1 regarding Meritorious Claims and Contentions and supports the adoption of the proposed rule as drafted.

Thank you for consideration of our opinion in this matter.

Sincerely,

Steven Lewis
Chair
State Bar of California
Committee on Professional Responsibility and Conduct

LACBA
Los Angeles County Bar Association

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ERIC A. WEBBER

WRITER'S DIRECT LINE:

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(909) 388-6881 fax
llau@scif.com

October 11, 2006

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Amendments to the Rules of Professional Conduct
Comment on Proposed Revisions to Rule 3-200

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed the proposed amendments to Rule 3-200 of the Rules of Professional Conduct. The Committee agrees with the Commission's view that the policy and substance of the California rule and the ABA Model Rule are very similar and with the Commission's recommendation that California adopt ABA Model Rule 3.1 in the interest of national uniformity.

Sincerely yours,

Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

Rule 2.4

THE STATE BAR OF CALIFORNIA
PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

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Comments submitted are regarded as public record.

DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Peter H. Liederman

Professional Affiliation

*** City** San Francisco

*** State** California

*** email address** lawfirmberkeley@yahoo.com

A copy of your response will be sent to this email addres

Rule 2.4

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 3.1 Meritorious Claims and Contentions [3-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

Enter your comments here. To upload files proceed to the ATTACHMENTS section below.

Comment [2] Sentence "This Rule also prohibits a lawyer from continuing an action after the lawyer knows that it has no basis in law and fact that is not frivolous" is strange. How can it have a basis in law and fact that is frivolous?

comment [4] question need for this comment.

Attachments

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MEMORANDUM

Via email to: ***randall.difuntorum@calbar.ca.gov***

Date: October 15, 2006

To: Mr. Randall Difuntorum
Staff Counsel, Professional Responsibility
State Bar of California

From: Philip D. Humphreys, Chair
Legal Ethics Committee
Bar Association of San Francisco

Re: ***BASF Legal Ethics Committee comment on certain June 2006 State Bar Rules Revision Commission proposed rule revisions.***

Pursuant to your October 12th telephone conversation with Christopher Muñoz, Secretary of this Committee, we hereby submit the Committee's comment, as approved by Committee resolution, on seven of the proposed new or amended rules in the June 2006 released package.

For the record, we wish to specify that this comment package is submitted as the work product of the Legal Ethics Committee of the Bar Association of San Francisco. We wish to add that, following a review of the substance of these comments, the Board of Directors of the Bar Association of San Francisco has endorsed these work product comments of the Committee as appropriate expressions of the views of the Bar Association of San Francisco.

No inference of either approval or disapproval, by either the Committee or BASF, should be taken from the Committee's declination, at this time, of the opportunity to comment on the remaining twenty rules in the June 2006 package.

/s/ Philip Humphreys
Philip Humphreys

/by/
Christopher Muñoz

Rule 5.1: *Responsibilities of Partners, Managers, and Supervisory Lawyers*;

Rule 5.2: *Responsibilities of a Subordinate Lawyer*;

Rule 5.3: *Responsibilities Regarding Nonlawyer Assistants*;

These three rules are new to California. However, the concept of a duty of supervise is implicit in the text of California Rule 3-110, and is made explicit in a one-sentence comment to that rule, as further supported in the discussion by an extensive string citation of California case law.

Proposed Rule 5.1 deals with the professional responsibilities of the supervising lawyers, Proposed Rule 5.2 deals with the correlative professional responsibilities of the supervised lawyers, and Proposed Rule 5.3 deals with professional responsibilities regarding the training and supervision of nonlawyer assistants. We commend the Commission for bringing these three rules into the corpus of the new California proposed rules. In their ABA predecessor form, the three rules and their corresponding comments have proved exceptionally helpful to both lawyers and non-lawyer assistants in meeting their respective professional responsibilities in legal organizations.

Rule 5.1 (implied within the scope of CRPC Rule 3–110 — Failing to Act Competently): *Responsibilities of Partners, Managers, and Supervisory Lawyers.*

The Committee is surprised that the Commission chose to delete Comment [3]. This comment gives a great deal of guidance to lawyers with regard to their fulfillment of their supervisory obligations. The practical and fairly explicit suggestions of Comment [3] have contributed to the development of various compliance mechanisms such as monitoring efforts, inside ethics counsel, professional development and training programs, and the fostering of an ethical atmosphere or culture within firms. The Commission's deletion of this comment suggests, perhaps erroneously, that all of this guidance is of little value or, even worse, is inappropriate. The Committee recommends the restoration of Comment [3].

Near the end of newly numbered Comment [4] there is an erroneous duplication of the words "the resulting misapprehension".

STEVE COOLEY
LOS ANGELES COUNTY DISTRICT ATTORNEY

18000 CLARA SHORTRIDGE FOLTZ CRIMINAL JUSTICE CENTER
210 WEST TEMPLE STREET LOS ANGELES, CA 90012-3210 (213) 974-3501

October 16, 2006

Ms. Audrey Hollins
Office of Professional Competence, Planning & Development
State Bar of California
180 Howard Street
San Francisco, California 94105

Opposition to Proposed Rule 5.1 of the California Rules of Professional Conduct

Dear Ms. Hollins:

As the elected District Attorney of Los Angeles County, I urge the Commission for Revision of the Rules of Professional Conduct not to adopt the proposed draft of Rule 5.1. While this Office supports imposing sanctions for supervising attorneys who directly encourage or abet ethical violations by those whom they supervise, the proposed rule, as discussed in the enclosed memorandum prepared by our Professional Responsibility Unit, goes too far. The proposal would permit an attorney to be "vicariously responsible" for the improper acts of another even though he or she did not approve or condone that action.

The better solution, already contained in the proposed rule, is to sanction those supervisors who do not make reasonable efforts through direct supervision to insure that those they supervise conform to the Rules of Professional Conduct.

Another concern is that while the proposed rule correctly imposes ethical duties on supervising attorneys, it establishes no measurable standard, other than a case by case determination, to assess when a lawyer holds such a position. As discussed further in the enclosed memorandum, the proposed rule could impose liability on many deputy district attorneys who are not truly viewed as supervisors.

Very truly yours,

STEVE COOLEY
District Attorney

cmh

Enclosure

PROPOSED RULE 5.1 AMENDING RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA

INTRODUCTION

The California State Bar Commission for the Revision of the Rules of Professional Conduct has proposed adopting an amended version of the American Bar Association's Model Rule of Professional Conduct 5.1. That rule imposes ethical duties on attorneys who supervise, either directly or indirectly, the work of other lawyers. While the proposal has merit, there are two disturbing aspects of the rule as presently drafted.

First, it imposes vicarious liability on supervising attorneys who may be held responsible for actions of less senior lawyers they neither directly encouraged nor condoned. Second, the proposed rule imposes responsibilities on supervising attorneys with little guidance as to when a lawyer may be assigned that role. This latter proposal is especially troubling given that under the proposed rule's undefined rubric, many deputy district attorneys (DDAs) may find themselves subject to a bar investigation even though, under departmental policy, they have no management authority.

DISCUSSION

Background

The Los Angeles County District Attorney's Office (LADA) is the largest local prosecutorial office in the United States, serving over 10 million people and responsible for all felony prosecutions in this county. (LADA Legal Policies Manual (Apr. 2005), p. 1.) Also, the Office prosecutes all misdemeanor violations in 78 of 88 incorporated cities and all of the unincorporated areas of the county. (*Ibid.*) "The staff of approximately 1,962 includes 948 deputy district attorneys, 239 investigators, and 775 support personnel." (*LADA Office Overview,* http://lacountyda.org/oview.htm [as of Oct. 12, 2006].) Yearly, LADA prosecutes nearly 60,000 felonies; 200,000 misdemeanors; and approximately 30,000 juvenile petitions. (*Ibid.*) These cases are prosecuted in the Central Operations Bureau in downtown Los Angeles as well as at 30 local offices and nine juvenile courts. (*Ibid.*)

Head deputy district attorneys supervise the main branch offices and special prosecution units, and deputies-in-charge administer smaller local area and juvenile offices. (*LADA Office Overview,* http://lacountyda.org/oview.htm [as of Oct. 12, 2006]) While head deputy district attorneys are management lawyers, deputies-in-

charge are not management staff and ultimately many return to non-administrative positions. Additionally, in most felony courthouses there are a number of senior non-management attorneys who serve as calendar deputies with the responsibility of assigning cases to other lawyers for prosecution. Other attorneys provide advice and training to fellow prosecutors through assignments in the Training Division, the Professional Responsibility Unit (PRU), and the Appellate Division, which maintains a Deputy of the Day program to answer inquiries from any prosecutor about a myriad of legal issues. Other than the head deputies in charge of the Training and Appellate Division, none of those attorneys has any management authority.

The policy of LADA is that every employee "shall adopt the highest standards of ethical behavior and professionalism." (*LADA Office Overview,* http://lacountyda.org/oview.htm [as of Oct. 11, 2006].) To accomplish that goal, LADA has three deputies, as part of their duties, assigned to PRU who provide advice to deputy district attorneys facing ethical issues. The PRU deputies, along with other prosecutors, provide ethics training on a regular basis and publish a quarterly officewide newsletter, *Ethicsline.*

Vicarious Liability

Proposed Rule 5.1(b) establishes that a supervisory attorney can be disciplined under a theory of vicarious liability. (Proposed Model Rule 5.1, Comment [4].) This vicarious liability policy is contrary to that of the American Bar Association which in adopting its version of Rule 5.1 sought to impose supervisory responsibility "without introducing the concept of vicarious liability." (ABA/BNA, Lawyers' Manual on Professional Conduct, note 13 at 91:05 (citing ABA, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-1983, at 229 (1999).) Under the proposal, a supervising attorney could be sanctioned even though he or she did not encourage or ratify the improper conduct by a subordinate, nor even knew such an act was occurring. (Proposed Model Rule 5.1, Comment [5].) To ensure compliance with this provision in a county of over 4,000 square miles and with an attorney work force of over 900 attorneys creates an insoluble conundrum, especially, since management, at all levels, will be responsible for the actions of a single attorney of whose conduct they had no knowledge.

The better solution to this problem is already contained in the proposed rule under subdivision (a). That provision mandates that management "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurances that all lawyers in the firm conform to the Rules of Professional Conduct." (Proposed Rule 5.1(a).) Law firms and government agencies, such as LADA, can discharge this responsibility by setting up procedures to review the work of less senior attorneys,

providing ongoing training in ethics-related conduct and establishing certain attorneys to serve as an ethics committee, similar to LADA's already established PRU. (Comment, *Legal Professionalism: Duties and Responsibilities of Lawyers in Light of In re Myers: Are You Aware,* (2004) 55 S.C. L. Rev. 599, 614-616.) This provision, along with the proposal to sanction supervising attorneys who directly ratify misconduct, provides protection for the public, but does not create a compliance morass for both the State Bar and a large local agency, like LADA.

Supervising Attorneys

Proposed Rule 5.1(b) requires that lawyers with "direct supervisory authority over another lawyer" must make reasonable efforts to ensure" that junior lawyers follow the Rules of Professional Conduct. However, the Comment section provides no guidance as to what makes an individual attorney one with "direct supervisory authority[.]" Instead, the Comment merely instructs that, "Whether a lawyer has supervisory authority in particular circumstances is a question of fact." (Proposed Model Rule 5.1, Comment [4], see *In the Matter of Anonymous Member of the South Carolina State Bar* (2001) 346 S.C. 177 [552 S.E.2d 10, 13] ["Rule 5.1 does not require that an attorney be the day-to-day supervisor of the attorney committing the misconduct to create liability. The key to liability is whether there was authority over the violating attorney."].)

This lack of a measurable standard creates an issue arising out of LADA's encouragement to less experienced DDAs to seek informal advice from more senior attorneys, such as calendar deputies, regarding the handling of their cases. Similarly, LADA also encourages DDAs to ask for input from other non-management attorneys with expertise in certain practice areas, such as those lawyers assigned to PRU. However, none of those lawyers "supervise" other attorneys, in that they do not provide training, have any say in their yearly performance evaluations, nor cannot direct an attorney to take particular course of action. Yet, under proposed Rule 5.1's vague standard for supervision, such DDAs could be subject to sanction, even though they would never consider themselves a supervisor. The likely outcome of this rule's adoption will be to discourage consultation with more experienced lawyers, as such individuals, to protect themselves, will refuse to provide counsel to less experienced attorneys. Additionally, it will likely be harder to find attorneys willing to volunteer for non-management assignments such as PRU or serving in a calendar deputy position. Rather than promoting a better informed and supervised attorney, the unintended result may be just the opposite.

WILLIAM WOODS

THE STATE BAR OF CALIFORNIA
PROPOSED RULES OF PROFESSIONAL CONDUCT
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Your Information

Name Richard J. Burdge, Jr.

Professional Affiliation Howrey LLP

*** City** Los Angeles

*** State** California

*** email address** burdger@howrey.com

A copy of your response will be sent to this email addres

Rule 2.4

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

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- ○ AGREE ONLY IF MODIFIED

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I write to address the breadth of the first sentence of Rule 5.1(a), which states, in part, "A partner in a law firm, . . . shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurances that all lawyers in the firm conform to the Rules of Professional Conduct." As drafted, the Rule does not take into account the circumstances where "lawyers in the firm" practice only in jurisdictions other than California. For example, our firm has lawyers in five states, the District of Columbia and four foreign countries. Those non-California lawyers have their own conduct rules they must observe, and there is no reason they should have to observe California's rules.

Perhaps a general Rule will be proposed that makes it clear that when the Rules refer to all lawyers in a firm, they mean all lawyers who are members of the California Bar or all lawyers whose conduct is subject to these rules (in order to address pro hac vice lawyers, etc.). Alternatively, such qualifying language should be added to the Rule.

Attachments

You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the next to **Attachment**.

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Rule 2.4

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Chief Deputy District Attorney
Special Prosecutions

GARY G. AUER
Chief - Bureau of Investigation

October 19, 2006

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
Sacramento, CA 94105

Re: Comment on Proposed Rule 5.1

Dear Ms. Hollins:

On behalf of the District Attorney of Ventura County, I would like to comment on proposed Rule 5.1 of the Rules of Professional Conduct of the State Bar.

I agree with subdivision (c)(1) of the proposed rule, that a lawyer should be responsible for another lawyer's violation of the Rules of Professional Conduct if the first lawyer "orders, or, with knowledge of the specific conduct, ratifies the conduct involved." Discipline is appropriate when such direct involvement in the conduct is present.

I do not agree that the remaining subdivisions of proposed Rule 5.1 should be adopted.

Subdivisions (a) and (b) require partners, managers and supervisors to make reasonable efforts to ensure that their subordinates conform to the rules. A rule that requires an individual to "ensure" that another human being do something is generally problematic. It is not clear to me what actions the managing or supervising attorneys would be required to undertake to ensure that the other attorneys in their firm obey the rules. Enacting an office policy that attorneys must follow the rules would be superfluous since, as licensed professionals, every attorney is already legally obligated to comply with the rules. Providing training would be helpful, but every attorney is already required to complete 4 hours of MCLE training in legal ethics every three years. Partners, managers and supervisors should be able to exercise their own judgment about how much supervision another attorney needs in a given matter, and should not be subjected to the possibility of discipline for unanticipated misconduct of others they may know nothing about.

Hall of Justice • 800 South Victoria Ave., Suite 314, Ventura, CA 93009 • http://da.countyofventura.org • (805) 654-2500 • Fax (805) 654-3850

For public agencies such as district attorneys' offices, the effect of the above rules would be that whenever there is an alleged disciplinary violation, the elected district attorney and other management attorneys will also be charged. This would create a false public perception of office-wide corruption and systemic misconduct when in fact the misconduct is limited to the misconduct of one attorney. Requiring office management to prove that it did enough to "ensure" that attorneys obeyed the rules is unfair and shifts the focus away from the attorney who actually violated the rules.

The final provision, subdivision (c)(2), requires a partner, manager or supervisor to take "reasonable remedial action" upon learning of unethical conduct. This provision is overbroad and could be interpreted as requiring the manager to inquire into the details of every case handled by subordinate attorneys and themselves researching the legal ramifications of the facts learned, at the risk of being disciplined for failing to react sufficiently. This provision inappropriately shifts responsibility from the attorney who violated the rule to the manager.

As public prosecutors, we are proud of the high ethical standards of the attorneys in our office. Compliance with the Rules of Professional Conduct is essential to the proper functioning of our justice system. Those who violate the rules, and those who order or ratify unethical conduct, should be subjected to discipline. But attorneys should not be disciplined for the misconduct of other attorneys of which they may have no knowledge.

I suggest that only subdivision (c)(1) be adopted and that the other language in 5.1 be stricken.

Very truly yours,

MICHAEL D. SCHWARTZ
Special Assistant District Attorney

pc: Michael P. Judge

LACBA
Los Angeles County Bar Association

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November 1, 2006

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Amendments to the Rules of Professional Conduct
Comment on Proposed Revisions to Rule 3-110 (proposed Rules 5.1, 5.2)

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed the proposed amendments to Rule 3-110 of the Rules of Professional Conduct (proposed Rules 5.1, 5.2), Responsibilities of Partners, Managers, and Supervisory Lawyers. A minority of the Committee members have the following comments:

Rule 2.4

5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

Personal accountability is the touchstone of existing Rule of Professional Conduct 3-110. A minority of the Committee members have concerns with the Ethics 2000 changes of 2002, which although not intended to reflect a change in the substance of partners and supervisor's obligations,[1] actually dissipates the individualized duties of all lawyers to be responsible for their own conduct. By opening the door to include "within the group of responsible lawyers those who possess managerial authority comparable to that of a partner,"[2] the accountability of each individual lawyer is diluted.

[1] *Annotated Model Rules of Professional Conduct*, Fifth Edition, page 445, comment regarding the Reporter's Explanation of Changes.

[2] Ibid.

The collective national hue and cry demanding accountability as a result of the corporate debacle of 2002, resulting in modification of ABA Model Rule 1.13, and the Sarbanes-Oxley legislation, increasing lawyer responsibilities at the Securities Exchange Commission, was not supported by California's organized bar associations, basically because personal accountability is the foundation of California legal practice.

Individualized accountability of each lawyer is characteristic of the California legal profession and is articulated in existing rule 3-110. Therefore, the adoption of proposed Rule 5.1 decreases, rather than increases this individualized accountability. For example consider:

> "When comparing the rules as to liability, CRPC 3-110 can be read to impose greater liability than MR 5.1. MR 5.1 imposes liability on one lawyer for another lawyer's violations of the rules of professional conduct in only two specific instances: (1) when the lawyer orders or ratifies the conduct and (2) when a partner or lawyer with direct supervisory authority knows of the conduct at a time when its consequences can be avoided or mitigated and fails to take action. **In contrast, CRPC 3-110 imposes a duty on all lawyers to supervise the work of not only subordinate lawyers but also non-lawyer employees and agents**. Moreover, CRPC 3-110 imposes primary liability on partners and lawyers with supervisory duties for inadequate supervision more broadly than MR 5.1 imposes vicarious liability for the acts of others. For example, California courts have imposed liability on lawyers with supervisory duties whether or not the lawyer had knowledge of the specific conduct and whether or not the lawyer could take remedial action. See, e.g., *In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct.Rptr. 657 (involving the failure of an associate to file appellate papers and another associate leaving a courtroom prior to the court calling and hearing the motion); *Trousil v. State Bar* (1985) 38 Cal.3d 337, 211 Cal.Rptr. 525, 695 P.2d 1066 (secretarial errors delay the mailing of a settlement check); *Crane v. State Bar* (1981) 30 Cal.3d 117, 177 Cal.Rptr. 670, 635 P.2d 1163 (lawyer's staff contacts individuals represented by another lawyer)."[3] (Emphasis added)

By expanding the group of responsible lawyers, proposed Rule 5.1 creates a situation where each lawyer can point a finger at another, denying the fundamental personal accountability that is the defining characteristic of the existing California Rule. The Minority Committee members urge the Commission not create a situation that would give rise to plausible denial, when that alternative never existed before in California.

---

[3] *Cornell Ethics Project*, California Narrative, Rule 5.1 Comparison.

5.2 Responsibilities of Subordinate Lawyers

Personal accountability is the touchstone of California legal practice. Accordingly, the minority Committee members oppose the proposed rule creating a potential claim by subordinate lawyers where the *superior orders doctrine* could be used as a defense to claims of misconduct. Existing Rule 3-110, although considered somewhat analogous to Model Rule 5.2, imposes "absolute responsibility for all lawyers to uphold the rules of professional responsibility and act competently."[4] The Commission's proposed Rule 5.2 has the effect of reducing or decreasing subordinate lawyers' own individual ethical responsibilities.

All lawyers are equal. *Smith v. Superior Court* (People) 1968 68 Cal.2d 547. These proposals presume supervisory and subordinate lawyers are unequal. We do not support the creation for associates of a *Nuremberg* like defense to claims of ethical misconduct.[5] The Minority Committee members urge the Commission not reduce or decrease the responsibilities and enthusiasm of associates in the examination of marginal conduct.

Therefore, the Minority Committee members urge that the Commission not adopt proposed Rules 5.1 and 5.2.

Sincerely yours,

Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

[4] *Cornell Ethics Project*, California Narrative, Model Rule 5.2101 Model Rule Comparison.

[5] Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers* (1997) 32 Wake Forest L. Rev. 887.

THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

July 31, 2006

Members of the Board Committee on Regulation, Admission & Discipline Oversight

Members of the Special Commission for the Revision for the Revision of the Rules of Professional Conduct

Re: Proposed Rule 5.2

Dear Members:

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 5.2 – Responsibilities of Subordinate Lawyer. The proposed rule will provide important guidance to subordinate lawyers confirming their obligation to comply with ethical rules, yet we believe the rule strikes an appropriate balance to address the common problem of subordinate lawyers in working with their supervisors by permitting subordinate lawyers to defer to their supervisors regarding reasonable resolutions of arguable questions of professional duty. COPRAC supports the adoption of proposed Rule 5.2 as drafted.

Thank you for consideration of our opinion in this matter.

Sincerely,

Steven Lewis
Chair
State Bar of California
Committee on Professional Responsibility and Conduct

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 5.2: Responsibilities of a Subordinate Lawyer

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

We approve the proposed new rule in its entirety.

MEMORANDUM

Via email to: ***randall.difuntorum@calbar.ca.gov***

Date: October 15, 2006

To: Mr. Randall Difuntorum
Staff Counsel, Professional Responsibility
State Bar of California

From: Philip D. Humphreys, Chair
Legal Ethics Committee
Bar Association of San Francisco

Re: ***BASF Legal Ethics Committee comment on certain June 2006 State Bar Rules Revision Commission proposed rule revisions.***

Pursuant to your October 12th telephone conversation with Christopher Muñoz, Secretary of this Committee, we hereby submit the Committee's comment, as approved by Committee resolution, on seven of the proposed new or amended rules in the June 2006 released package.

For the record, we wish to specify that this comment package is submitted as the work product of the Legal Ethics Committee of the Bar Association of San Francisco. We wish to add that, following a review of the substance of these comments, the Board of Directors of the Bar Association of San Francisco has endorsed these work product comments of the Committee as appropriate expressions of the views of the Bar Association of San Francisco.

No inference of either approval or disapproval, by either the Committee or BASF, should be taken from the Committee's declination, at this time, of the opportunity to comment on the remaining twenty rules in the June 2006 package.

/s/ Philip Humphreys
Philip Humphreys

/by/
Christopher Muñoz

Rule 5.1: *Responsibilities of Partners, Managers, and Supervisory Lawyers*;

Rule 5.2: *Responsibilities of a Subordinate Lawyer*;

Rule 5.3: *Responsibilities Regarding Nonlawyer Assistants*;

These three rules are new to California. However, the concept of a duty of supervise is implicit in the text of California Rule 3-110, and is made explicit in a one-sentence comment to that rule, as further supported in the discussion by an extensive string citation of California case law.

Proposed Rule 5.1 deals with the professional responsibilities of the supervising lawyers, Proposed Rule 5.2 deals with the correlative professional responsibilities of the supervised lawyers, and Proposed Rule 5.3 deals with professional responsibilities regarding the training and supervision of nonlawyer assistants. We commend the Commission for bringing these three rules into the corpus of the new California proposed rules. In their ABA predecessor form, the three rules and their corresponding comments have proved exceptionally helpful to both lawyers and non-lawyer assistants in meeting their respective professional responsibilities in legal organizations.

Rule 5.2 (implied within the scope of CRPC Rule 3–110 — Failing to Act Competently): *Responsibilities of a Subordinate Lawyer.*

The editorial changes at the beginning of Comment [1] introduce the unfortunate legalism "not necessarily", which robs the sentence of the clarity of the original Model Rules language. The Committee urges the restoration of the original language.

The rewrite of Comment [2], while in the main clarifying, has an unfortunate addition in the last sentence of the Comment. There the new language imposes on the supervised lawyer a new duty

"to communicate his or her professional judgment . . . to the supervisory lawyer".

In many situations, the supervised lawyer may be better advised to seek advice from the organization's ethics counsel, from another supervising lawyer, or from a more senior lawyer within the organization. At this point, such communication with the original supervising lawyer may engender an unresolved conflict between the two, may do irreparable damage to the supervised lawyer's career, and may not work to reach an appropriate ethical resolution of the disputed action. Consequently, the Committee suggests that the language be amended by substituting "a" for "the" in the quoted text above, so that the language reads:

"to communicate his or her professional judgment . . . to *a* supervisory lawyer". (emphasis added)

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Los Angeles County Bar Association

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November 1, 2006

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Amendments to the Rules of Professional Conduct
Comment on Proposed Revisions to Rule 3-110 (proposed Rules 5.1, 5.2)

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed the proposed amendments to Rule 3-110 of the Rules of Professional Conduct (proposed Rules 5.1, 5.2), Responsibilities of Partners, Managers, and Supervisory Lawyers. A minority of the Committee members have the following comments:

Rule 2.4

5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

Personal accountability is the touchstone of existing Rule of Professional Conduct 3-110. A minority of the Committee members have concerns with the Ethics 2000 changes of 2002, which although not intended to reflect a change in the substance of partners and supervisor's obligations,[1] actually dissipates the individualized duties of all lawyers to be responsible for their own conduct. By opening the door to include "within the group of responsible lawyers those who possess managerial authority comparable to that of a partner,"[2] the accountability of each individual lawyer is diluted.

[1] *Annotated Model Rules of Professional Conduct*, Fifth Edition, page 445, comment regarding the Reporter's Explanation of Changes.

[2] Ibid.

The collective national hue and cry demanding accountability as a result of the corporate debacle of 2002, resulting in modification of ABA Model Rule 1.13, and the Sarbanes-Oxley legislation, increasing lawyer responsibilities at the Securities Exchange Commission, was not supported by California's organized bar associations, basically because personal accountability is the foundation of California legal practice.

Individualized accountability of each lawyer is characteristic of the California legal profession and is articulated in existing rule 3-110. Therefore, the adoption of proposed Rule 5.1 decreases, rather than increases this individualized accountability. For example consider:

> "When comparing the rules as to liability, CRPC 3-110 can be read to impose greater liability than MR 5.1. MR 5.1 imposes liability on one lawyer for another lawyer's violations of the rules of professional conduct in only two specific instances: (1) when the lawyer orders or ratifies the conduct and (2) when a partner or lawyer with direct supervisory authority knows of the conduct at a time when its consequences can be avoided or mitigated and fails to take action. **In contrast, CRPC 3-110 imposes a duty on all lawyers to supervise the work of not only subordinate lawyers but also non-lawyer employees and agents**. Moreover, CRPC 3-110 imposes primary liability on partners and lawyers with supervisory duties for inadequate supervision more broadly than MR 5.1 imposes vicarious liability for the acts of others. For example, California courts have imposed liability on lawyers with supervisory duties whether or not the lawyer had knowledge of the specific conduct and whether or not the lawyer could take remedial action. See, e.g., *In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct.Rptr. 657 (involving the failure of an associate to file appellate papers and another associate leaving a courtroom prior to the court calling and hearing the motion); *Trousil v. State Bar* (1985) 38 Cal.3d 337, 211 Cal.Rptr. 525, 695 P.2d 1066 (secretarial errors delay the mailing of a settlement check); *Crane v. State Bar* (1981) 30 Cal.3d 117, 177 Cal.Rptr. 670, 635 P.2d 1163 (lawyer's staff contacts individuals represented by another lawyer)."[3] (Emphasis added)

By expanding the group of responsible lawyers, proposed Rule 5.1 creates a situation where each lawyer can point a finger at another, denying the fundamental personal accountability that is the defining characteristic of the existing California Rule. The Minority Committee members urge the Commission not create a situation that would give rise to plausible denial, when that alternative never existed before in California.

[3] *Cornell Ethics Project*, California Narrative, Rule 5.1 Comparison.

5.2 Responsibilities of Subordinate Lawyers

Personal accountability is the touchstone of California legal practice. Accordingly, the minority Committee members oppose the proposed rule creating a potential claim by subordinate lawyers where the *superior orders doctrine* could be used as a defense to claims of misconduct. Existing Rule 3-110, although considered somewhat analogous to Model Rule 5.2, imposes "absolute responsibility for all lawyers to uphold the rules of professional responsibility and act competently."[4] The Commission's proposed Rule 5.2 has the effect of reducing or decreasing subordinate lawyers' own individual ethical responsibilities.

All lawyers are equal. *Smith v. Superior Court* (People) 1968 68 Cal.2d 547. These proposals presume supervisory and subordinate lawyers are unequal. We do not support the creation for associates of a *Nuremberg* like defense to claims of ethical misconduct.[5] The Minority Committee members urge the Commission not reduce or decrease the responsibilities and enthusiasm of associates in the examination of marginal conduct.

Therefore, the Minority Committee members urge that the Commission not adopt proposed Rules 5.1 and 5.2.

Sincerely yours,

Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

[4] *Cornell Ethics Project*, California Narrative, Model Rule 5.2101 Model Rule Comparison.

[5] Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers* (1997) 32 Wake Forest L. Rev. 887.

OCBA

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OC WOMEN LAWYERS ASSOC.

MEMORANDUM

Date: December 1, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct The State Bar of California

From: Orange County Bar Association ("OCBA")

Re: Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California Developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

Subj: Proposed Rule 5.2: Responsibilities of a Subordinate Lawyer

Founded over 100 years ago, the Orange County Bar Association has over 9,800 members, making it the second largest voluntary bar association in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared jointly by the Professionalism & Ethics and Administration of Justice Committees.

The OCBA respectfully submits the following concerning the subject proposed Rule:

*****

Comment:

The OCBA supports this rule, and believes that it is important to provide appropriate guidance to the subordinate lawyer who is asked to proceed in a manner that may be unethical, requiring the subordinate lawyer to comply with the Rules of Professional Conduct and with the State Bar Act, despite the direction of a supervisor to the contrary.

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THE STATE BAR OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

TELEPHONE: (415) 538-2161

July 31, 2006

Members of the Board Committee on Regulation, Admission & Discipline Oversight

Members of the Special Commission for the Revision for the Revision of the Rules of Professional Conduct

Re: Proposed Rules 5.3

Dear Members:

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 5.3 covering Responsibilities Regarding Nonlawyer Assistants. COPRAC supports the adoption of proposed Rule 5.3 as drafted.

Thank you for consideration of our opinion in this matter.

Sincerely,

Steven Lewis
Chair
State Bar of California
Committee on Professional Responsibility and Conduct

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 5.3: Responsibilities Regarding Nonlawyer Assistants

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

We approve the proposed new rule in its entirety.

MEMORANDUM

Via email to: ***randall.difuntorum@calbar.ca.gov***

Date: October 15, 2006

To: Mr. Randall Difuntorum
Staff Counsel, Professional Responsibility
State Bar of California

From: Philip D. Humphreys, Chair
Legal Ethics Committee
Bar Association of San Francisco

Re: ***BASF Legal Ethics Committee comment on certain June 2006 State Bar Rules Revision Commission proposed rule revisions.***

Pursuant to your October 12th telephone conversation with Christopher Muñoz, Secretary of this Committee, we hereby submit the Committee's comment, as approved by Committee resolution, on seven of the proposed new or amended rules in the June 2006 released package.

For the record, we wish to specify that this comment package is submitted as the work product of the Legal Ethics Committee of the Bar Association of San Francisco. We wish to add that, following a review of the substance of these comments, the Board of Directors of the Bar Association of San Francisco has endorsed these work product comments of the Committee as appropriate expressions of the views of the Bar Association of San Francisco.

No inference of either approval or disapproval, by either the Committee or BASF, should be taken from the Committee's declination, at this time, of the opportunity to comment on the remaining twenty rules in the June 2006 package.

/s/ Philip Humphreys
Philip Humphreys

/by/
Christopher Muñoz

Rule 5.1: *Responsibilities of Partners, Managers, and Supervisory Lawyers*;

Rule 5.2: *Responsibilities of a Subordinate Lawyer*;

Rule 5.3: *Responsibilities Regarding Nonlawyer Assistants*;

These three rules are new to California. However, the concept of a duty of supervise is implicit in the text of California Rule 3-110, and is made explicit in a one-sentence comment to that rule, as further supported in the discussion by an extensive string citation of California case law.

Proposed Rule 5.1 deals with the professional responsibilities of the supervising lawyers, Proposed Rule 5.2 deals with the correlative professional responsibilities of the supervised lawyers, and Proposed Rule 5.3 deals with professional responsibilities regarding the training and supervision of nonlawyer assistants. We commend the Commission for bringing these three rules into the corpus of the new California proposed rules. In their ABA predecessor form, the three rules and their corresponding comments have proved exceptionally helpful to both lawyers and non-lawyer assistants in meeting their respective professional responsibilities in legal organizations.

Rule 5.3 (implied within the scope of CRPC Rule 3–110 — Failing to Act Competently): *Responsibilities Regarding Nonlawyer Assistants.*

In Comment [1] the Commission has inserted the word "confidential" in the phrase "the obligation not to disclose confidential information related to the representation of the client . . . ".

This is an unfortunate addition, since a lawyer's obligation under Model Rule 1.6 is not restricted to confidential information. *See* ABA Model Rule 1.6, Comment [3], which states: "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." The Committee urges the restoration of the original language.

OCBA

ORANGE COUNTY BAR ASSOCIATION

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OC BARRISTERS
OC DEPUTY PUBLIC DEFENDERS
OC TRIAL LAWYERS ASSOC.
OC WOMEN LAWYERS ASSOC.

MEMORANDUM

Date: December 1, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct The State Bar of California

From: Orange County Bar Association ("OCBA")

Re: Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California Developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

Subj: Proposed Rule 5.3: Responsibilities Regarding Nonlawyer Assistants

Founded over 100 years ago, the Orange County Bar Association has over 9,800 members, making it the second largest voluntary bar association in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared jointly by the Professionalism & Ethics and Administration of Justice Committees.

The OCBA respectfully submits the following concerning the subject proposed Rule:

*****

Comment:

The OCBA supports this rule as drafted.

P.O. BOX 17777
IRVINE, CA 92623-7777
TELEPHONE 949/ 440-6700
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THE STATE BAR
OF CALIFORNIA

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

June 30, 2006

Members of the Board Committee on Regulation, Admission & Discipline Oversight

Members of the Special Commission for the Revision for the Revision of the Rules of Professional Conduct

Re: Proposed Rule 5.3.1

Dear Members:

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 5.3.1 - Employment of Disbarred, Suspended, Resigned or Involuntarily Inactive Member. We recognize this rule as continuing in essence the provisions of existing California rules while incorporating in the Comments to the rule helpful references to the California Rules of Court that address multi-jurisdictional practice. COPRAC supports the adoption of proposed Rule 5.3.1 as drafted.

Thank you for consideration of our opinion in this matter.

Sincerely,

Steven Lewis
Chair
State Bar of California
Committee on Professional Responsibility and Conduct

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 5.3.1: Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

We approve the revised proposed rule in its entirety.

LACBA
Los Angeles County Bar Association

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October 12, 2006

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Amendments to the Rules of Professional Conduct
Comment on Proposed Rule 1-311 (5.3.1)

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed the proposed revisions to Rule 1.311 (proposed rule 5.3.1).

Our Committee urges the Commission not to adopt any version of this proposed rule. If adopted, such rule would, in effect, preclude any disbarred or suspended lawyer from working in any capacity in the law.

Sincerely yours,

Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

Rule 2.4

MEMORANDUM

Via email to: ***randall.difuntorum@calbar.ca.gov***

Date: October 15, 2006

To: Mr. Randall Difuntorum
Staff Counsel, Professional Responsibility
State Bar of California

From: Philip D. Humphreys, Chair
Legal Ethics Committee
Bar Association of San Francisco

Re: ***BASF Legal Ethics Committee comment on certain June 2006 State Bar Rules Revision Commission proposed rule revisions.***

Pursuant to your October 12th telephone conversation with Christopher Muñoz, Secretary of this Committee, we hereby submit the Committee's comment, as approved by Committee resolution, on seven of the proposed new or amended rules in the June 2006 released package.

For the record, we wish to specify that this comment package is submitted as the work product of the Legal Ethics Committee of the Bar Association of San Francisco. We wish to add that, following a review of the substance of these comments, the Board of Directors of the Bar Association of San Francisco has endorsed these work product comments of the Committee as appropriate expressions of the views of the Bar Association of San Francisco.

No inference of either approval or disapproval, by either the Committee or BASF, should be taken from the Committee's declination, at this time, of the opportunity to comment on the remaining twenty rules in the June 2006 package.

/s/ Philip Humphreys
Philip Humphreys

/by/
Christopher Muñoz

Rule 5.3.1 (CRPC Rule 1–311): *Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member.*

Proposed Rule 5.3.1 continues existing restrictions on a lawyer's employment of a disbarred, suspended, resigned or involuntarily inactive member ("disbarred attorney") in current Rule 1–311, and also amends the current rule in one significant substantive way.

The noteworthy substantive change is the addition of language to the requirement that a notice be served on the State Bar whenever a lawyer employs a disbarred, suspended, resigned or involuntarily inactive attorney member. The proposed rule provides that the information contained in such notices shall be available to the public. Presently, the information in the notices is **not** made available to the public. The Rules Revision Commission believes that "the policy of accountability and candor reflected in the current rule militates in favor of changing this aspect of the rule", and that consumers of legal services "should be positioned to exercise an informed choice of counsel when researching State Bar member information" and may consider this information meaningful to the making of such choice.

The Committee objects to the proposed amendment making such notices as filed with the State Bar available to the public. We believe that this amendment is unnecessary, and that its primary effect will be to discourage lawyers from hiring attorney members of the State Bar who have been disbarred or are otherwise not in good standing, thereby reducing such persons' ability to rehabilitate themselves. As currently written, prior to or at the time of employing a disbarred attorney, a lawyer must provide notice of the situation to each client on whose matter the disbarred attorney will work. We believe that this requirement adequately protects and gives notice to clients. Second, the current requirement that the employing lawyer file a notice with the State Bar ensures that lawyers will comply with the rule. The Committee does not believe that the proposed added requirement provides any significant additional client protection, and the Committee is concerned that it will drastically limit a disbarred attorney's chances of rehabilitation.

THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

July 31, 2006

Members of the Board Committee on Regulation, Admission & Discipline Oversight

Members of the Special Commission for the Revision for the Revision of the Rules of Professional Conduct

Re: Proposed Rules 5.5

Dear Members:

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 5.5 covering Unauthorized Practice of Law; Multijurisdictional Practice of Law. COPRAC supports the adoption of the proposed rule. However, COPRAC is concerned that Comments 3 through 7, characterized as "Guidance on what constitutes the practice of law," may create a trap for the unwary practitioner. Those Comments narrowly construe the cited cases. As a result, the practitioner may not fully appreciate the complexities of the law regarding activity that constitutes the "practice of law" from reading the Comments. As a result, practitioners could underestimate the risks of particular conduct. Therefore, COPRAC requests that the proposed Rule include an additional cautionary notice to practitioners of the unique complexities of the law in this area.

Thank you for consideration of our opinion in this matter.

Sincerely,

Steven Lewis
Chair
State Bar of California
Committee on Professional Responsibility and Conduct

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

The changes to the language of 1-300 related to the unauthorized practice of law by California lawyers are sound.

Rationale For Comment 1:

Prohibiting only "knowing" assistance of another in the unauthorized practice of law is a good change. It is conceivable, for example, that a California lawyer could assist someone in the practice of law who is disbarred without the lawyer knowing the person he or she is assisting is disbarred or not otherwise licensed to practice in California. The change to this part of the rule also brings this rule into line with other rules requiring that the offense be "knowing," such as RPC 2-100 prohibiting that contact with a person the lawyer knows is represented by counsel in the matter. (See *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187.)

Comment 2:

Proposed comment 7, purporting to explain subsection (a)(2) of the proposed rule, is confusing and either should be reworded or deleted.

Rationale for Comment 2:

Comment 7 says that the rule against assisting others in the unauthorized practice of law does not "prohibit a lawyer from counseling lawyers or non-lawyers in how to proceed in their own matters." If the commentator intends by this only that a California lawyer may assist a pro se litigant or drafter, whether admitted to a different bar or not a lawyer at all, it should say so. Otherwise, "their own matters" makes no sense. If, for example, a non-California lawyer has as one of his "own matters" a California case he is not otherwise authorized to handle, the rule against assisting in the unauthorized practice would apply even if it is the lawyer's "own matter" as lawyers generally refer to matters under their control.

The second sentence of Comment 7 purports to permit California lawyers to advise those who are not California lawyers about "the kinds of legal services they may provide in California." We assume the comment writer is distinguishing between "legal services" that do not constitute "the practice of law" and "legal services" that do constitute the practice of law. If so, the second sentence should add the following underlined insertion: "Paragraph (a)(2) is also not intended to prohibit a lawyer from counseling non-lawyers or lawyers not admitted to practice law in California concerning the kinds of legal services not constituting the practice of law they may provide in California."

Comment 3:

The flaws in 5.5(b), addressing the multijurisdictional practice of law, are more serious. First, is the practical problem of subjecting to discipline before the California State Bar lawyers who are admitted only elsewhere.

Rationale for Comment 3:

N/A

Comment 4:

Comment 2 says that "paragraph (b) [of Proposed Rule 5.5] prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law." No it doesn't.

Rationale for Comment 4:

Paragraph (b) only prohibits non-California lawyers from establishing or maintaining an office or continued presence in this state or representing to others that the lawyer is admitted to practice in California. That is not the same thing as flatly barring non-California lawyers from practicing law in this state except as otherwise allowed.

By contrast, ABA Model Rule 5.5(a) says: "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction. . . ."

That expressly limits lawyers – *all lawyers* – to practice in those jurisdictions where they are licensed or otherwise authorized to practice.

We recommend adding new subsection (b)(1): "except as authorized by these Rules or other law, engage in any activity constituting the 'practice of law' as that term is construed under California law." We would renumber what are now subsections (1) and (2) as numbers (2) and (3).

We do not agree that the prohibition on the practice of law in California by non-California lawyers is necessarily implied by the prohibition on representing oneself as admitted to practice law in this state when one is not. Even if it were, the central purpose of a rule should be expressed not merely implied.

Please see Exhibit A for clean and redlined versions of the suggested changes to this proposed new rule.

Concurring Comments

Query whether the comment is accurate in saying that "paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law." To the contrary, (b) gives rise to the argument that a particular practice is not systematic or continuous, nor part of a resident office.

The question of inter-jurisdictional practice is an area in which lawyers really *do* need guidance, and therefore the rules should be clear. Without taking a position on what "the unlawful practice of law" is or should be, the rule is of little assistance and it an unambiguous articulation of the issue is needed.

EXHIBIT A

CLEAN AND REDLINED VERSIONS

SDCBA SUGGESTED REVISION TO PROPOSED RULE 5.5

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

(a) A lawyer admitted to practice law in California shall not:

(1) practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction; or

(2) knowingly assist a person or organization in the performance of activity that constitutes the unauthorized practice of law.

(b) A lawyer who is not admitted to practice law in California shall not:

(1) except as authorized by these Rules or other law, engage in any activity constituting the "practice of law" as that term is construed under California law;

(2) except as authorized by these Rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or

(3) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. Paragraph (a) prohibits the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person in the performance of activities that constitute the unauthorized practice of law.

[2] Paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law. (See California Business and Professions Code, sections 6125 and 6126. See also California Rules of Court, rules 964 [registered legal services attorneys], 965 [registered in-house counsel] 966 [attorneys practicing law temporarily in California as part of litigation], 967 [non-litigating attorneys temporarily in California to provide legal services], 983 [counsel *pro hac vice*], rule 983.1 [appearance by military counsel], 983.2 [certified law students], rule 983.4 [out-of-state attorney arbitration counsel program] and rule 988 [registered foreign legal consultant].) A lawyer does not violate paragraph (b) to the extent the lawyer is engaged in activities authorized by any other applicable exception. (See, e.g., 35 U.S.C. section 32(b)(2)(D) and *Sperry v. Florida ex rel. Florida Bar* (1963) 373 U.S. 379 [83 S.Ct. 1322]; *Augustine v. Dept. of Veteran Affairs* (Fed. Cir. 2005) 429 F.3d 1334.)

Guidance on what constitutes the practice of law

[3] The definition of the practice of law is established by law and varies from one jurisdiction to another. The purpose of prohibiting the unauthorized practice of law is to protect the public and the administration of justice from the provision of legal services by unqualified persons or entities. Except as otherwise prohibited in Rule 5.3.1, paragraph (a)(2) is not intended to prohibit a lawyer from employing the services of para-professionals or other assistants and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work as provided in Rule 5.3. Likewise, paragraph (a)(2) is not intended to prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law, including claims adjusters, employees of financial or commercial institutions or entities, social workers, accountants, low cost legal service programs, and persons employed in government agencies.

[4] In California, the definition of the "practice of law" has evolved through case law and is generally understood to include the following:

(a) Non-lawyer providing legal advice to California resident in California, even if the advice is with regard to non-U.S. law. (*Bluestein v. State Bar* (1975) 13 Cal.3d 162, 175, [118 Cal.Rptr. 175, 183, fn. 13]. See also Business and Professions Code section 6126, subdivision (a).)

(b) Appearing on behalf of another or performing services in a representative capacity before a tribunal in any matter pending therein throughout its various stages and in conformity with the adopted rules of procedure. (See *Birbrower, Montalbano, Condon & Frank, P.C. v. Sup. Ct. (ESQ Business Services, Inc.)* (1998) 17 Cal.4th 119, 128 [70 Cal.Rptr.2d 304, 308]; *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535 [209 P 363, 365]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 542 [86 Cal.Rptr. 673, 677].)

(c) Giving legal advice and counsel to another which involves the application of law or legal principles to the specific facts and circumstances, rights, obligations, liabilities or remedies of that person or organization or of another, whether or not a matter is pending in any court. (See *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535, [209 P 363, 365].)

[5] Merely holding oneself out as being admitted or entitled to practice law in California when actually not admitted or otherwise entitled to practice law in California has been held to be the unauthorized practice of law. (E.g., *In re Cadwell* (1975) 15 Cal.3d 762 [543 P.2d 257, 125 Cal.Rptr. 889]; *Crawford v. State Bar* (1960) 54 Cal.2d 659, 666 [355 P.2d 490, 494, 7 Cal.Rptr. 746, 750]. See also Rule 7.5.)

[6] Under Business and Professions Code 6126, a member who has resigned from the State Bar with charges pending is prohibited from representing another person in a state administrative hearing, even if the state agency permits non-lawyers to practice before it. (*Benninghoff v. Superior Court* (2006) 38 Cal.App.4th 61 [38 Cal.Rptr.3d 759]. See also Rule 5.3.1.)

[7] Paragraph (a)(2) is not intended to prohibit a lawyer from counseling lawyers or non-lawyers on how to proceed in their own matters. Paragraph (a)(2) is also not intended to prohibit a lawyer from counseling non-lawyers or lawyers not admitted to practice law in California concerning the kinds of legal services not constituting the practice of law they may provide in California.

SDCBA SUGGESTED REVISION TO PROPOSED RULE ~~(CLEAN VERSION)~~5.5

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

(a) A lawyer admitted to practice law in California shall not:

(1) practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction; or

(2) knowingly assist a person or organization in the performance of activity that constitutes the unauthorized practice of law.

(b) A lawyer who is not admitted to practice law in California shall not:

(1) except as authorized by these Rules or other law, engage in any activity constituting the "practice of law" as that term is construed under California law;

(2) except as authorized by these Rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or

(~~2~~3) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. Paragraph (a) prohibits the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person in the performance of activities that constitute the unauthorized practice of law.

[2] Paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law. (See California Business and Professions Code, sections 6125 and 6126. See also California Rules of Court, rules 964 [registered legal services attorneys], 965 [registered in-house counsel] 966 [attorneys practicing law temporarily in California as part of litigation], 967 [non-litigating attorneys temporarily in California to provide legal services], 983 [counsel *pro hac vice*], rule 983.1 [appearance by military counsel], 983.2 [certified law students], rule 983.4 [out-of-state attorney arbitration counsel program] and rule 988 [registered foreign legal consultant].) A lawyer does not violate paragraph (b) to the extent the lawyer is engaged in activities authorized by any other applicable exception. (See, e.g., 35 U.S.C. section 32(b)(2)(D) and *Sperry v. Florida ex rel. Florida Bar* (1963) 373 U.S. 379 [83 S.Ct. 1322]; *Augustine v. Dept. of Veteran Affairs* (Fed. Cir. 2005) 429 F.3d 1334.)

Guidance on what constitutes the practice of law

[3] The definition of the practice of law is established by law and varies from one jurisdiction to another. The purpose of prohibiting the unauthorized practice of law is to protect the public and the administration of justice from the provision of legal services by unqualified persons or entities. Except as otherwise prohibited in Rule 5.3.1, paragraph (a)(2) is not intended to prohibit a lawyer from employing the services of para-professionals or other assistants and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work as provided in Rule 5.3. Likewise, paragraph (a)(2) is not intended to prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law, including claims adjusters, employees of financial or commercial institutions or entities, social workers, accountants, low cost legal service programs, and persons employed in government agencies.

[4] In California, the definition of the "practice of law" has evolved through case law and is generally understood to include the following:

(a) Non-lawyer providing legal advice to California resident in California, even if the advice is with regard to non-U.S. law. (*Bluestein v. State Bar* (1975) 13 Cal.3d 162, 175, [118 Cal.Rptr. 175, 183, fn. 13]. See also Business and Professions Code section 6126, subdivision (a).)

(b) Appearing on behalf of another or performing services in a representative capacity before a tribunal in any matter pending therein throughout its various stages and in conformity with the adopted rules of procedure. (See *Birbrower, Montalbano, Condon & Frank, P.C. v. Sup. Ct. (ESQ Business Services, Inc.)* (1998) 17 Cal.4th 119, 128 [70 Cal.Rptr.2d 304, 308]; *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535 [209 P 363, 365]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 542 [86 Cal.Rptr. 673, 677].)

(c) Giving legal advice and counsel to another which involves the application of law or legal principles to the specific facts and circumstances, rights, obligations, liabilities or remedies of that person or organization or of another, whether or not a matter is pending in any court. (See *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535, [209 P 363, 365].)

[5] Merely holding oneself out as being admitted or entitled to practice law in California when actually not admitted or otherwise entitled to practice law in California has been held to be the unauthorized practice of law. (E.g., *In re Cadwell* (1975) 15 Cal.3d 762 [543 P.2d 257, 125 Cal.Rptr. 889]; *Crawford v. State Bar* (1960) 54 Cal.2d 659, 666 [355 P.2d 490, 494, 7 Cal.Rptr. 746, 750]. See also Rule 7.5.)

[6] Under Business and Professions Code 6126, a member who has resigned from the State Bar with charges pending is prohibited from representing another person in a state administrative hearing, even if the state agency permits non-lawyers to practice before it. (*Benninghoff v. Superior Court* (2006) 38 Cal.App.4th 61 [38 Cal.Rptr.3d 759]. See also Rule 5.3.1.)

[7] Paragraph (a)(2) is not intended to prohibit a lawyer from counseling lawyers or non-lawyers on how to proceed in their own matters. Paragraph (a)(2) is also not intended to prohibit a lawyer from counseling non-lawyers or lawyers not admitted to practice law in California concerning the kinds of legal services not constituting the practice of law they may provide in California.

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PLEASE REFER TO
OUR FILE NUMBER:
27357.117

October 13, 2006

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, California 94105

Re: Proposed Rule 5.5: Unauthorized Practice of Law;
Multijurisdictional Practice of Law

Rule 2.4

Dear Members of the Board of Governors:

We write on behalf of our client, American International Companies, the member insurance companies of American International Group, Inc. (hereinafter collectively "AIC"). AIC appreciates the opportunity to address the California State Bar Association's Board of Governors ("the Bar") regarding its recently proposed Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) (hereinafter "proposed rule"). AIC has a defined and significant interest in commenting on the proposed rule. Collectively, the member companies of AIC are the largest providers of property and casualty insurance in the world, and the AIC companies are among the leading property and casualty insurers doing business in California. The proposed rule, as currently conceived, may have an impact on the manner in which AIC's employees and claims representatives conduct their business.

The proposed rule advises that an admitted lawyer may not "knowingly assist a person or organization in the performance of activity that constitutes the unauthorized practice of law." The "Comment" section of the proposed rule purports to provide guidance on what constitutes the practice of law. It is this guidance with which AIC is concerned.

It is AIC's view that the proposed rule endeavors to define what constitutes the practice of law in a manner that is both confusing and incomplete. Moreover, as discussed herein, the proposed rule, as currently framed, may pose a threat to the manner in which citizens of California access the law. Specifically, AIC suggests that the Bar should decline to adopt the proposed rule insofar as it purports to define or provide guidance on what constitutes the practice of law for each of the following reasons:

- The proposed rule is potentially misleading and its adoption could result in significant and unintended consequences;
- The proposed rule is ambiguous and is therefore likely to provide more confusion than guidance;
- Adoption of the proposed rule could result in restricted access to the law, legal information, and remedies currently available to the citizens of California; and
- Adoption of the proposed rule may have a chilling effect on the commercial services and information available to the citizens of California.

For each of the above reasons, AIC urges this Committee to decline to adopt the proposed rule, at least insofar as it purports to provide guidance on what constitutes the practice of law in California.

A. The Proposed Rule May Inadvertently Impinge On The Layperson's Access To The Law

Undoubtedly, the State Bar's Rules Revisions Committee had good intentions when it set out to provide guidance on what constitutes the practice of law in California. Certainly, rules against the unauthorized practice of law have a laudable goal: to protect the public from unscrupulous, unskilled and non-licensed practitioners. However, as currently drafted, the proposed rule (and Comments thereto) are misleading, potentially ambiguous and may have unintended consequences of which the Bar should be aware before it determines to advise the wholesale adoption of the proposed rule.

(1) The Proposed Rule Is Ambiguous And May Be Applied Inconsistently

The proposed rule advises that "[a] lawyer admitted to practice law in California shall not: ... knowingly assist a person or organization in the performance of activity that constitutes the unauthorized practiced of law." Proposed Rule 5.5 ¶ (a)(2). Comment 3 to the proposed rule proceeds to explain what the rule is not intended to do:

> "[P]aragraph (a)(2) is not intended to prohibit a lawyer from employing the services of para-professionals or other assistants and delegating functions to them....Likewise, paragraph (a)(2) is not intended to prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law, including claims adjusters, employees of financial or commercial institutions or entities, social workers, accountants, low cost legal service programs and persons employed in government agencies.

Thus, Comment 3 creates an exception for advice to "nonlawyers whose employment requires knowledge of law." Implicit in this Comment is the recognition that certain laypersons require knowledge of the law to perform their employment duties. The Comment does not suggest the types of activities that these "nonlawyers" may lawfully perform. For the reasons stated below, it is neither possible nor advisable to attempt to do so given the breadth of job-related activities that require knowledge of the law.

The Comment to the proposed rule continues, however, by defining the areas that have been deemed to constitute the practice of law in the past. Such acts explicitly include: providing legal advice, appearing on behalf of another, and giving legal advice which involves the application of law or legal principles to specific facts and circumstances. Comment 4 (a-c).

Thus, on the one hand, the proposed rule implicitly recognizes that employees such as claims adjusters, accountants, and social workers require knowledge of the law, while, on the other hand, defines the practice of law in a manner that would appear to preclude those employees from imparting or utilizing this knowledge in any meaningful way.

(2) The Proposed Rule May Threaten The Manner In Which Laypersons Access The Law Daily

Laypersons access the law daily. Every time a citizen determines to engage in an activity that requires adherence to certain codified "rules," i.e., California and federal laws, that citizen is accessing law. Adherence to such rules is implicated, for example, when one drives a car, pays taxes, makes a small claim, or files divorce papers.

Each of these activities may be supervised by non-lawyers. For example, employees of the IRS may advise taxpayers regarding how to determine one's tax liability. A lay accountant who files tax returns for his client may assess tax code provisions necessary to complete the filing. The highway patrol officer who issues tickets for traffic violations may advise drivers of their right to contest the citation. A family member may represent another in small claims matters. Hospital employees may ask patients to execute legally binding waivers upon their admittance to the hospital. Books advising on how to conduct one's own divorce proceedings or to plan one's own estate are widely available for purchase. These are relatively uncontroversial means by which laypersons are provided access to the law in ways that are helpful to the average California citizen.

Nevertheless, the proposed rule poses a risk that each of these activities could be construed as constituting the unauthorized practice of law. As discussed above, Comment 4(c) to the proposed rule identifies the "practice of law" as "generally understood" in California as including:

> Giving legal advice and counsel to another which involves the application of law or legal principles to the specific facts and circumstances, rights,

obligations, liabilities or remedies of that person or organization or of another, whether or not pending in any court.

In each of the common situations described above, however, the activity could be construed as the giving of advice to a person as to his or her legal rights or responsibilities. The Bar should be hesitant to adopt formal Comments to the rule which are so broad as to be considered as restricting or even prohibiting the manner in which laypersons access legal information.

In this way, the proposed rule exemplifies the difficulty that attaches to any attempt to define the practice of law in a manner that may be applied across the board. Any such definitions necessarily, if unintentionally, will impinge on the legitimate activities of non-lawyers who must access the law in order to meet their professional or personal obligations. For this reason, attempting such a definition is ill-advised.

Advocates for the proposed rule may point out that the guidance on what constitutes the practice of law included in the proposed rule purports simply to provide examples of what has been held to constitute the practice of law by various courts of this state. Nevertheless, there is a significant risk that when those identified activities are codified in an ethics rule and considered outside the context of the cited cases, they will be misconstrued to apply too broadly in a wide variety of circumstances. In this way the proposed rule's inclusion of a series of activities that will be presumed to be the practice of law adds to, rather than resolves, the rule's ambiguity.

The difficulty stems from that fact that it is impossible to identify each and every act that constitutes the practice of law without unintentionally threatening a layperson's legitimate access to the law. Any list of activities intent on cataloging what constitutes the practice of law would be inadequate both because of what it excludes and, more importantly, because of the activities it unintentionally includes (and therefore proscribes as to the layman). Without a meaningful inclusion of the activities that do not constitute an "authorized practice of law," the proposed rule would likely apply to otherwise permissible activities that benefit California residents. Because the proposed rule fails to account for activities that do not constitute the "unauthorized practice of law," it is necessarily incomplete, and more likely to confuse than guide.

(3) The Proposed Rule Does Not Accurately Reflect California Law With Regard To The Practice Of Law

Comment 4 (c) is somewhat misleading because it expands the definition of the practice of law provided by the court in *People v. Merchants' Protective Corp.*, (1922) 189 Cal. 531, 535 ("*Merchants*"). Specifically, in *Merchants*, the court defined the practice of law as follows:

> [D]oing and performing services in a court of justice in any manner depending therein throughout its various stages and in conformity with the adopted rules of procedure ...include[ing] legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matters may or may not be in court. *Id* at 535.

Comment 4(c) does not simply reiterate the definition in *Merchants* but adds to the definition the "application of law or legal principles to the specific facts and circumstances, rights, obligations, liabilities or remedies of that person or organization or of another." This suggests a broader definition of the practice of law than is actually found in the case law, and, thus, potentially prohibits a greater scope of activities than was intended.

B. Adoption Of The Proposed Rule Could Preclude Insurance Claims Adjusters From Providing California' Policyholders With Valuable Information Regarding Their Policies And Claims

Claims adjusters, as a matter of routine, complete a variety of forms on behalf of insureds which affect the legal rights and responsibilities of policyholders. Claims adjusters typically outline for policyholders policy benefits and obligations when claims are filed against them. In smaller, routine claims, lay adjusters typically complete release agreements for execution by the policyholders, evaluate claims against policyholders, and negotiate resolution of the claims on policyholders' behalf. Such negotiations may generally occur at any time during the pendency of a claim, typically may be conducted even when an attorney has been retained to represent the policyholder, and without the attorney's consent. In sum, claims adjusters currently conduct a broad variety of tasks which would be threatened by implementation of the proposed rule.

Moreover, insofar as the proposed definition precludes laypersons from counseling a person as to his or her legal rights and responsibilities, the proposed definition would also preclude claims adjusters from explaining to policyholders the effect of the contracts they are executing. It appears unrealistic to expect a claims adjuster to ask for information from a claimant and to complete forms without explaining to the claimant what the forms mean. Yet, a literal application of this provision would divest California's claimants from important access to information regarding their claims and the meaning of the forms they are executing.

Thus, insofar as the Comment to the proposed rule suggests that providing such advice to policyholders would constitute the practice of law, then claims adjusters may be precluded from providing these services to the insureds of California. While this likely is not the intent of the Rules Revision Commission, it is nevertheless a real risk should the proposed rule, including Comments, be adopted wholesale.

C. Adoption Of The Proposed Rule Threatens Legislatively Sanctioned Procedures For California Citizens To Address Personal Hardship

(1) Small Claims Procedures Allow For The Participation By Layperson Representatives

Consideration of the small claims procedures in California provides a vivid illustration of the valuable advocacy and adjudication of rights that would be threatened were the proposed rule adopted. Small claims procedures under California law specifically allow for individuals to represent themselves, or in some cases to be represented by a spouse or by a non-attorney at the discretion of the court. Code Civ. Proc. § 116.540; *Merco Constr. Engineers, Inc. v. Municipal Court* (1878) 21 Cal. 3d 724. Generally speaking, while attorneys *may* provide advice to claimants and respondents in such actions, attorneys are not required to take part in small claims actions. Code Civ. Proc. § 116.530. Rather, the small claims forum was created to allow for the informal prosecution of small claims "without the cost, delay, or procedural difficulties incident to normal litigation." *Prudential Ins. Co. v. Small Claims Court* (1946) 76 Cal. App. 2d 379, 383. This setting excludes attorneys from trial to avoid disadvantage to the impoverished, untrained litigant who could not afford to hire an attorney. *Id.* The California legislature also recognized that small claims "are of special importance to the parties and of significant social and economic consequence collectively." Code Civ. Proc. § 116.120.

Nevertheless, were the examples in Comment 4 applied literally, participation by a non-lawyer representative in small claims matters could be construed as constituting the unauthorized practice of law insofar as the proposed rule includes the representation of a person before a tribunal as presumptively the practice of law. The proposed rule could, therefore, constitute an unjust infringement on the protections provided by California case law and statute were it construed as precluding such activities.

(2) Non-attorneys May Participate In Workers' Compensation Hearings

Participation by non-attorneys at workers' compensation hearings is also specifically permitted under California law and would likewise be threatened by the adoption of the proposed rule. *See* Cal. Lab. Code § 5700 ("Either party may be present at any [worker's compensation] hearing, in person, by attorney, or by any other agent, and may present testimony pertinent under the pleadings.").

Case law suggests that one purpose for the legislative decision to allow non-lawyers to appear before the Commission was that many claimants for compensation were indigent and their claims for compensation were so small that the engagement or service of a member of the bar and would not be justified. *See Bland v. Reed* (1968) 261 CA2d 445, 449. Without the right to have a lay representative the claimant would often be unrepresented.

In addition to representation at hearings, California's Labor Code section 5501 allows a workers' compensation application to "be filed with the appeals board by any party in interest, his attorney, ***or other representative authorized in writing***," as long as the non-attorney is authorized in writing and so notifies the Workers' Compensation Appeals Board (emphasis added). *See 99 Cents Only Stores v. Workers' Comp. Appeals Bd.* (2000) 80 Cal. App. 4th 644, 648; *Permanente Medical Group v. Workers' Com. Appeals Bd.* (1985) 171 Cal. App. 3d 1171 (California Labor Code section 5501 allows medical provider to initiate the workers' compensation process as if the employee himself had filed a claim).

The Supreme Court of California in *Eagle Indemnity Co. v. Industrial Accident Commission, et. al.* (1933) 217 Cal. 244, 249, recognized that representation of claimants before the Industrial Accident Commission ("Commission") constitutes the performance of legal services, but nonetheless upheld this practice. Nevertheless, these established rules with regard to non-attorney participation in worker's compensation procedures could be construed as prohibited under the proposed rule as constituting the unauthorized practice of law.

D. Foreign Legal Consultants Allowed To Practice Law In California

Comment 4 to the proposed rule could also unintentionally interfere with the activity of foreign legal consultants in California. In response to the growing demand of California businesses for legal guidance on foreign transactions and investments, the California legislature enacted California Rule of Court 988, which authorizes qualified foreign lawyers to practice limited law in California without requiring that they become active members of the California State Bar Association.[1]

The California State Bar itself has acknowledged the need of foreign lawyers in California:

> [To] provide ready access to competent advice on foreign laws applicable to international business transactions, ... advise California businesses and individuals interested in investing abroad, ... advise foreign nationals residing in California on the law of their country, ... advise California residents being transferred abroad, ... assist federal and state agencies and courts with expert information on the law in foreign countries ... [and] ... expand the range of contact with foreign lawyers for California lawyers and law firms.[2]

Rule 2.4

[1] California Rules of Court section 988 defines Registered foreign legal consultant as a person who (1) is admitted to practice and is in good standing as an attorney or counselor at law or the equivalent in a foreign country; and (2) has a currently effective Certificate of Registration as a Registered Foreign Legal Consultant from the State Bar.

[2] State Bar of California Office of Professional Standards, Request that the Supreme Court Adopt

While authorizing certain qualified foreign lawyers to practice limited law in California, the legislature expressly restricted the scope of activities in which Foreign Legal Consultants may engage. For example, activities traditionally performed by local counsel, such as appearing in court, preparing pleadings, or providing professional legal advice on state and federal laws are prohibited by California Rule of Court 988(d). Further, applicants must comply with strict eligibility requirements. *Id.* at (c). The restrictions imposed by this rule are meant to protect California consumers against unqualified or unscrupulous foreign attorneys as well as prevent the "unauthorized practice of law."

Despite the built-in safeguards of California Rule of Court 988, however, Comment 4 to the proposed rule could disallow foreign attorneys registered as Foreign Legal Consultants from providing legal advice or counsel even with regard to the laws of the country where they are admitted to practice law. No exception or safeguards are provided in the proposed rule for such consultants and, in this manner, the rule may have a chilling effect on their otherwise permissible activities.

E. The Public Interest Is Best Served By Not Attempting To Define The Practice Of Law Which Could Effectively Reduce California's Citizens Access To The Law

Restrictions against the unauthorized practice of law widely purport to protect the public from unknowledgeable and/or unscrupulous "practitioners" who lack the legal training and accountability of attorneys. *See, e.g., West Virginia State Bar v. Earley* (1959) 144 W.Va. 504, 527 ("The justification for excluding from the practice of law persons who are not admitted to the bar ... [is] the protection of the public from being advised and represented in legal matters by unqualified and undisciplined persons over whom the judicial department of the government could exercise slight or no control."); *Russell v. Dopp* (1995) 36 Cal. App. 4th 765 (the public policy supporting the requirement that attorneys be licensed to practice law is to protect the public from being advised and represented by persons who are not qualified to practice law and to uphold the integrity of the judicial process.).

Likewise, it is the public interest that is of paramount concern when determining whether a particular act constitutes the practice of law. Therefore, a determination regarding whether conduct constitutes the unauthorized practice of law is most critically influenced by the public interest that application of the rule would serve or disserve. *See Unauthorized Practice of Law Committee v. State of Rhode Island* (R.I. 1988) 543 A.2d 662, 665 (The practice of law should not be "subject to such rigid and traditional definition as to ignore the public interest."); *Liberty Mutual Ins. Co. v. Jones* (1939) 344 Mo. 932, 956 (The determination of what constitutes the practice of law should not be influenced by "any consideration such as creating a monopoly

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New California Rule of Court 988, Relating to Foreign Legal Consultants, and Amend Rule of Court 952, Relating to Supreme Court Review of State Bar Determinations, and Memorandum and Supporting Documents in Explanation, at 3 (October 31, 1986).

for the legal profession in the insurance business but must be guided by the public interest."); *Henize v. Giles* (1986) 22 Ohio St. 3d 213, 218 ("[I]t is the duty of this court so to regulate the practice of law and to restrain such practice by laymen in a common-sense way in order to protect primarily the interest of the public and not to hamper and burden such interest with impractical technical restraints no matter how well supported such restraint may be from the standpoint of pure logic.").

Here, as discussed above, the public would not generally benefit by the adoption of a rule that suggests an overly broad definition of the practice of law. In fact, the public's access to important legal information could be reduced by adoption of the proposed rule. In this way, consideration of the public good militates against adoption of the proposed rule.

F. A Definition Of The Practice Of Law Is Best Performed On A Case By Case Basis

A precise definition of what constitutes the practice of law has eluded courts nationwide for years. *See, e.g., State ex rel Junior Association of the Milwaukee Bar v. Rice* (1940) 236 Wis. 38, 53 ("[I]t is difficult, if not impossible, to lay down an all-inclusive definition of practice of law."); *In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar* (1992) 309 S.C. 304 (declining to adopt proposed rules whereby the state bar had attempted to delineate the practice of law and to establish clear guidelines to preclude the inadvertent unauthorized practice of law).

Perhaps due to the elusive nature of what it means to "practice the law," most jurisdictions have concluded that any determination of what constitutes the practice of law is best performed on a case-by-case basis. *Liberty Mutual Ins. Co. v. Jones* (1939) 344 Mo. 932, 966 ("To hold that the acts done by a lay employee, wholly independent of the circumstances in which they were done, automatically determine whether he is guilty of engaging in unauthorized law business, is to convict thousands who draw on slight routine legal knowledge in the daily work in their own limited spheres. We cannot go that far."); *State ex rel Junior Association of the Milwaukee Bar v. Rice* (1940) 236 Wis. 38, 53 ("[T]he general trend of judicial decision is to determine each case of unauthorized practice of law largely upon its own particular facts.").

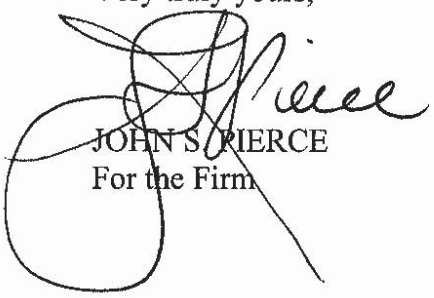
This is also the approach that California courts have thus far adopted. *See, e.g., Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court* (1998) 17 Cal. 4th 119, 129 ("We believe it is impossible to frame any comprehensive and satisfactory definition of what constitutes the practice of law. To a large extent each case must be decided upon its own particular facts."); *The People v. Landlords Professional Services* (1989) 215 Cal. App. 3d 1599, 1609 ("[A]ny definition of legal practice is, given the complexity and variability of the subject, incapable of universal application and can provide only a general guide to whether a particular act or activity is the practice of law.").

This is the approach that the Bar should take by *declining* to adopt the proposed rule which purports to provide guidance on what constitutes the practice of law in California. For each of the reasons discussed herein, this analysis is better performed on a case-by-case basis.

G. Conclusion

For all of the reasons stated above, AIC respectfully requests that the Bar refrain from recommending the adoption of the recently proposed rule, including the Comment thereto which purports to provide guidance on what constitutes the practice of law.

Very truly yours,



JOHN S. PIERCE
For the Firm

JSP:

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U.S. Department of Justice

Professional Responsibility Advisory Office

Washington, D.C. 20530

October 13, 2006

Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, California 94105-1639

Re: Comments Submitted by the United States Department of Justice on Rules 1.4 and 5.5 of the Proposed New California Rules of Professional Conduct

Dear Ms. Hollins:

Thank you for this opportunity for the Department of Justice to comment about several of the proposed new California Rules of Professional Conduct. As you are aware, the Department of Justice is charged with responsibility for investigating alleged violations of, and otherwise enforcing, federal law. The Department's enforcement duties encompass criminal law as well as civil and other non-criminal law.

The Professional Responsibility Advisory Office of the Department of Justice (PRAO) advises Department of Justice attorneys and Assistant United States Attorneys about compliance with their professional responsibilities. Having worked closely with the United States Attorneys' Offices for the four federal districts in California, we would like to bring our concerns about two proposed rules to your attention, Rules 1.4 and 5.5. As you have requested, a discussion of each rule is set forth in a separate attached page.

We appreciate your consideration of these comments.

Sincerely,

Barbara Kammerman
Acting Director

Attachments

ATTACHMENT 2

Comment on Proposed Rule 5.5
Barbara Kammerman, Acting Director
Professional Responsibility Advisory Office
United States Department of Justice

Proposed Rule 5.5 would prohibit the unauthorized practice of law and sets forth the conditions that would permit a lawyer not licensed in California nevertheless to practice there without violating the Rule. The Department asks that Comment [2] to the Rule be amended to recognize existing statutory authority for Department attorneys or others properly designated by the Attorney General to represent the United States in state and federal courts throughout California.

Proposed Rule 5.5 states in relevant part:

(b) A lawyer who is not admitted to practice law in California shall not:

(1) except as authorized by these Rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

Comment

[2] Paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law. (See California Business and Professions Code, sections 6125 and 6126. See also California Rules of Court, rules 964 [registered legal services attorneys], 965 [registered in-house counsel] 966 [attorneys practicing law temporarily in California as part of litigation], 967 [non-litigating attorneys temporarily in California to provide legal services], 983 [counsel pro hac vice], rule 983.1 [appearance by military counsel], 983.2 [certified law students], rule 983.4 [out-of-state attorney arbitration counsel program] and rule 988 [registered foreign legal consultant].) A lawyer does not violate paragraph (b) to the extent the lawyer is engaged in activities authorized by any other applicable exception. (See e.g., 35 U.S.C. section 32(b)(2)(D) and Sperry v. Florida ex rel. Florida Bar (1963) 373 U.S. 379 [83 S.Ct. 1322]; Augustine v. Dept. of Veteran Affairs (Fed. Cir. 2005) 429 F.3d 1334.)

The United States recommends that citations to certain federal statutes be added to acknowledge that Department of Justice attorneys who are licensed to practice in another jurisdiction generally are authorized to practice in state or federal courts in California regardless of whether they are licensed in the state. The United States Attorney General has the authority by federal statute to assign any officer of the Justice Department to appear on behalf of, or otherwise represent the interests of, the United States in any legal proceeding in any forum in the United States, so long as that attorney is duly licensed and authorized to practice as an attorney under the laws of at least one state, territory, or the District of Columbia. See 28 U.S.C. §§ 515-519, 530C(c)(1) and 547. Thus, attorneys sent by the Attorney General to state or federal courts in California to represent the interests of the United States are themselves vested with nationwide authority—by clear statutory authorization—to appear and conduct "any kind of legal proceeding" in which the United States is concerned, regardless of whether they reside or are licensed to practice in the state in which the proceeding is brought. 28 U.S.C. §§ 515(a), 547.

Under the Supremacy Clause of the United States Constitution, the activities of federal officers and agents carrying out their duties on behalf of the United States are free from direct state regulation, except where Congress has expressly provided otherwise. See, e.g., Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 180-181 (1988); Hancock v. Train, 426 U.S. 167, 178-179 (1976); James Stewart & Co. v. Sadrakula, 309 U.S. 94, 103-104 (1940). This principle has long been an established part of the law. Thus, in Cunningham v. Neagle, 135 U.S. 1, 62-63 (1890), the Supreme Court made clear that a California sheriff could not interfere with a United States Marshal carrying out his duties to protect the safety of federal officials. The Court explained the constitutional underpinnings of its ruling: "The United States is a government with authority extending over the whole territory of the Union, acting upon the states and upon the people of the states. While it is limited in the number of its powers, so far as its sovereignty extends, it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it." Id. at 62.

Moreover, the Supreme Court has in various circumstances held that the states cannot regulate the activities of the Federal Government without clear Congressional authorization. See, e.g., Sperry v. Florida, 373 U.S. 379, 402 (1963) (where the Court ruled that the state of Florida could not enjoin an individual from preparing and prosecuting patent applications within the state on the grounds that the individual was engaging in the unauthorized practice of law under state law. The Court reasoned that "since patent practicioners are authorized to practice only before the Patent Office, the State maintains control over the practice of law within its borders except to the limited extent necessary for the accomplishment of federal objectives."). If attorneys are authorized to represent a client in a forum, they are likewise authorized to carry out any attendant functions or duties related to the representation. See, e.g., In re McCue, 293 P. 47, 52 (Cal. 1930) ("We do not deem the action of applicant in having a case properly within the jurisdiction of the federal court, but begun in the superior court, transferred from the latter court to the proper jurisdiction a matter of any great or serious consequence. The proceeding to have

the case transferred from the state court was merely an incident to the defense and trial of the action in the federal court.").

In sum, we believe that an attorney for the Department of Justice who has been sent by the Attorney General to represent the interests of the United States in any state or federal forum in the state of California is able to do so, and it would be appropriate to revise the proposed Rule to make this clear. Accordingly, we recommend that Comment [2] to the proposed Rule 5.5 be revised in the following manner.

Comment

[2] Paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law. (See California Business and Professions Code, sections 6125 and 6126. See also California Rules of Court, rules 964 [registered legal services attorneys], 965 [registered in-house counsel], 966 [attorneys practicing law temporarily in California as part of litigation], 967 [non-litigating attorneys temporarily in California to provide legal services], 983 [counsel pro hac vice], ~~rule~~ 983.1 [appearance by military counsel], 983.2 [certified law students], ~~rule~~ 983.4 [out-of-state attorney arbitration counsel program] and ~~rule~~ 988 [registered foreign legal consultant].) A lawyer does not violate paragraph (b) to the extent the lawyer is engaged in activities authorized by any other applicable exception. (See e.g., 28 U.S.C. sections 515-519, 530C(c)(1), and 547, 35 U.S.C. section 32(b)(2)(D) and Sperry v. Florida ex rel. Florida Bar (1963) 373 U.S. 379 [83 S.Ct. 1322]; Augustine v. Dept. of Veteran Affairs (Fed. Cir. 2005) 429 F.3d 1334.)

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Re: Rule 5.5: Unauthorized Practice of Law

Dear Ms. Hollins:

I was a State Bar prosecutor when Roberta Yang was the Chief Trial Counsel. I have represented the State Bar in unauthorized practice of law cases against non-California lawyers in the Superior Court under Business and Professions Code. I could not bring those actions in the State Bar Court. The State Bar Court does NOT have jurisdiction over non-California attorneys. The State Bar only has jurisdiction over attorneys who have been admitted, or are seeking admission, to practice law in California.

Thus, the State Bar does NOT have jurisdiction, as suggested in Rule 5.5(b), over "a lawyer who is not admitted to practice law in California..."

I would also suggest the language in 5.5(a) be revised to include the words *and an active member*" as follows:

(a) A lawyer admitted to practice law ***and an active member*** in California shall not:

Good luck in your lofty effort of revising California ethic rules to mirror the structure of the ABA rules. I am glad the differences remain between the two and I agree the structure should be parallel. I am also grateful for the guidance in the Comment section after each rule.

With gratitude,

Michele J. Dougherty

THE STATE BAR OF CALIFORNIA
PROPOSED RULES OF PROFESSIONAL CONDUCT
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DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Peter H. Liederman

Professional Affiliation

*** City** San Francisco

*** State** California

*** email address** lawfirmberkeley@yahoo.com

A copy of your response will be sent to this email addres

Rule 2.4

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Rule 5.5 Unauthorized Practice of Law; Multi-jurisdictional Practice of Law [1-300]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

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Comment [7] This is in fact a rule, or at least an expression of an allowed practice that you may wish to revisit.
Locally, there are one or two groups of pro-tenant lawyers who regularly advise and assist clients, who while listed as pro per submit ghost written demurrers and other documents to the courts, which the courts regularly reject because they are frivolous. The rule as provided encourages the 'ghost' attorneys to advance frivolous and dilatory pleadings, knowing they will never be held responsible, they cannot be sanctioned, and the courts and plaintiff parties just have to put up with it.

I respectfully suggest you consider a rule that an attorney or law firm that provides laymen with legal services in an ongoing case must notify the court and opposing counsel of their participation.

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DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Alan Konig

Professional Affiliation

*** City** San Francisco

*** State** California

*** email address** ahkcal@comcast.net

A copy of your response will be sent to this email addres

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 5.5 Unauthorized Practice of Law; Multi-jurisdictional Practice of Law [1-300]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

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PROPOSED RULE 5.5 (UPL/MULTIJURISDICTIONAL PRACTICE OF LAW)

While the rule is legally correct and a prudent rule to include in any revision to the current Rules of Professional Conduct, the commentary to the proposed rule, unfortunately, is incomplete and misleading.

Paragraph 2 of the proposed comments concludes with the overly broad and misleading statement that "[a] lawyer does not violate paragraph (b) to the extent the lawyer is engaged in activities authorized by any other applicable exception."[1] The comment then concludes by providing citation to federal cases that found federal preemption prohibited the state from regulating the practice of law when that practice was arguably limited to federal law and expressly authorized by federal law (*Sperry* and *Augustine*).

By choosing to highlight only those two legal authorities while, at the same time, not highlighting legal authorities that expressly held that a state was *not* preempted from regulating the practice despite the practice being limited to solely federal matters and federal law, the commentary has provided an incomplete and inaccurate statement of the law that will, undoubtedly, mislead attorneys into believing that their practice is authorized so long as it is limited to federal matters, federal law, or in federal forums.

There are several federal decisions to which the commentary could cite in order to present a balanced statement and understanding of federal preemption of a state's ability to regulate the practice of law and that would put attorneys on notice that they need to carefully evaluate the particular facts of their situation before reaching a conclusion that an exception exists to their unauthorized practice of law (UPL).

Only citing to *Speery* will mislead many attorneys because the holding of *Speery* is not as expansive as most would like to believe. The decision hinged on the fact that Congress had authorized the patent office to promulgate regulations and those regulations expressly defined the individuals who may practice before the patent office. Absent the grant from Congress and the patent office's promulgation of regulations, the State of Florida would have been free to regulate the practice. *See Speery*, 373 U.S. 379, 383. This is critical because Congress has never granted to many federal agencies the authority to promulgate their own regulations. A major federal agency that has never been granted such authority is the U.S. Equal Employment Opportunity Commission (EEOC). *See General Electric Co. v. Gilbert* (1976) 429 U.S. 125, 141. Thus, there could be no federal preemption of a state's ability to regulate the practice of law even when that practice was limited to the EEOC. *See, e.g., The Florida Bar re Advisory Opinion on NonLawyer Representation in Securities Arbitration* (Fla. 1997) 696 So.2d 1178, 1181.

A variable of the principle stated above can be found in cases addressing whether, in fact, a specific federal law or regulation actually authorizes federal practice that preempts a state's ability to regulate the practice. *See, e.g., Arons v. New Jersey State Board of Education* (3rd Cir. 1988) 842 F.2d 58 (New Jersey not preempted from regulating practice of law despite

[1] It is unclear why the comment is limited to addressing the unauthorized practice of law in California only. The same statement is equally applicable to a California attorney who chooses to practice in a jurisdiction other than California, including before federal agencies and federal courts.

provisions of the Education for All Handicapped Children Act of 1975 [now known as the Individuals with Disabilities Education Act (IDEA)]).

Additionally, numerous federal decisions have authorized a State to regulate the practice of law even when the practice was limited to those agencies or courts that have the authority to permit the practice. Leading among the cases is *Spanos v. Skouras Theatres Corp.* (2nd Cir. 1966) 364 F.2d 161, 171, that post-dated *Speery* and held that limiting one's practice solely to federal matters or in federal forums in which one was entitled to practice did not permit an attorney not admitted to practice in a particular State to ". . .maintain[ ] an office there and hold[ ] himself out to give advice to all comers on federal matters." *See also Servidone Construction Corp. v. St. Paul Fire & Marine Ins. Co.* (N.D.N.Y. 1995) 911 F.Supp. 560; *Brown v. Goode, Peterson & Hemme* (Bankr. S.C. 2001) 270 B.R. 43; *In re Boettcher* (Bankr. N.D.Cal. 2001) 262 B.R. 94; *In re Peterson* (Bankr. D.Conn. 1994) 163 B.R. 665; *In re Tanksley* (Bankr. W.D.Va. 1994) 174 B.R. 434. Several state court decisions are in accord. *See, e.g., Attorney Grievance Comm. of Maryland v. Harris-Smith* (Md. 1999) 356 Md. 72, 737 A.2d 567; *Attorney Grievance Comm. of Maryland v. Barneys* (Md. 2002) 370 Md. 566, 805 A.2d 1040; *In re Banks* (D.C. 2002) 805 A.2d 990; *In re Amalgamated Development Co.* (D.C. 1977) 375 A.2d 494

All of the above cited cases, along with several dozen not cited herein, are critical knowledge for attorneys to have in order to adequately make a determination that their practice outside of the jurisdiction in which they are admitted could conceivably constitute UPL. By citing to only two cases holding federal preemption, the comment creates a false sense of security in an attorney who may be practicing with specific authorization from a federal law or jurisdiction, that the practice is authorized and beyond the reach of their licensing state to regulate. If citations to cases are to be given at all, it is imperative that it present a balanced and complete representation of the requirements and conflicting interpretations of the law.

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule Rule 5.6: Restrictions on Lawyer's Right to Practice

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

The majority of the Legal Ethics Committee, with one member of the Committee dissenting, approves the proposed new rule, except that we believe it is a bad idea to delete current subdivision 1-500(B) ("A member shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these rules,"). We see no explanation for the deletion in the Commission's analysis and, if the matter is not addressed elsewhere, the subsection should be reinserted.

Dissent 1:

5.6(b) should not be included in its current form, because it can be used to prevent lawyers from serving clients in a specialized field once they leave a firm. Either the lawyer has earned the compensation for past work or he/she has not, and he/she should be paid on that basis.

Dissent 2:

In sum, I object to the use of the ethics code or rules to enforce or protect law firm agreements relating to compensation issues (i.e. restrictive covenants or retirement agreements).

I object to Rule 5.6 to the extent that it purports to authorize or give the imprimatur of an "ethics code or rule" violation for lawyers acting contrary to a restrictive covenant. The comment to 5.6 (a) (1), I believe expands, and it states that (a) (1) permits restrictive covenants in "a law corporation, partnership or employment agreement." However, there is no explanation for this conclusion. What is the basis of invoking the ethics rules or the powers of the state bar in relation to this issue? The Comments do not make any statement regarding it.

In fact, the New Jersey Committee of Professional Ethics has agreed in substance that restrictive covenants violate the ethics rules. See Advisory Committee on Professional Ethics, Appointed by the Supreme Court of New Jersey, Opinion 78 – Restrictive Covenants for In House Counsel.

In addition to the extent the *Howard v. Babcock* (1993) 6 Cal.4th 409 [25 Cal.Rptr.2d 80] permits restrictive covenants, I disagree in that (1) clients are always free to chose their attorneys (2) a law firm should not be permitted to prohibit a lawyer from engaging in "non–competitive" areas of practice to the law firm that he or she is a partner, of counsel or associate, and (3) these restrictive covenants must be used to prohibit moon lighting by attorneys (who in essence are just trying to make more money).

Furthermore, I object to section (b)(2). Again, what is the policy behind this proposed rule and how does it further the public interest? If the Rules are used to protect financial arrangements between law firm attorneys, then why not have the rules deal with all types of financial arrangements between lawyers. That would not be a simple task.

What are the ethics polices or issues that these financial arrangements seek to protect. No such policy is stated. Moreover, no facts have been provided that back up the argument to have the state bar involved in this area. My fear is that law firms may use the state bar mechanism to achieve their private ends rather than protecting the public from unscrupulous lawyers (which is what I understand the gist of the ethics rules to be). Why are these rules in the ethics code?

THE STATE BAR OF CALIFORNIA
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DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Phillip Feldman

Professional Affiliation varied but individual

*** City** Sherman Oaks

*** State** California

*** email address** StateBarDefense@aol.com

A copy of your response will be sent to this email addres

Rule 2.4

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 5.6 Restrictions on a Lawyer's Right to Practice [1-500]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

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ABA 5.6 is more succinct. The verbosity only adds commentary which, if truly needed, (and they are not) can be placed in unambiguous comments instead of cluttering a simple rule.

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DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Karen L. Hawkins

Professional Affiliation Taggart & Hawkins

*** City** Oakland

*** State** California

*** email address** klhawkins@tagghawk.com

A copy of your response will be sent to this email addres

Rule 2.4

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 5.6 Restrictions on a Lawyer's Right to Practice [1-500]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

Enter your comments here. To upload files proceed to the ATTACHMENTS section below.

ATTACHMENTS INCLUDE:
1) LETTER TO THE COMMISSION;
2) SUGGESTED REVISIONS TO PROPOSED RULE 5.6
3) REDLINE COMPARISON OF RULE 5.6, AS PROPOSED BY THE COMMISSION, AND THE SUGGESTED REVISIONS

Attachments

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LAW OFFICES OF
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3828

October 16, 2006

The Commission for the Revision
of the Rules of Professional Conduct
(Via E-Mail submission)

Re: Comments on Proposed Rule 5.6 (formerly Rule 1-500)

Dear Members of the Commission:

At the public hearing on October 7, 2006, I appeared before the Commission to express concerns regarding proposed Rule 5.6, and the negative impact it will have on law firms with existing retirement plans which cannot meet the strict definitional standards imposed by the current language of proposed Rule 5.6(b)(2). A written summary of the presentation was submitted at the time of the hearing. This writing constitutes an expansion of those comments and, as requested by the members of the Commission who were present at the hearing, suggests alternative language for both the Rule and the Comment. The oral and written presentation submitted at the public hearing and this submission are made on behalf of, and at the request of, the Chicago-based law firm of Katten Muchin Rosenman LLP (KMR).

The concerns about the impact of the rule as proposed center on the opening phrase of paragraph (b)(2): "The affected compensation will be paid solely from future firm revenues". KMR believes that the proposed revision to current Rule 1-500, if adopted as written, contains language which goes beyond the model rule language, introduces restrictions, and creates inflexibility, which will place KMR's Retirement/Death Benefit Plan (the "Plan"), as it relates to KMR's California partners, in noncompliance with California's Rules of Professional Conduct. The potential Hobson's Choice which will be faced by KMR, and any other similarly situated multistate law firms, will be either to exclude all California partners from the Plan, or to elect to terminate a retirement benefit program which otherwise operates within the criteria of ABA Model Rule 5.6, and relevant judicial interpretations, in the other jurisdictions in which KMR maintains law offices. From the statement of the drafters accompanying the proposed revisions, KMR does not believe that the Commission intended this harsh result: "Conform format and substance to MR 5.6. The majority of the Commission voted to conform the revised Rule 1-500 **as closely as possible** to Model Rule 5.6, as reflected in the current revision." [1]

1. Drafter's Revision and Recommendation regarding Rule 1-500. (emphasis added)

SUMMARY

In summary, the recommendations are:

(1) Rule 5.6(b)(2) should be modified by striking the phrase "The affected compensation will be paid solely from future firm revenues";

(2) Rule 5.6(b)(2) should retain the current list of compensation sources, forfeiture of which is prohibited under existing case law;

(3) The Commentary should be modified consistent with the above; and,

(4) The Commentary should be expanded to clarify the intended meaning in proposed Rule 5.6(b)(2) of a "lawyer's vested interest in a retirement plan."

Attached hereto for ease of reference are Exhibit I, containing the recommended changes; and, Exhibit II, which is a machine-lined comparison of Exhibit I and the current proposed version of Rule 5.6 as released by the Commission on June 30, 2006.

DISCUSSION

KMR maintains a multi-state practice, including since 1991 an office in Los Angeles, and more recently an office in Palo Alto. KMR has approximately 65 attorneys and 95 support staff in California. KMR believes the Plan, which has been in place since 1983, is currently in full compliance with ABA Model Rule 5.6, and the case law interpreting that Rule.

If proposed Rule 5.6 was fully consistent with ABA Model Rule 5.6, KMR's concerns would be alleviated. However, notwithstanding the Commission's earlier stated intent "to conform the revised Rule 1-500 as closely as possible to Model Rule 5.6," all of proposed California Rule 5.6(b), and nearly all of the proposed commentary, is new language developed by the Commission with the apparent intention of limiting covenants which restrict a lawyer's right to practice to bona fide retirement agreements.[2] While the Commission's original intent may have been to be consistent with Model Rule 5.6, "in large part, the new language in the rule and in the comments results from the Commission's consideration of case law developments, in particular the California Supreme Court's decision in *Howard v. Babcock* (1994), 6 Cal. 4th 409 [7 Cal. Rptr. 2d 867] concerning restrictive agreements among law firm principals which the Supreme Court has deemed permissible, as a policy matter, to accommodate the reasonable business

2. Commentary, "III. Summary of Proposed New and Amended Rules, Rule 5.6, Restrictions on a Lawyer's Right to Practice".

interests of a law firm as a going concern." [3] The Supreme Court's *Babcock* decision "as a policy matter, to accommodate the reasonable business interests of a law firm," is not served if firms using bona fide retirement agreements or plans which include coverage of both California and non-California members are precluded from continuing their plans entirely, or are precluded from covering their California members, because of substantive restrictions placed on California members when such a restriction does not exist in ABA Model Rule 5.6, or in any variation in any other jurisdiction of which we are aware.

The current proposal varies substantially from Model Rule 5.6 in its effort to define the parameters of a bona fide retirement agreement and, from the language, it appears that the Commission believed it had identified finite parameters for such a definition which would provide guidance for lawyers and firms going forward. But sharp distinctions are elusive in this context, particularly given the variety of other sources available for funding a firm's retirement arrangements. As a matter of policy and fairness, revisions to California ethics rules which impact multi-state law firms differently than law firms operating solely within California, should be avoided. A firm whose retirement agreement has otherwise satisfied the rules of professional conduct in every other jurisdiction for more than 20 years should not suddenly find itself in noncompliance with the California rules.

The current Commentary Summary states that "the guidance provided…relies heavily on references to case law. The Commission believes, however, that case law references are important for this area of regulation because the interpretation of the prohibition is tied closely to the specific factual settings at issue." [4] As discussed below, the relevant case law does not require that only compensation which is to be paid "solely from future firm revenues" may be contractually forfeited. Because there are other sources for funding for a firm's payment of retirement benefits, in addition to future firm revenues, that portion of proposed Rule 5.6(b)(2) which identifies future revenues as the sole source of payment (1) is not supported by case law; (2) fails to take into consideration the other sources for funding which do not violate the intent of Model Rule 5.6; and, (3) is at odds with the Supreme Court's policy decision to accommodate the reasonable business interests of a law firm as a going concern.

3. Id.

4. Id.

RECOMMENDED CHANGES

1. Rule 5.6(b)(2) should be modified by striking the phrase "The affected compensation will be paid solely from future firm revenues".

Proposed Rule 5.6(b)(2) states:

> "(b) Notwithstanding paragraph (a)(1) of this Rule, or unless otherwise proscribed by law, a lawyer may offer or enter into an agreement that provides for forfeiture of any of the compensation to be paid by a law firm to a lawyer after termination of that lawyer's membership in or employment by that law firm if the lawyer competes with that law firm after such termination, provided that:
>
> (1) The lawyer's eligibility for receipt of such compensation is conditioned on minimum age and length of service requirements; and
>
> (2) The affected compensation will be paid solely from future firm revenues, and not from compensation already earned by the lawyer, the lawyer's share in the equity of the firm, the lawyer's share of the firm's net profits, or the lawyer's vested interest in a retirement plan."

The Comments to the Proposed Rule say that the exception in proposed Rule 5.6(b) is intended to apply to bona fide retirement agreements. The Comment states in relevant part:

> "Authorities interpreting the analogous 'retirement benefits' exception under [ABA] Model Rule 5.6 have identified the factors enumerated in [proposed Rule 5.6] paragraphs (b)(1) and (b)(2) as essential attributes of such retirement agreements....See also *Neuman v. Akman*, (D.C. 1998) 715 A.2d 127 at 136 (retirement benefits come "entirely from firm profits that post-date the withdrawal of the partner"); Virginia State Bar Standing Committee on Legal Ethics Opn. No. 880 (1987) (distinguishing "compensation already earned" from benefits funded "by the employer or partnership or third parties" that qualify under retirement benefits exception); *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg* (Iowa 1990) 461 N.W. 2d 598, 601-602 [59 USLW 2311] (payments of former partner's equity holdings do not qualify as retirement benefit); *Pettingell v. Morrison, Mahoney & Miller* (Mass. 1997) 426 Mass. 253, 257-258 [687 N.E. 2d 1237] (distribution of acquired capital does not constitute retirement benefit); *Cohen v. Lord, Day & Lord* (NY 1989) 75 N.Y.2d 95, 100 [550 N.E. 2d 410] (retirement benefits exception does not authorize forfeiture of partner's uncollected share of net profits)."

The cited cases support a conclusion that compensation subject to forfeiture should not include compensation already earned by the lawyer (*Cohen*, and the Virginia Ethics Opinion, *supra*), or the lawyer's share in the equity or capital of the firm (*Anderson* and *Pettingell*, *supra*), but compensation subject to forfeiture may come from benefits funded "by the employer or partnership or third parties" (the Virginia Ethics Opinion, *supra*) and may come entirely from profits that post-date the withdrawal of the partner (*Neuman*, *supra*). However, none of these cases, nor the Virginia Ethics Opinion cited in the Commentary, dealt with a situation in which the retirement benefits are funded in part by future revenues [5] and in part from other sources, such as "the employer or partnership firm or third parties."

Although not explicitly discussed in the authorities cited in the Commentary, other sources of retirement benefit payments can include amounts reserved, or deducted (whether previously, currently or in the future), from the firm's net profits, to which a partner has no entitlement either while a partner, or upon his or her withdrawal from the firm; and investments and earnings on investments made by the firm (including the cash surrender value of, loans from, and death benefit proceeds from life insurance policies) to which none of the firm's lawyers expressly have a share allocated to, or owned by, him or her under the partnership agreement. Moreover, as a matter of policy, the use of such amounts previously reserved or deducted from the firm's profits creates no ethical concern in situations where, pursuant to the terms of the partnership agreement or other document, no lawyer in the firm is entitled to a share of, or to recoup, such amounts upon his or her withdrawal from the firm (regardless of whether they compete with the firm). Professor Robert Hillman, in discussing the ethics of "across-the-board" reductions in amounts payable to departing partners (prior to their retirement) states in relevant part: "To discourage departures and to avoid subsidizing competition that may itself affect [the firm's] income streams, a rational firm will seek to minimize payouts to departing partners, perhaps limiting such amounts to the return of capital the partners previously invested in the firm. Such a limited payout applied across-the-board to all departing partners would be unobjectionable under ethics norms. The ethics problem [outside the special circumstances of retirement] arises not from limited payouts but from differential payments that are reduced because of competition." [6] There are multiple sources of payment for retirement liabilities which do not constitute (1) compensation already earned by (or allocable to) the lawyer; (2) the lawyer's share of equity in the firm; (3) the lawyer's share of net profits; or (4) the lawyer's vested interest in a retirement plan.

Neither Model Rule 5.6, nor the majority of case law interpreting it, require that retirement benefits be paid solely from future firm revenues before a cost may be imposed for competitive

5. A distinction should be made in this context between revenues (gross receipts plus investment income) and profits (revenues less expenses).

6. *Hillman on Lawyer Mobility*, Robert W. Hillman, Professor of Law, University of California, Davis, Sec. 2.3.5.3 (2d ed., 2006 Supplement).

withdrawals. Moreover, *Babcock* does not reach the issue, nor does the California Supreme Court mandate such a limited definition of payments which may be contractually forfeited. The various courts which have addressed the issue attempt to determine whether the "toll" being charged to a terminating partner, (irrespective of the reasons for withdrawal) who elects to compete with his/her former firm, comes from a bona fide retirement benefit funded by receipts otherwise not traceable to an individual partner, or whether the "toll" deprives the withdrawing partner of what is essentially deferred compensation, previously earned and set aside for that specific partner, or the partner's own capital or equity in the firm. The *Neuman* court [7] cites with approval that age and length of service criteria are the "conditions that render ... payments 'retirement benefits'." [8]

The *Neuman* court looked extensively at the analysis and criticisms from Professor Hillman regarding the determination of what constitutes a retirement benefit and identified the following criteria as relevant to the analysis: (1) the presence of minimum age and service requirements; (2) the existence of provisions dealing independently with withdrawal for purposes of retirement and withdrawal for other reasons, and (3) the period over which the payments are to be made. Hillman's most recent articulated position with respect to the difficulties and challenges in tracing the source of benefits in a law partnership environment is a caution against rigidity: "Because of the law's reticence to impose forfeitures of interests in partnerships, it is understandable that some courts consider the source of the benefit in considering whether a retirement payment may be conditioned on non-competition with the firm. The challenge lies in tracing the source of a payment. In a law firm, partners 'fund' their own post withdrawal benefits by accepting less in the way of present compensation (i.e., allocation of current profits) in exchange for payments in the future. Any benefit paid to a withdrawing partner is a form of deferred compensation. This is true even of those plans basing benefits to a former firm member on a percentage of the firm's current profits. The profits allocable to the remaining partners are reduced, a consequence they accept in the hope that they will enjoy similar benefits when they leave the firm." [9]

Assuming a responsible law firm desires to provide bona fide retirement benefits, with such benefits being subject to forfeiture if the retired partner competes with the firm, it is in the best interests of the firm, its remaining partners and indirectly, the firm's clients, that it be financially able to pay such retirement obligations upon and after each partner's retirement. If no amounts have been accumulated with which to pay existing retirement obligations, the burden falls to the current partner group to forego current compensation to meet the shortfall. Partners who leave to avoid these funding demands exacerbate future funding shortfalls. A significant risk to the firm's ongoing viability and survival arises as a result.

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7. *Neuman v. Akman*, 715 A.2d 127 (D.C. 1998).

8. *Miller v. Foulston et al.*, 246 Kan. 450, 790 (Kan. 1990).

9. *Hillman on Lawyer Mobility*, *supra* at §2.3.5.7.

A retirement plan benefit eligible for the exception contained in Model Rule 5.6 should be one which recognizes that some partners, upon reaching a certain age, will stop practicing law, and as a consequence, experience a drop in income which the law firm has elected to supplement. To the extent a partner elects to stop practicing with a specific firm, and instead chooses to compete directly against it, such a salary supplementation is not only unnecessary, it functions to deprive the firm of current assets at the same time it risks losing business and future fees to the departing partner. The funding for this supplemental compensation can have a variety of different sources (current and future) without imposing a forfeiture of equity, capital or earned fees in the event of a competitive withdrawal.

It is better policy to encourage firms to be economically prudent and sensible in meeting their future obligations to fund partner retirement by utilizing some portion of firm current net profits and other resources, in addition to future firm revenues. As proposed, the language in section (b)(2) of Rule 5.6 will preclude firms from using any sources of funding other than future firm revenues for retirement plans if they also wish to include restrictive covenants for competitive withdrawals in their partnership agreements. Examples of economically viable funding sources which may run afoul of the Rule as proposed include: (1) Specific reservation and investment of a portion of current profits, which by the terms of the partnership agreement are not allocated or allocable to any partner but which are earmarked for purposes of meeting future funding obligations; (2) Funds received by a firm in the form of rebates from current partners with respect to the tax benefits received by each partner in a current year arising from the payment of tax-deductible retirement benefits in that current year; and (3) loans against the firm's appreciated assets.

It may also be fiscally prudent for a law firm, which is otherwise in compliance with the requirements of ABA Model Rule 5.6, to better protect its retired partners' benefits by having the then-current partners pay to the firm (out of pocket) additional amounts in one or more years. Under proposed Rule 5.6(b)(2), such payments could be impermissible because the source of the payments is not solely out of "future firm revenues", but rather is a payment from or on behalf of the firm funded by the remaining partners. Whether the current partners contribute from income which was generated before or after the retired partner's withdrawal, they do not violate the policy behind ABA Model Rule 5.6. See, Virginia Ethics Opinion, *supra*, which approves of retirement compensation funded "by the partnership or third parties". However, there is uncertainty as to how such funding would be viewed under California proposed Rule 5.6.

By way of specific examples, assume a law firm ("Law Firm") maintains a retirement plan designed to provide a steady stream of 120 monthly payments to a retired (noncompetitive) partner, after which any forfeiture based on competition with Law Firm terminates. A substantial portion of the benefits paid will come from future firm revenues, but some portion will not. Because monies are fungible, it is difficult, if not impossible, to identify the specific source for

any particular benefits payment. A partner's eligibility for retirement benefits is conditioned on reaching a minimum age and length of service. In an effort to be fiscally prudent, Law Firm establishes a pool of assets, primarily in the form of whole and universal life insurance policies on the lives of certain partners. Law Firm is the owner and beneficiary of these policies. Such an asset pool is recognized as a prudent means of amassing tax-favored cash build-up in the form of the cash surrender value of the policies, and to facilitate Law Firm's receipt of tax-free death benefit proceeds. Consequently, when a partner retires, Law Firm may look to these insurance policies to fund his or her benefits as follows: (1) borrowing against the cash surrender values of the policies; (2) withdrawals from life insurance policies; (3) death benefit proceeds paid on account of another partner's death; and (4) dividends on the life insurance policies.

In addition to utilizing insurance policies as a retirement benefit funding source, Law Firm may utilize several other sources for cash which under the proposed Rule would not constitute "future firm revenues": (a) a "reserve" created from current year's profits, which by agreement (typically 1%, but no more than 2% of net income), is not allocated, or allocable, to any specific partner, and the earnings thereon. This "reserve", which is not viewed as "compensation already earned by the lawyer" or as "the lawyer's share of the firm's profits," is used to pay insurance policy premiums, to pay the interest on any loans taken against cash surrender values of the policies and to pay current year retirement benefits; (b) a "rebate" from current partners is paid to Law Firm in an amount equal to the tax benefit received by each partner in a current year in connection with that partner's aliquot share of Law Firm's tax deduction for payment of current year retirement benefits. The "rebated" funds are available to be used for payment of retirement benefits in the current year, or in future years.

Law Firm allocates a specified percentage of current year's profits to partners on an annual basis. That amount, which becomes a special capital account credit for each eligible partner, along with any partner specific equity in Law Firm, is not subject to forfeiture under its retirement plan. Law Firm's provision for retirement benefit funding through asset accumulation, in addition to utilizing future revenues, offends neither the letter nor the spirit of Model Rule 5.6. Notwithstanding its compliance with the ABA Model Rule, Law Firm's plan will run afoul of proposed Rule 5.6 by utilizing funding sources not "solely from future firm revenues" to pay its retirement benefits.

The most recent relevant discussion of Model Rule 5.6 and its application in the context of a retirement benefit appears in the 2004 New Jersey case *Borteck v. Riker, Danzig, Sherer, Hyland & Perretti LLP*, 844 A.2d 521 (N.J. 2004), a case not referenced in the current Comment portion of proposed Rule 5.6. After reciting the retirement provisions of the partnership agreement in dispute, the New Jersey Supreme Court finds itself persuaded both by actuarial expert testimony that enumerated the usual indicia present in a "legitimate retirement plan" under the Internal Revenue Code, to wit: (1) minimum age requirements; (2) terms containing benefit calculation

formulas; (3) defined term for benefit payouts; (4) benefits increase as years of service increase; and (5) benefits are payable to a deceased retiree's estate; and by references to Professor Hillman's bona fide retirement plan criteria as recited in an earlier Iowa case. "According to Hillman, the first and most important factor 'is the existence of minimum age and service requirements'...a second factor to consider is the existence of provisions dealing independently with withdrawal for purposes of retirement and withdrawal for other reasons...[the] third factor focuses on the time period over which benefits are to be paid, the implication being that 'the payment of benefits over an extended period supports the conclusion that the payments are in fact for purposes of funding a retirement." [10] No reference is made by either expert source to benefits being funded solely from future revenues of the firm. While another relevant consideration for the New Jersey Court was that the benefits established under the plan in question were funded at least in part from revenues that post-date the withdrawal of a partner,[11] it did not require that such retirement benefit funding come **solely** from future revenues.

We urge the Commission to reconsider the language and intention of proposed Rule 5.6(b)(2) so that in determining what constitutes a valid retirement benefit, so long as the factors enumerated in proposed Rule 5.6(b)(1) are met, and the four prohibited sources [12] listed in proposed Rule 5.6(b)(2) are not forfeited on withdrawal, it should be sufficient that some portion of the funding comes from future revenues. By no means should the proposed Rule require all, substantially all, or a predominant portion of the funding to come solely from a firm's future revenues. Provisions for forfeiture of retirement benefits which are funded at least in part from a firm's future revenues should come within the safe-harbor provision of Rule 5.6.

2. Rule 5.6(b)(2) should retain the current list of compensation sources, forfeiture of which are prohibited under existing case law.

With these comments, KMR does not mean to suggest that an otherwise eligible withdrawing partner, whatever the motivation, should be required to forfeit his or her specific capital account or equitable interest in a law firm, the compensation already earned by the lawyer, or the lawyer's share of net profits. KMR also applauds the Commission's efforts to provide additional guidance by proposing definitional criteria for a bona fide retirement plan, as enumerated in proposed Rule 5.6(b)(1). However, KMR believes that the language in proposed Rule 5.6(b)(2), which requires that a payment shall not be forfeited unless it comes solely from future firm revenues, creates unintended restrictions and jeopardizes retirement arrangements for California purposes of otherwise compliant plans.

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10. *Borteck*, 844 A.2d at 528-29.

11. *Id*. At 529.

12. I.e., compensation already earned by the lawyer, the lawyer's share in the equity of the firm, the lawyer's share of the firm's net profits, and the lawyer's vested interest in a qualified retirement plan.

While it is admirable to provide guidance regarding the main sources of payment which do not constitute bona fide retirement benefit payments for purposes of the exception under proposed Rule 5.6, it is impossible to define the infinite number of legitimate sources of funding which do constitute bona fide retirement benefit payments. It is far better to identify a non-exclusive list of sources of benefit payments that are nonforfeitable, and to leave to the courts the determination of whether the retirement plan or arrangement complies with proposed Rule 5.6, based on the specific relevant facts and circumstances of a particular case. Recognizing that there are numerous sources of forfeitable payments that do not violate applicable case law, we recommend that Rule 5.6(b)(2) not attempt to specify the universe of sources for forfeitable payments that do not violate applicable case law.

3. The Commentary should be modified so it reflects the proposed revisions.

If the Commission agrees with the recommended revisions to Rule 5.6(b)(2), we recommend that the Commentary be modified consistent therewith. In substance, the Commentary should add to its summary of applicable case law citation a reference to *Borteck*, and should recognize that retirement benefits may be paid from sources which include but are not limited to: (i) future firm revenues which post-date the lawyer's retirement; (ii) reserves or deductions from firm net profits intended for use as payment of such retirement benefits and which, by the terms of the firm's partnership agreement or other documents, do not constitute compensation earned by the lawyer, the lawyer's share in the equity of the firm or the lawyer's share of net profits; (iii) amounts funded or contributed by other partners; (iv) investments and reinvestments of any sources of funding permitted hereunder, including the ownership of life insurance policies and the cash surrender value, withdrawals, loan proceeds and death benefit proceeds from life insurance policies; and (v) earnings and appreciation on investments and reinvestments; and (vi) proceeds from financing, refinancing, sale or other disposition of such investments.

4. The Commentary should clarify that the phrase "lawyer's vested interest in a retirement plan" refers to retirement plans qualified under ERISA.

Proposed Rule 5.6(b)(2) states that the effective compensation cannot be paid from, *inter alia,* "the lawyer's vested interest in a retirement plan." The Commentary does not explain what this term (a term of "art" under The Employee Retirement Income Security Act of 1974, as amended- "ERISA") means but there has been informal confirmation that the reference is to qualified pension and profit-sharing plans. At a minimum, the Commentary should explicitly so state. The Commission might consider revising Rule 5.6(b)(2) further to add the words "qualified under the Employee Retirement Income Security Act".

CONCLUSION

We are available to discuss in greater detail with members of the Commission these comments and the manner in which proposed Rule 5.6 might be modified to meet the Commission's objectives while assuring that KMR's Plan continues to be in compliance with both ABA Model Rule 5.6 and with proposed Rule 5.6 in California.

Very truly yours,

TAGGART & HAWKINS



Karen L. Hawkins

KLH/hlk
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Enclosures: As stated

SUGGESTED REVISIONS TO~~COMMISSION'S~~ PROPOSED RULE, OCTOBER 16~~JUNE 30~~, 2006 ~~(CLEAN VERSION)~~

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

(a) A lawyer shall not offer or enter into:

(1) A partnership, shareholder, operating, employment or other similar agreement that restricts the right of a lawyer to practice law after termination of the relationship; or

(2) Any other agreement, whether in connection with the settlement of a lawsuit or otherwise, that restricts any lawyer's right to practice law.

(b) Notwithstanding paragraph (a)(1) of this Rule, or unless otherwise proscribed by law, a lawyer may offer, or enter into, an agreement that provides for forfeiture of any of the compensation to be paid by a law firm to a lawyer after termination of that lawyer's membership in, or employment by, that law firm if the lawyer competes with that law firm after such termination, provided that:

(1) The lawyer's eligibility for receipt of such compensation is conditioned on minimum age and length of service requirements; and

(2) The affected compensation will not be paid ~~solely from future firm revenues, and not~~ from compensation already earned by the lawyer, the lawyer's share in the equity of the firm, the lawyer's share of the firm's net profits, or the lawyer's vested interest in a retirement plan.

Comment

[1] Paragraph (a)(1) permits a restrictive covenant in a law corporation, partnership or employment agreement that provides that a lawyer who is a law corporation shareholder, partner or associate shall not have a separate practice during the existence of the relationship. However, upon termination of the relationship (whether voluntary or involuntary), the lawyer is free to practice law without any contractual restriction except in the case of retirement from the active practice of law or as further noted below.

[2] Paragraph (b)'s exception for certain agreements relating to compensation to be paid after termination of membership in or employment by a law firm does not apply to all agreements in connection with any withdrawal from a firm but is intended to apply to bona fide retirement agreements. Authorities interpreting the analogous "retirement benefits" exception under American Bar Association Model Rule 5.6 have identified the factors enumerated in paragraphs (b)(1) ~~and (b)(2)~~ as essential attributes of such retirement agreements. See, e.g., *Neuman v. Akman* (D.C. 1998) 715 A.2d 127, 136-137 (lifetime payments to former partners who satisfy age and tenure requirements qualify as true retirement benefits); *Donnelly v. Brown*, *Winick, Graves*, *Gross*, *Baskerville*, *Schoenebaum & Walker*, *P.L.C.* (Iowa 1999) 599 N.W.2d 677, 682 (policy of distributing benefits after "ten years of service and sixty years of age or twenty-five years of service...

clearly qualifies as a retirement plan"); *Miller v. Foulston*, *Siefkin*, *Powers & Eberhardt* (Kan. 1990) 246 Kan. 450, 458 [790 P.2d 404] (payments made to former partners who satisfy age, longevity or disability requirements "[f]it squarely within the exception of [the ethics rule]").

[3] The aforementioned~~Significantly, these~~ authorities have applied the retirement benefits exception to circumstances involving less than full retirement, thereby implicitly rejecting the notion that public policy requires the complete cessation of practice in order to qualify under the exception to the Rule.

[4] Paragraph (b)(2) specifies four potential sources for post-termination payments which do not qualify for the safe-harbor exception of paragraph (b), namely, ~~See also *Neuman v. Akman*, supra, 715 A.2d at 136 (~~retirement benefits paid~~come "entirely~~ from compensation already earned as a lawyer, the lawyer's share in the equity of the firm, the lawyer's share of the firm's net profits, and the lawyer's vested interest in a retirement plan. For this purpose, a lawyer's vested interest in a retirement plan refers to a qualified retirement plan that is governed by the Employee Retirement Income Security Act of 1974, as amended (ERISA).~~post-date the withdrawal of the partner");~~ Virginia State Bar Standing Committee on Legal Ethics Opn. No. 880 (1987) (distinguishing "compensation already earned" from benefits funded "by the employer or partnership or third parties" that qualify under retirement benefits exception); *Anderson v. Aspelmeier*, *Fisch*, *Power*, *Warner & Engberg* (Iowa 1990) 461 N.W.2d 598, 601-602 [59 USLW 2311] (payments of former partner's equity holdings do not qualify as retirement benefit); *Pettingell v. Morrison*, *Mahoney & Miller* (Mass. 1997) 426 Mass. 253, 257-258 [687 N.E.2d 1237] (distribution of acquired capital does not constitute retirement benefit); *Cohen v. Lord*, *Day & Lord* (NY 1989) 75 N.Y.2d 95, 100 [550 N.E.2d 410] (retirement benefits exception does not authorize forfeiture of partner's uncollected share of net profits.~~).~~

The rule does not require safe-harbor compensation to be paid from any specified source or sources. See *Borteck v. Riker, Danzig, Sherer, Hyland & Perretti LLP*, (N.J. 2004), 844 A.2d 521 (retirement benefits paid at least in part from future firm revenues).

All funding sources, other than the four non-qualifying sources described in the preceding paragraph, can be acceptable sources. Thus, the affected compensation described in paragraph (b)(2) may be paid from sources which include, but are not limited to: (i) future firm revenues which post-date the lawyer's retirement; (ii) reserves or deductions from firm net profits intended for use for payment of such current or future retirement benefits and which by the terms of the firm's partnership or other documents do not constitute compensation earned by the lawyer, the lawyer's share in the equity of the firm or the lawyer's share of net profits; (iii) amounts funded or contributed by other partners; (iv) investments and reinvestments of any sources of funding permitted hereunder, including the ownership of life insurance policies and the cash surrender value, withdrawals, loan proceeds and death benefit proceeds from life insurance policies; (v) earnings and appreciation on investments and reinvestments, and (vi) proceeds from financing, refinancing, sale or other disposition of such investments.

[5]~~[3]~~ While this Rule bars agreements restricting an attorney's right to practice law after withdrawal from a law firm, the Supreme Court has held that former Rule 1-500 does not per se prohibit a law partnership agreement that provides for reasonable payment by a withdrawing partner who continues to practice law in competition with his or her former partners in a specified geographical area after withdrawal. See *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80]. The Court's rationale for permitting such agreements is that "an agreement that assesses a reasonable cost against a partner who chooses to compete with his or her former partners does not restrict the practice of law. Rather, it attaches an economic consequence to a departing partner's unrestricted choice to pursue a particular kind of practice." Id. at 419. However, the toll exacted must not be so high that it unreasonably restricts the practice of law. Id. at 419, 425. See also *Haight, Brown & Bonesteel v. Sup. Ct*. (1991) 234 Cal.App.3d 963, 969-971 [285 Cal.Rptr. 845] (former Rule 1-500 does not prohibit agreement providing for withdrawing partner to compensate former partners if withdrawing partner chooses to represent clients previously represented by firm); *Schlessinger v. Rosenfeld*, *Meyer & Susman* (1995) 40 Cal. App. 4th 1096 [47 Cal.Rptr.2d 650] (partnership agreement reducing withdrawing partner's share of fees if such partner competes with law firm not considered unlawful toll on competition). But see *Champion v. Superior Court* (1988) 201 Cal. App. 3rd 777 [247 Cal.Rptr. 624] (forfeiture of future fees for cases taken by withdrawn partner unconscionable under former Rule 2-107).

[6]~~4~~] This Rule is not intended to prohibit agreements otherwise authorized by Business and Professions Code sections 6092.5(i) or 6093 (governing agreements regarding conditions of practice, entered into between respondents and disciplinary agency in lieu of disciplinary proceedings or in connection with probation) or in connection with the sale of a law practice as authorized by Business & Professions Code sections 16602 et seq. (governing agreements not to compete in connection with dissolution of or dissociation from partnership); see also Los Angeles Bar Ass'n Form. Opn. 480 (1995) (partnership agreement that does not survive analysis under Business and Professions Code section 16600 et seq. may violate former Rule 1-500).

Exhibit I

SUGGESTED REVISIONS TO PROPOSED RULE, OCTOBER 16, 2006

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

(a) A lawyer shall not offer or enter into:

(1) A partnership, shareholder, operating, employment or other similar agreement that restricts the right of a lawyer to practice law after termination of the relationship; or

(2) Any other agreement, whether in connection with the settlement of a lawsuit or otherwise, that restricts any lawyer's right to practice law.

(b) Notwithstanding paragraph (a)(1) of this Rule, or unless otherwise proscribed by law, a lawyer may offer, or enter into, an agreement that provides for forfeiture of any of the compensation to be paid by a law firm to a lawyer after termination of that lawyer's membership in, or employment by, that law firm if the lawyer competes with that law firm after such termination, provided that:

(1) The lawyer's eligibility for receipt of such compensation is conditioned on minimum age and length of service requirements; and

(2) The affected compensation will not be paid from compensation already earned by the lawyer, the lawyer's share in the equity of the firm, the lawyer's share of the firm's net profits, or the lawyer's vested interest in a retirement plan.

Comment

[1] Paragraph (a)(1) permits a restrictive covenant in a law corporation, partnership or employment agreement that provides that a lawyer who is a law corporation shareholder, partner or associate shall not have a separate practice during the existence of the relationship. However, upon termination of the relationship (whether voluntary or involuntary), the lawyer is free to practice law without any contractual restriction except in the case of retirement from the active practice of law or as further noted below.

[2] Paragraph (b)'s exception for certain agreements relating to compensation to be paid after termination of membership in or employment by a law firm does not apply to all agreements in connection with any withdrawal from a firm but is intended to apply to bona fide retirement agreements. Authorities interpreting the analogous "retirement benefits" exception under American Bar Association Model Rule 5.6 have identified the factors enumerated in paragraphs (b)(1) as essential attributes of such retirement agreements. See, e.g., *Neuman v. Akman* (D.C. 1998) 715 A.2d 127, 136-137 (lifetime payments to former partners who satisfy age and tenure requirements qualify as true retirement benefits); *Donnelly v. Brown*, *Winick, Graves*, *Gross*, *Baskerville*, *Schoenebaum & Walker*, *P.L.C.* (Iowa 1999) 599 N.W.2d 677, 682 (policy of distributing benefits after "ten years of service and sixty years of age or twenty-five years of service... clearly qualifies as a retirement plan"); *Miller v. Foulston*, *Siefkin*, *Powers & Eberhardt* (Kan. 1990) 246 Kan. 450, 458 [790 P.2d 404] (payments made to former partners who

satisfy age, longevity or disability requirements "[f]it squarely within the exception of [the ethics rule]").

[3] The aforementioned authorities have applied the retirement benefits exception to circumstances involving less than full retirement, thereby implicitly rejecting the notion that public policy requires the complete cessation of practice in order to qualify under the exception to the Rule.

[4] Paragraph (b)(2) specifies four potential sources for post-termination payments which do not qualify for the safe-harbor exception of paragraph (b), namely, retirement benefits paid from compensation already earned as a lawyer, the lawyer's share in the equity of the firm, the lawyer's share of the firm's net profits, and the lawyer's vested interest in a retirement plan. For this purpose, a lawyer's vested interest in a retirement plan refers to a qualified retirement plan that is governed by the Employee Retirement Income Security Act of 1974, as amended (ERISA). Virginia State Bar Standing Committee on Legal Ethics Opn. No. 880 (1987) (distinguishing "compensation already earned" from benefits funded "by the employer or partnership or third parties" that qualify under retirement benefits exception); *Anderson v. Aspelmeier*, *Fisch*, *Power*, *Warner & Engberg* (Iowa 1990) 461 N.W.2d 598, 601-602 [59 USLW 2311] (payments of former partner's equity holdings do not qualify as retirement benefit); *Pettingell v. Morrison*, *Mahoney & Miller* (Mass. 1997) 426 Mass. 253, 257-258 [687 N.E.2d 1237] (distribution of acquired capital does not constitute retirement benefit); *Cohen v. Lord*, *Day & Lord* (NY 1989) 75 N.Y.2d 95, 100 [550 N.E.2d 410] (retirement benefits exception does not authorize forfeiture of partner's uncollected share of net profits

The rule does not require safe-harbor compensation to be paid from any specified source or sources. See *Borteck v. Riker, Danzig, Sherer, Hyland & Perretti LLP,* (N.J. 2004), 844 A.2d 521 (retirement benefits paid at least in part from future firm revenues).

. All funding sources, other than the four non-qualifying sources described in the preceding paragraph, can be acceptable sources. Thus, the affected compensation described in paragraph (b)(2) may be paid from sources which include, but are not limited to: (i) future firm revenues which post-date the lawyer's retirement; (ii) reserves or deductions from firm net profits intended for use for payment of such current or future retirement benefits and which by the terms of the firm's partnership or other documents do not constitute compensation earned by the lawyer, the lawyer's share in the equity of the firm or the lawyer's share of net profits; (iii) amounts funded or contributed by other partners; (iv) investments and reinvestments of any sources of funding permitted hereunder, including the ownership of life insurance policies and the cash surrender value, withdrawals, loan proceeds and death benefit proceeds from life insurance policies; (v) earnings and appreciation on investments and reinvestments, and (vi) proceeds from financing, refinancing, sale or other disposition of such investments.

[5] While this Rule bars agreements restricting an attorney's right to practice law after withdrawal from a law firm, the Supreme Court has held that former Rule 1-500 does not per se prohibit a law partnership agreement that provides for reasonable payment by a withdrawing partner who continues to practice law in competition with his or her former partners in a specified geographical area after withdrawal. See *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80]. The Court's rationale for permitting such agreements is that "an agreement that assesses a reasonable cost against a partner who chooses to compete with his or her former partners does not restrict the practice of law. Rather, it attaches an economic consequence to a departing partner's unrestricted choice to pursue a particular kind of practice." Id. at 419. However, the toll exacted must not be so high that it unreasonably restricts the practice of law. Id. at 419, 425. See also *Haight, Brown & Bonesteel v. Sup. Ct*. (1991) 234 Cal.App.3d 963, 969-971 [285 Cal.Rptr. 845] (former Rule 1-500 does not prohibit agreement providing for withdrawing partner to compensate former partners if withdrawing partner chooses to represent clients previously represented by firm); *Schlessinger v. Rosenfeld*, *Meyer & Susman* (1995) 40 Cal. App. 4th 1096 [47 Cal.Rptr.2d 650] (partnership agreement reducing withdrawing partner's share of fees if such partner competes with law firm not considered unlawful toll on competition). But see *Champion v. Superior Court* (1988) 201 Cal. App. 3rd 777 [247 Cal.Rptr. 624] (forfeiture of future fees for cases taken by withdrawn partner unconscionable under former Rule 2-107).

[6] This Rule is not intended to prohibit agreements otherwise authorized by Business and Professions Code sections 6092.5(i) or 6093 (governing agreements regarding conditions of practice, entered into between respondents and disciplinary agency in lieu of disciplinary proceedings or in connection with probation) or in connection with the sale of a law practice as authorized by Business & Professions Code sections 16602 et seq. (governing agreements not to compete in connection with dissolution of or dissociation from partnership); see also Los Angeles Bar Ass'n Form. Opn. 480 (1995) (partnership agreement that does not survive analysis under Business and Professions Code section 16600 et seq. may violate former Rule 1-500).

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Re: Proposed Amendments to the Rules of Professional Conduct
Comment on Proposed Revisions to Rule 1-500 (proposed Rule 5.6)

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed the proposed amendments to Rule 1-500 of the Rules of Professional Conduct (proposed Rule 5.6), Restrictions on a Lawyer's Right to Practice.

5.6 (b)

It is our Committee's recommendation to delete the portion of proposed Rule 5.6 subparagraph (b) that attempts to make a disciplinary offense the restrictions on covenants not to compete that are sometimes included in employment agreements, dissolution agreements, separation agreements, and the like. Both the text of proposed Rule 5.6 and the comments attempt to analyze case law governing payment of benefits and compensation post-retirement or withdrawal of a lawyer from a law firm. Our Committee believes the proposed modifications contain an incomplete analysis of the civil authorities interpreting those situations in which a law firm and its affiliated lawyer(s) may contract to restrict post-employment retirement benefits and/or other compensation to be paid to a lawyer formerly affiliated with the firm. The applicable statutory and case law authorities are not amenable to comprehensive summary in the context of a disciplinary rule and comments.

Most important, however, our Committee believes the enforcement and interpretation of, or challenge to, such agreements are beyond the appropriate scope of disciplinary rules, and cannot constitute ethical violations. Civil courts are the proper forum for the enforcement or challenge to retirement benefits and post-employment compensation agreements, not the disciplinary authority.

Therefore, our Committee opposes the proposed modifications to current Rule 1-500(b). Equally important, our Committee strongly urges that the "guidelines" the Commission seeks to include and adjunct to proposed Rule 5.6 are beyond the appropriate scope of the disciplinary rules, and are more properly left to the civil courts for a case by case determination.

5.6(a)

We also noticed that the *Discussion* in current Rule 1-500 relating to subparagraph (a) of the current rule, is being deleted in its entirety (*see footnote1 below*), with no proposed revision. It is unclear from the Commission's Discussion Draft of 2006 the reasons behind such deletion.

The current *Discussion* makes clear that it is unethical, in connection with the settlement of a case, to either suggest or agree that, as a condition of the settlement, an attorney for one of the parties (typically plaintiff's counsel), refrain from representing other clients against the same opposing party (typically the defendant) in other cases. This has traditionally been accepted as an improper attempt to: (1) conceal or bury adverse information about a tort to prevent other injured parties from being represented by experienced counsel; and (2) to elevate the interests of the current plaintiff and/or that plaintiff's attorney over the interests of public good and/or other similarly situated plaintiffs. It is important to have a comment on the scope of the application of subparagraph (a) to the negotiation of settlement agreements. Therefore, our Committee opposes the deletion of the first two sentences in the "*Discussion*" section of current Rule 1-500, regarding the scope of the application of subparagraph (a) to the negotiation of settlement agreements.

Our Committee urges the Commission to keep the following comment in the proposed Rule 5.6(a):

> Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.

Rule 2.4

Sincerely yours,

Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

Footnote 1:

> *Discussion:*
>
> Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.
>
> Paragraph (A) permits a restrictive covenant in a law corporation, partnership, or employment agreement. The law corporation shareholder, partner, or associate may agree not to have a separate practice during the existence of the relationship; however, upon termination of the relationship (whether voluntary or involuntary), the member is free to practice law without any contractual restriction except in the case of retirement from the active practice of law. (Amended by order of Supreme Court, operative September 14, 1992.)

Hollins, Audrey

From: Difuntorum, Randall
Sent: Tuesday, November 14, 2006 1:04 PM
To: McCurdy, Lauren; Hollins, Audrey; Lee, Mimi
Subject: FW: BASF Legal Ethics Committee comment on certain June 2006 State Bar Rules Revision Commission proposed rule revisions

Lauren, Audrey, & Mimi:

Here is another Rules Revision Commission comment from BASF. The rule which is the subject of the comment, rule 5.6 [1-500], is not on the December 1st agenda but it still needs to be numbered and and then uploaded to the formsite database. Thanks. - Randy D.

****

Randall Difuntorum
Director, Professional Competence
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Rule 2.4

-----Original Message-----
From: Philip Humphreys [mailto:phumphre@lmi.net]
Sent: Monday, November 13, 2006 6:10 PM
To: Difuntorum, Randall
Subject: BASF Legal Ethics Committee comment on certain June 2006 State Bar Rules Revision Commission proposed rule revisions

To:

Randall Difuntorum, Esq.

Staff Counsel, Professional Responsibility

State Bar of California

From:

Philip D. Humphreys, Chair

Legal Ethics Committee

Bar Association of San Francisco

Our comments referred to above were delivered to you on October, 16, 2006.

However, one comment was inadvertently omitted from our transmittal. It is attached to this email in .pdf format.

Rule 5.6 (CRPC Rule 1-500): *(Restrictions on a Lawyer's Right to Practice)*

Our committee does not object to any of the substantive changes to this rule.

However, two matters implicit in the changes to proposed Rule 5.6 should receive the attention of the Commission:

First, present paragraph (B) of Rule 1-500 is not included in draft Rule 5.6. We take this deletion to mean that the substance of this paragraph will be addressed by the Commission elsewhere in its revisions.

Second, the attention of the Commission is invited to the letter previously submitted by our committee regarding proposed revisions to CRPC Rule 2-300, Sale of a Law Practice. As this rule is considered by the Commission we again urge that sole practitioners be treated similarly to firm partners/shareholders in realizing on the good will created during the lawyer's professional life. In doing so, the Commission may see the need to revisit Rule 5.6

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OC WOMEN LAWYERS ASSOC.

MEMORANDUM

Date: December 1, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct of The State Bar of California

From: Orange County Bar Association ("OCBA")

Re: Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California Developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

Subj: Proposed Rule 5.6: Restrictions on Lawyer's Right to Practice [1-500]

Founded over 100 years ago, the Orange County Bar Association has over 9,800 members, making it the second largest voluntary bar association in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared jointly by the Professionalism & Ethics and Administration of Justice Committees.

The OCBA respectfully submits the following concerning the subject proposed Rule:

*****

Comment:

We are in agreement with the changes to Rule 5.6 (existing Rule 1-500) with the exception of the deletion of former paragraph 1-500(B) ("A member shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these rules.") This paragraph should be maintained or an appropriate reference made to its continuation as part of a cross-referenced new Rule. Deletion of the paragraph without comment or cross-reference will lead to incorrect claims that the old paragraph restrictions had been omitted as unnecessary or incorrect. This subsection should be maintained.

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WWW.OCBAR.ORG

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 7.1: Communications Concerning the Availability of Legal Services

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule 7.1:

* * * * *

Comment 1:

The Commission should reinsert the words "tends to" in Rule 7.1 (c)(3). Current Rule 1-400(D)(2) states that matters presented or arranged in a manner or format that tends to confuse, deceive or mislead the public are prohibited. Proposed rule 7.1 (c) (3) deletes the words "tends to."

Rationale For Comment 1:

This deletion would seem to heighten the bar for prosecution, and correspondingly lower the public protection the rule is designed to provide. Therefore, we recommend the words "tends to" be reinserted. We otherwise approve the proposed rule.

HF&J A HOGE, FENTON JONES & APPEL, INC.

Attorneys at Law | San Jose | Pleasanton | East Palo Alto | Hollister

James E. Towery
408.947.2432
jet@hogefenton.com

October 13, 2006

Audrey Hollins
State Bar of California
Office of Professional Competence,
Planning and Development
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Revisions to the California Rules of Professional Conduct
Our File No.: 77218

Dear Ms. Hollins:

Thank you for inviting comments on the proposed revisions to California's Rules of Professional Conduct. I am writing on behalf of Key Professional Media, Inc., the publisher of *Super Lawyers*® magazines. *Super Lawyers* is one of numerous publications and entities—including Martindale-Hubbell, *The American Lawyer*, the *National Law Journal*, *Chambers USA*, and the *Best Lawyers in America*, among others—that rate the qualifications of lawyers for the benefit of other lawyers and consumers.

Rule 2.4

We applaud the Rules Revision Commission for its hard work and commitment to maintaining the integrity of the legal profession. The purpose of these comments is to bring to your attention one ramification of some of the proposed amendments: Several provisions, which may be otherwise unobjectionable, might sweep broadly enough to cause cautious lawyers to refrain from advertising their selection or ranking by lawyer-rating services that are of value to consumers choosing counsel and lawyers making referrals. For example, one proposed comment to Rule 7.1 would prohibit lawyers from advertising their achievements if such an advertisement could "lead a reasonable person to form an unjustified expectation" about the lawyer's ability, or could be viewed as "an unsubstantiated comparison" between a lawyer and her peers "presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated." Proposed Rule 7.1 cmt. [3]. More generally, lawyer advertisements would be prohibited if they "[o]mit[] to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public." Proposed Rule 7.1(c)(4). Together, these provisions might be read to prohibit a lawyer from reporting the truthful fact that she has received an AV rating from Martindale-Hubbell, or has been listed by publications, such as *Best Lawyers in America* and *Super Lawyers*, that conduct peer reviews and assess other achievements.

We are not asking that these provisions be eliminated, but only that they be clarified. The final rule should make clear that it is permissible for lawyers or law firms to truthfully reveal to potential clients that bona fide independent entities—such as publishers of periodicals or consumer guides—have recognized them or rated their qualifications in some reasonable way.

These ratings are of great value to prospective clients who are hungry for any information that bears on quality, particularly information about a lawyer's reputation among peers. Just as consumers rely on independent ratings to guide other important decisions—such as what hospitals to go to or what colleges to attend—they should be allowed to consider similar bona fide ratings in the mix of information they assess as they choose legal counsel. These ratings are especially valuable to the average consumer, who cannot afford to hire the most famous lawyers, but nevertheless needs some signal to assure himself that the lawyer he is about to choose is reputable. There is nothing inherently misleading or untoward about advertising these ratings, so long as the rating entity is independent of the lawyers themselves, provides some explanation for the criteria and process by which the rating is made, and does not award ratings on the basis of financial contributions. Because these ratings are valuable to clients and not misleading, and because they have already proven themselves useful in the marketplace, it would be both harmful to the public and unconstitutional to prohibit lawyers from sharing this information with potential clients, as the Supreme Court has often emphasized that ethics rules may not constitutionally ban lawyer advertising unless such advertising is inherently misleading. The proposed rules should be amended to permit lawyers to refer to bona fide professional ratings in their advertising; a simple proviso to the proposed rules would preserve the core of the rules, but eliminate the most serious practical and constitutional concerns. **Language for a modest amendment is proposed in the final section of this submission.**

Lawyer-Rating Publications and Their Selection Processes

As you may be aware, there exists a wide range of independent ratings and assessments of lawyers and law firms that provide valuable information to consumers. Some of these ratings are largely subjective and others are somewhat objective. Some are bestowed on many lawyers, and others are bestowed only on one or two lawyers a year. Some (like *Super Lawyers*) are subject to rigorous and highly transparent peer-review processes and quality checks, and others seem more subjective and opaque. The common feature of all these assessments is that they are made by entities that are entirely independent of the lawyers themselves and they rate lawyers only on the basis of quality, achievement and reputation. Here is a brief description of the processes by which several publications select the lawyers in their ratings:

Super Lawyers.[1] *Super Lawyers* is a group of magazines that publishes articles of interest to lawyers, as well as lists of highly regarded attorneys in various practice areas. Each stand-alone magazine, which comes out once a year, covers a specific geographic market. There are, for example, separate *Super Lawyers* magazines covering the Northern California, Southern California,

[1] A New Jersey lawyer advertising committee recently concluded that it is improper for lawyers to advertise that they were listed in one of the *Super Lawyers* magazines. As is explained below, that opinion was based on a complete misapprehension of the *Super Lawyers* selection process. The New Jersey Supreme Court has stayed the opinion.

and San Diego legal market; editions in other parts of the country may cover entire states or regions. Furthermore, the *Super Lawyers* lists are also published annually (along with editorial content), in some markets, as inserts or special advertising sections in regional general-interest periodicals.

Super Lawyers strictly adheres to a rigorous selection process directed at casting as wide a net as possible, evaluating quality in the most objective possible terms, and verifying and validating its data. The only way a lawyer can be listed in a *Super Lawyers* magazine is through this selection process; no lawyer can ever buy her way on to the list. Lawyers (and other advertisers) can buy advertisements in *Super Lawyers* magazine and other local periodicals that publish the lists. But the determination whether a lawyer will be selected by *Super Lawyers* is independent of any advertising or other payments that are made to the magazine. In fact, advertising is sold well after the lawyer selection process has concluded. No one can "pay to play," or influence the selection process in any illegitimate way.

The *Super Lawyers* selection process has four phases. Phase One is an extensive effort to identify the largest possible pool of the most highly regarded practitioners in the relevant state. Each year, magazine staff mails a ballot to virtually every lawyer resident in the relevant state and admitted to practice in the relevant market for at least five years. Nationwide, it will send ballots to 800,000 lawyers this year. Every recipient of a ballot is asked to nominate the best lawyers he or she has *personally* observed in action. Attorneys may not vote for themselves, and are limited in how many colleagues from their own firm they can nominate. Every nomination is given a point value, with nominations from outside a lawyer's firm bearing a much higher point value than a nomination from within the lawyer's own firm. But *Super Lawyers* does not rest on external nominations alone. The research staff also independently searches for qualified candidates by scouring professional databases, press, and websites, and by interviewing law firms' managing partners and marketing directors—all with a view toward identifying highly talented lawyers who might have been missed in the balloting process, particularly talented lawyers in specialty areas or with low-visibility (yet high-quality) practices.

Phase Two is the evaluation process. The *Super Lawyers* staff conducts independent research on every candidate, searching for evidence of peer recognition and professional achievement. It gathers information across 12 criteria: recent verdicts and settlements; transactions; representative clients; experience; honors and awards; special licenses and certifications; position within law firm; bar and or other professional activity; pro bono and community service; scholarly lectures and writings; education and employment background; and other outstanding achievement. It then assigns a point value to each criterion.

Phase Three is peer evaluation by practice area. The practitioners who receive the highest point values in their areas of practice are recruited to rate all the other practitioners in the same practice area. In all, *Super Lawyers* designates up to 60 practice areas, which means it appoints dozens of blue ribbon panels in each jurisdiction to evaluate the lists in their own areas of expertise. Members of the blue ribbon panel may also add candidates to the selection pool.

Phase Four is the final selection. Once all point totals are tallied, candidates are grouped according to the size of their firms. The staff places the top lawyers in each category on the *Super*

Lawyers list, until it has selected a number of candidates that equals 5% of the total active resident bar.

Before publishing the lists, *Super Lawyers* takes two additional steps. First, it conducts a Web-based search to ensure that any candidate for the lists is not subject to public disciplinary proceedings or has any other outstanding matters that would reflect adversely on her. Second, no lawyer's name is published unless she responds to an inquiry personally verifying the information to be published, and staff sends each lawyer a declaration to sign averring that she has never been subject to disciplinary or criminal proceedings.

Martindale-*Hubbell Ratings.* These listings, focused on lawyers' legal ability and ethical qualifications, are based on confidential questionnaires and interviews with members of the bar and bench. Lawyers are evaluated at various points in their careers—about every five to eight years. Lawyers who are found to meet the publishers' standards may be awarded letter grades commensurate with their experience level. Attorneys are awarded a grade of AV, BV, or CV based on their peer-reviewed level of experience and legal ability. (The "V" indicates that Martindale has concluded that the lawyer meets "very high" ethical standards; only lawyers who meet these standards are rated.) Martindale does not disclose the criteria by which it arrives at any of these grades. What we do know is that Martindale rates 45% of the more than 800,000 lawyers in its directories. Approximately 21% of all attorneys in the Martindale directory (and 47% of all lawyers who are rated) receive an AV rating, 21% receive a BV rating, and 3% receive a CV rating; the remaining attorneys are unrated. Martindale also publishes a book, *The Bar Register of Pre-Eminent Lawyers*, which it calls "the most exclusive directory of law firms," listing only those attorneys that "have earned the AV® Rating ... and have therefore been designated by their colleagues as preeminent in their field." *See* http://www.martindale.com. The Martindale ratings are also prominently featured on its lawyer-referral website for consumers, which bills itself as "the most trusted source for identifying qualified legal counsel" and "the #1 online lawyer directory." *See* http://www.lawyers.com.

Chambers USA Listings. Chambers is a London-based publisher that rates U.S. law firms and attorneys nationwide and publishes an annual directory. It designates "leading firms" in particular practice areas, and labels top attorneys as "senior statesm[e]n," "star[s]," "up-and-coming individual[s]," and "senior associates to watch." These honorifics are based on submissions by the law firms and attorneys themselves, as well as by the "referees" they designate—their clients, for the most part. *Chambers* does not publicly disclose its selection criteria or process. All it says is that it ranks lawyers on a scale from 1 to 6, based upon unsolicited submissions by law firms and personal interviews of 7,000 lawyers. *See* http://www.chambersandpartners.com.

Best Lawyers in America. Published annually as a book, *Best Lawyers in America* lists lawyers and law firms that are considered at the top of their respective fields. Lawyers are nominated by a "voting pool," but the editors will also consider unsolicited nominations. The voting pool consists of lawyers who had attained the honor in the previous year. The editors select among the nominees based on telephone interviews of clients, colleagues, and the nominees themselves. In addition, lists drawn from the *Best Lawyers* listings are published in advertising-supported general-interest magazines. *See* http://www.bestlawyers.com.

American Lawyer Litigation Department of the Year. Every other year, *The American Lawyer* magazine identifies the "Litigation Department of the Year," and four runners-up. It also identifies the "Best" litigation department in a variety of substantive arenas—such as intellectual property; labor and employment; and product liability. *The American Lawyer* explains its process, but it acknowledges that ultimately the choice is supremely subjective. It "invite[s] ... firms to report ... no more than five examples of 'significant achievements'" in their litigation work. These submissions are reviewed by "reporters and editors" and "whittled down ... to a short list of finalists." Magazine staff "visit[]" the finalists, and solicit "client references" as well. On the basis of this information, winners and runners-up are selected in each category, although *The American Lawyer* provides no description of the criteria by which it ranks and selects among all the candidates, much less how much value it places on each criterion. *American Lawyer*, Jan. 2006, at 69.

American Lawyer A-*List.* *The American Lawyer* magazine annually compiles a list of top law firms nationwide and dubs the top 20 in their rankings as the "A-List" of firms, which they also refer to as a "select group" of the "New Elite." The rankings are based on both objective and subjective criteria: law firm revenues, pro bono work, attorney diversity, and associate "satisfaction," all of which are quantified in some way and incorporated into a complex formula. *American Lawyer*, June 2006, at 99.

Independent Ratings Are Helpful to Consumers and Lawyers Alike

As stated previously, lawyer ratings provide a significant benefit to both consumers and lawyers. Whenever a consumer hires a professional to provide personal services, whether it is a doctor, a financial planner or whatever, one piece of highly relevant information useful to the consumer is the reputation of that professional. This is no different than consumers selecting which graduate school to attend based in part on rankings in *U.S. News & World Report*, or selecting a restaurant based in part on the Zagat's ® rating. That such ratings are based upon reputational considerations does not make them misleading, and in fact such ratings provide a valuable service to the public.

Indeed, one of the most important pieces of information a consumer (or a lawyer making a referral) can have about a lawyer is the lawyer's reputation among her peers. Under usual circumstances, current information on a lawyer's reputation is a better indication of quality than what school the lawyer graduated from 20 years earlier, what courts have admitted her, or her own reports on professional experience and expertise. Information about reputation is valuable to the consumer regardless of whether that reputation places the lawyer among the handful at the pinnacle of her field (as the *American Lawyer* rankings do) or places the lawyer in the top 5% of the pack (as the *Super Lawyers* rankings do). In fact, the latter information is far more valuable to the average consumer. The vast majority of consumers are not in a position to hire the lawyers who are reputed to be the absolute best in their fields. But that does not mean that they should settle for the worst, or even the bottom half. These consumers would still be eager to know whether the lawyer they are interviewing is perceived to be *near* the top of the pyramid. *That* is

information that is much harder to come by, especially for a consumer who does not have a golden Rolodex or the capacity to reach the top lawyers directly for recommendations.

Consumers are not the only ones who need this information. The information is also valuable for other attorneys. Clients often ask their lawyers to refer them to specialists in other fields, or need legal assistance in other jurisdictions. When a lawyer does not have a personal connection with the relevant field or jurisdiction, she may wish to consult reliable publications that independently rate or assess lawyers to make an informed recommendation.

Of course, inclusion in any list is not a guarantee of quality, and exclusion is not a brand of mediocrity. Designation on a *Super Lawyers* list or the list of *America's Best Lawyers*, or designation as an *American Lawyer* Litigation Department of the Year, is just one piece of information that a consumer may consider in the mix in choosing which counsel to retain. Just as law school and class rank are relevant and permissible facts to reveal to consumers—even though it would be inadvisable to choose a lawyer on those facts alone—so, too, consumers should not be shielded from independent ratings, even though any one rating, alone, is never definitive.

Advertising One's Listing in Lawyer-Rating Publications Is Not Misleading

There is nothing inherently misleading in such an advertisement. Any reasonable consumer understands that a lawyer who is selected for inclusion in a *Super Lawyers* magazine cannot guarantee a winning jury verdict in a single bound, and that a lawyer recognized by peers on the *Best Lawyers* list, or an AV-rated lawyer, is not necessarily going to secure better results than a lawyer who, for whatever reason, did not. Consumers understand that these ratings are no more guarantees of success or superiority than a position on the law review, a degree from Harvard, or experience in 20 jury trials.

The reality is consumers have become adept at assessing these sorts of external ratings. They evaluate ratings in relation to some of their most important life decisions. Ratings are not just a part of choosing a DVD player or a car. They also guide consumers in the choice of colleges, heart surgeons, cancer centers, supported living communities, and investments. There is no reason to believe that the same consumers who use ratings in these (often foreign) arenas would be misled by similar ratings when it comes to choosing lawyers and law firms. To be sure, some of the assessments are more subjective than others. But the inherently subjective nature of peer reviews neither diminishes the value of the credential to consumers nor renders the resulting review misleading.

That is not to say that a rating could never be inherently misleading or used in a misleading manner. It would be misleading to report a rating as an implicit indication of merit, for example, if the rating entity listed any lawyer who was willing to pay a hefty fee. And it would be misleading to say, "Listed in *Winning Lawyers* four years running," without reporting that the rating is for golf scores, not legal acumen, or that 90% of the lawyers in the state also made the list. In short, while there may be situations in which a lawyer improperly uses a rating to

mislead—situations that would run afoul of any state's rules against misleading advertising—there is nothing inherently misleading about truthfully advertising the fact of an external rating that is independent and above-board. Indeed, at least where a rating entity (such as *Super Lawyers*) publicizes its process and selection criteria, the rating should not be considered misleading.

Advertising a Listing in a Lawyer-Rating Publication Does Not Create an "Unjustified Expectation" or Make an "Unsubstantiated Comparison"

Consumers are well aware that a positive rating or a mark of approval from a private third party—for a professional, a college, or a toaster oven—should carry only so much weight in making an informed selection. There is nothing to suggest that consumers of legal services would be blindsided by such ratings, while a potential purchaser of "Motor Trend's Mid-Size Sedan of the Year" would not be. Because they know that each independent rating entity has its own selection processes, they would not have "unjustified" expectations about the quality of a lawyer on one of the lists: They would simply be aware that the particular lawyer was sufficiently qualified to meet the applicable criteria.

Nor would a lawyer advertising his listing be making an "unsubstantiated" comparison—the substantiation comes from the existence of the independent, bona fide rating entity. So, a lawyer who advertises that he is "the best patent lawyer" in the state (in his own opinion) is making an unsubstantiated comparison, but a lawyer who states that she has been selected for inclusion in *Northern California Super Lawyers* is not. In fact, the latter lawyer is not making a comparison at all; the rating publication (*Super Lawyers*, *The American Lawyer*, etc.) is the one that made the comparison—according to its published criteria. As discussed above, there could some day appear a bogus rating service whose standards were so loose (or nonexistent) that any lawyer advertising his inclusion therein would, in effect, be making an unsubstantiated statement. But *Super Lawyers*, with its carefully designed and quality-controlled selection process is a bona fide rating service, and advertising one's inclusion on its lists is a meaningful, substantiated statement.

First Amendment Ramifications of Restricting Lawyer Advertising

The Supreme Court has long held that advertising by attorneys is valuable to consumers of legal services. *See, e.g.*, *Bates v. State Bar of Ariz.*, 433 U.S. 350, 382 (1977). "[T]he prohibition of advertising serves only to restrict the information that flows to consumers," and any move to "prohibit[] ... advertising serves only to restrict the information that flows to consumers." *Id.* at 374. While attorney advertising that is inherently misleading can obviously be restricted, states have no such authority with respect to truthful advertising. *See id.* at 382-83; *see also Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 100 (1990).

Precisely because an attorney's reference to a rating is not inherently misleading, it would violate the First Amendment to ban such references. *See Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994). Because some portion of the consumer public is largely

unsophisticated on legal matters, almost anything a lawyer reports could be "potentially misleading" to someone. *Peel*, 496 U.S. at 100-01. But the possibility that a consumer might misunderstand a reference will not justify a blanket ban unless the reference is "inherently misleading." *Id.*; *see In re R.M.J.*, 455 U.S. 191, 203 (1982).

Thus, for example, the Court has invalidated state-bar rules that have prohibited attorneys from advertising: certification by the National Board of Trial Advocacy, a nongovernmental entity that attests to attorneys' having met a particular set of criteria relating to litigation experience, *see Peel*, 496 U.S. at 94-96; qualification as a Certified Financial Planner (CFP) by a private organization, *see Ibanez*, 512 U.S. at 138; and even the fact of "[a]dmi[ssion] to practice before the Supreme Court of the United States," *R.M.J.*, 455 U.S. at 205-06. Even though consumers might not understand the precise nature of these qualifications or know precisely who issues them, the Court has repeatedly concluded that such information (so long as it was truthful and issued by bona fide organizations) is helpful to consumers in their selection of counsel. *See Peel*, 496 U.S. at 109; *R.M.J.*, 455 U.S. at 203; *cf. Ibanez*, 512 U.S. at 146. In each case, the Court held that "'disclosure of ... truthful, relevant information is more likely to make a positive contribution to decision-making than is concealment of such information.'" *Ibanez*, 512 U.S. at 142 (quoting *Peel*, 496 U.S. at 108).

States are not powerless to address a scenario in which "unscrupulous attorneys" hold themselves out as having received a rating "issued by an organization that ... made no inquiry into [their] fitness, or by one that issued certificates indiscriminately for a price." *Peel*, 496 U.S. at 102; *see id.* at 110. In such a circumstance, disciplinary authorities—such as yours—may investigate the rating organization's standards, and if they are found to be "bogus," conclude that advertising such a certification is misleading. *Id.* at 102, 109. But the possibility that some ratings might be bogus does not justify a prohibition against bona fide ratings.

That is presumably why the weight of authority to have evaluated the question has concluded that state ethics rules should not prohibit an attorney from truthfully advertising a listing in a publication that rates lawyers. Two federal courts have invalidated state rules forbidding attorneys from advertising their listing in lawyer-rating publications. *See Mason v. Florida Bar*, 208 F.3d 952, 956 (11th Cir. 2000) (Martindale-Hubbell); *Allen, Allen, Allen & Allen v. Williams*, 254 F. Supp. 2d 614, 628 (E.D. Va. 2003) (*Best Lawyers in America*). The opinions of five state bar ethics authorities (in Arizona, Florida, Iowa, Tennessee, and Virginia)—including one approved by the state's highest court—have reached the same conclusion.[2] These courts and committees all concluded that it is ethical for lawyers truthfully to provide this type of information to consumers, some after conducting an assessment of the nature of the listing in question and the processes used to determine its composition. Furthermore, the Federal Trade

---

[2] *See* Opinion No. 05-03 (Ariz. State Bar Comm. Rules Prof'l Conduct July 2005), *available at* http://www.myazbar.org/ethics (*Best Lawyers in America*); Letter from Ruth A. Smith, Assistant Ethics Counsel, Florida Bar to William C. White, Publisher, Super Lawyers (Apr. 20, 2006) (*Super Lawyers*), *reproduced at* http://www.superlawyersfacts.com/Appendix_2.pdf, at PA-000196; Opinion No. 05-03 (Iowa Sup. Ct. Bd. Prof'l Ethics & Conduct Mar. 8, 2005) (*Best Lawyers in America*), *available at* http://www.iowabar.org/ethics.nsf; Advisory Ethics Opinion 2006-A-841 (Tenn. Bd. Prof'l Resp. Sept. 21, 2006) (unpublished); Legal Advertising Opinion A-0114 (Va. State Bar) (*Best Lawyers in America*), *available at* http://www.vsb.org/committees/standing/advertising/a114.html, *approved by* Order (Va. Aug. 26, 2005).

Commission has recently opined, in response to a call for public comments on a rule change in New York, that "literally accurate superlative descriptions (such as advertising that an attorney is listed among '*Super Lawyers*' or '*America's Best Lawyers*', or that a lawyer has earned a 'highest' 'AV' ranking awarded by *Martindale-Hubbell*) ... may benefit consumers so long as they are neither false nor misleading."[3]

The only outlier is New Jersey's Opinion 39—an opinion which the New Jersey Supreme Court promptly stayed. *See* Order, *In re Opinion 39 of the Comm. on Attorney Advertising* (N.J. Aug. 18, 2006), *reproduced at* http://www.superlawyersfacts.com/Stay_Order.pdf. This past summer, the New Jersey committee not only concluded that attorneys in that state were forbidden from advertising their inclusion in *Super Lawyers* and similar magazines, but further enjoined them from providing biographical information to such magazines, and even from participating in the peer-review surveys that form part of their nomination and listing processes. *See* Opinion No. 39, 15 N.J.L. 1549, 185 N.J.L.J. 360, 2006 WL 2382939, at *2-*3 (N.J. Comm. Attorney Adver. July 24, 2006). But as the petition for review points out, both the committee's process and its analysis were flawed. *See* Petition for Review, *In re Opinion 39 of the Comm. on Attorney Advertising* (N.J. filed Aug. 14, 2006), *reproduced at* http://www.superlawyersfacts.com/Petition_For_Review.pdf. The opinion did not even acknowledge the First Amendment, much less weigh its conclusion against the Supreme Court's strictures. In addition, the committee did not deign to seek input from the publications themselves and ascertain the facts about the selection processes (which is required under New Jersey law), and thus based its decision on false impressions about the nature of *Super Lawyers*' selection process. *See* Opinion 39, 2006 WL 2382939, at *1 & n.1 (characterizing the "selection and ranking process" as "arbitrary," even though it is both rigorous and published, and falsely concluding that "selection ... is focused upon encouraging lawyers to advertise"). For these reasons, it is highly unlikely that Opinion 39 will survive the imminent judicial review.

Proposed Amendment

The proposed rules' core objectives can still be achieved while mitigating the most serious constitutional concerns, by adding the following proviso, perhaps as an additional comment to Rule 7.1:

> Nothing in this Rule shall prohibit a lawyer or law firm from truthfully advertising ratings or assessments by bona fide independent entities, so long as the advertisement otherwise complies with this Rule and the lawyer or law firm cannot influence the independent entity through financial contributions or other illegitimate means.

Whatever the precise language of the proviso, however, the proposed rules should be modified to allow consumers and lawyers easy access to the wide range of rating information about lawyers they wish to hire or refer, especially bona fide peer-based ratings, which guide consumers in the often mystifying and intimidating effort to distinguish one lawyer from another. While we appreciate the legitimate concerns animating the proposed rules we have

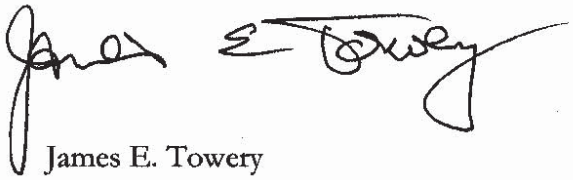
[3] Letter from Maureen K. Ohlhausen, Director, Office of Policy Planning, Federal Trade Commission to Michael Colodner, Counsel, New York Office of Court Administration, at 3 n.10 (Sept. 14, 2006), *available at* http://www.ftc.gov/os/2006/09/V060020-text.pdf.

highlighted here, they sweep more broadly than necessary to accomplish their objective. In the process, they threaten to diminish customers' ability to select attorneys based on their perceived abilities and reputations.

If the Rules Revision Commission has any further questions regarding this submission or the *Super Lawyers* selection process more generally, please do not hesitate to contact me.

Sincerely,

HOGE, FENTON, JONES & APPEL, INC.



James E. Towery

JET: slq

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October 23, 2006

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Amendments to the Rules of Professional Conduct
Comment on Proposed Rule 7.1

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed the Commission's proposed Rule 7.1.

As the Commission reports proposed Rule 7.1 contains the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services, this proposed rule retains much of the substance of current rule 1-400.

However, proposed Rule 7.1(b) has not been limited to misrepresentations that are "material". The Commission's reasons are (1) sections of the Business and Professions Code, e.g. section 6157, do not contain a "material" limitation; (2) federal advertising statutes proscribing misrepresentations are also not so limited; (3) the weighing in a disciplinary proceeding of public/client harm caused by misleading advertising would necessarily reflect due consideration of whether the content at issue is "material," whether or not the rule is expressly limited; and (4) a lawyer should not make misstatements, whether material or otherwise. [See *Commission's Summary of Public Comment Proposal*, June 2006, p. 25:3.]

Our Committee believes that if one of the rationales is that "the weighing in a disciplinary proceeding of public/client harm caused by misleading advertising would necessarily reflect due consideration of whether the content at issue is "material," whether or not the rule is expressly limited", then the rule should reflect the same, so that lawyers who are subject to this rule, prosecutors who are enforcing this rule, and State Bar judges who are making the decisions, all operate under the clear understanding that that "materiality" is an element that will be considered and uniformly applied in every case. Therefore, our Committee recommends that the term "material" should be included in proposed Rule 7.1 (b).

Furthermore, the Model Rule does contain the materiality requirement. Thus, our Committee recommends, consistent with the Model Rule, adding "materially" between "a" and "false" to proposed Rule 7.1(b).

In addition, our Committee recommends that the element of "intent" should also be included in the text of proposed Rule 7.1 (b), as it is so stated in the example in Comment [5] "For example, a lawyer's *intentionally* misleading use of metatags . . ." (*emphasis added*)

To make the text of the proposed Rule and its Comment consistent, our Committee recommends the following change to proposed Rule 7.1 (b):

> "A lawyer shall not intentionally make a materially false or misleading communication as defined herein."

Sincerely yours,

Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

OCBA

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OC WOMEN LAWYERS ASSOC.

MEMORANDUM

Date: December 1, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct The State Bar of California

From: Orange County Bar Association ("OCBA")

Re: Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California Developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

Subj: Proposed Rule 7.1: Communications Concerning the Availability of Legal Services

Founded over 100 years ago, the Orange County Bar Association has over 9,800 members, making it the second largest voluntary bar association in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared jointly by the Professionalism & Ethics and Administration of Justice Committees.

The OCBA respectfully submits the following comments concerning the subject proposed Rule:

*****

Comment 1:

We suggest that the final phrase in subsection (c)(3) be written include a communication that "tends to confuse, deceive, or mislead the public."

Rationale for Comment 1:

Subsection (D)(2) of current Rule 1-400 precludes a communication that, among other things, "tends to confuse or mislead the public." The current proposal deletes the words "tends to." We are concerned that this change might establish an unnecessarily high burden in disciplinary proceedings, requiring proof that the public was actually confused, deceived, or misled.

Comment 2:

We suggest that the word "unqualified" be added before "predictions" in the first Board of Governors' standard adopted pursuant to paragraph (d).

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Rationale for Comment 2: The standard precludes a "communication" that "contains guarantees, warranties, or predictions regarding the representation." We have concerns regarding the use of the word "predictions." During the course of initial "communications" with clients or prospective clients, it is not unusual for such clients or prospective clients to ask the attorney what the chances of success are. This is a legitimate question for purposes of such client's or prospective client's decisions regarding litigation or other legal action. However, disallowing all "predictions" would suggest that an attorney would not be able to provide that kind of information, although potentially material to a client's or prospective client's decisions, including whether or not to engage the attorney or law firm. Limiting the prohibition to "unqualified predictions" would allow this sort of discussion without diluting the protections offered by the rule.

We otherwise support the proposed rule as written.

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 7.2: Advertising

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule 7.2:

* * * * *

Comment 1:

We propose retaining the ABA Model Rule definitions in Comment 6 for "legal services plan" and "lawyer referral service."

Rationale For Comment 1:

This proposed retention would result in keeping the second, third and fourth sentences of Comment 6 to the ABA Model Rule 7.2. We otherwise approve the proposed rule.

THE STATE BAR OF CALIFORNIA
PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

This form allows you to submit your comments by entering them in the text box below and/or by uploading files as attachments. You should discuss only **one** Rule per comment submission form. Select the proposed Rule from the drop down list.

Comments submitted are regarded as public record.

DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Phillip Feldman

Professional Affiliation varied but individual

*** City** Sherman Oaks

*** State** California

*** email address** StateBarDefense@aol.com

A copy of your response will be sent to this email addres

Rule 2.4

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 7.2 Advertising [1-400]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

Enter your comments here. To upload files proceed to the ATTACHMENTS section below.

ABA Rule 7.2 and its comments make all needed pertinent points. Attempts to placate the BOG (which has the right at any time to amend any rule subject to Supreme Court approval) by retaining their legislative mandate to make rules in this regard is misguided. In addition attepts to placate the legislature, which inter alia, rejuevenated the commission, by retaining the remnants of 1-400 is equally misguided.
The reason for revision in the first place was to resolve shortfalls of the status quo,not perpetuate them by compromising the broad restraints of improper advertising.

Similarly, B&P 17001 et seq does not need a professional responsibility assist from the commission, nor ought lawyers be led to believe they are not subject to its mandate just because they have additional constraints under rules of professional conduct.

Attachments

You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the next to **Attachment**.

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1.
In the **Attachment** field, type in the file name (for example -> *c: comments.doc*) or locate the file by clicking on the **Browse** button. For help with browsing and locating the file click .

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4.
To upload another file, repeat steps 1 thru 3.

Rule 2.4

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October 23, 2006

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Amendments to the Rules of Professional Conduct
Comment on Proposed Rule 7.2

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed proposed Rule 7.2. Our Committee agrees with the Commission's recommendation that California adopt proposed Rule 7.2.

Sincerely yours,

Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

Rule 2.4

OCBA

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OC ASIAN AMERICAN BAR
OC BARRISTERS
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OC TRIAL LAWYERS ASSOC.
OC WOMEN LAWYERS ASSOC.

MEMORANDUM

Date: December 1, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct The State Bar of California

From: Orange County Bar Association ("OCBA")

Re: Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California Developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

Subj: Proposed Rule 7.2: Advertising

Founded over 100 years ago, the Orange County Bar Association has over 9,800 members, making it the second largest voluntary bar association in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared jointly by the Professionalism & Ethics and Administration of Justice Committees.

The OCBA respectfully submits the following comment concerning the subject proposed Rule:

*****

Comment:

We support the proposed rule as written.

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MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 7.3: Direct Contact with Prospective Clients

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule 7.3:

* * * * *

Comment 1:

The changes in the new rule regarding streamlining and modernizing the standards result in greater clarity.

Rationale For Comment 1:

The new rule deals only with "solicitations," whereas the old rule also dealt with "communications" and the number of standards promulgated to carry out the rule is reduced from sixteen (16) to one (1). There are also changes to accommodate technological advances in methods of communication (from in person or by telephone to now include real-time electronic contact or electronic communications).

Comment 2:

The proposed changes regarding the specifics of acceptable "Advertising Material" on attorney promotional material may promote misleading advertisements.

Rationale For Comment 2:

The standards of former Rule 1-400 required that the word "Advertisement", "Newsletter" "or words of similar import" be in 12 point font on the first page of the document. This has been deleted in the new rule and all that remains is the requirement that the words "Advertising Material" or "words of similar import" be on the outside envelope, "if any . . . unless it is apparent from the context that the communication is an advertisement." This change may cause attorney advertising to be misleading and deceptive to the public regarding whether the recipient is actually receiving an official document or one that is a solicitation. Further, it leaves open to interpretation what is an "apparent" advertising communication.

THE STATE BAR OF CALIFORNIA
PROPOSED RULES OF PROFESSIONAL CONDUCT
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Comments submitted are regarded as public record.

DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Alan Konig

Professional Affiliation

*** City** San Francisco

*** State** California

*** email address** ahkcal@comcast.net

A copy of your response will be sent to this email addre

Rule 2.4

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 7.3 Direct Contact with Prospective Clients [1-400]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

Enter your comments here. To upload files proceed to the ATTACHMENTS section below.

Has the possibility of specifically prohibiting "pop-up" windows as a form of electronic communication been considered?

Attachments

You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the next to **Attachment**.

INSTRUCTIONS

1.
In the **Attachment** field, type in the file name (for example -> *c: comments.doc*) or locate the file by clicking on the **Browse** button. For help with browsing and locating the file click .

2.
Once you have selected the file, click **Upload** and wait while your file uploads.

3.
After the file has successfully been uploaded, below **Uploaded file**, your document's file name should appear in blue. If you do not see your file's name then you should go back to step 1 or click for assistance.

4.
To upload another file, repeat steps 1 thru 3.

Rule 2.4

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Back

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November 1, 2006

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Amendments to the Rules of Professional Conduct
Comment on Proposed Revisions to Rule 1-400 (proposed Rule 7.3)

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed the proposed amendments to Rule 1-400 of the Rules of Professional Conduct (proposed Rule 7.3), Direct Contact with Prospective Clients. The Committee has the following comments:

The Committee opposes proposed Rule 7.3(a) (and existing Rule 1-400(C)) on two grounds: first, it is so poorly drafted that a lawyer cannot tell what it prohibits; second, attorneys should be permitted to solicit client business in person, by telephone or by real-time electronic contact, so long as the solicitation does not violate subsection (b).

Text of Proposed Rule

The proposed rule states:

> A lawyer shall not by in person, telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California or the person contacted:
>
> (1) is a lawyer; or
>
> (2) has a family, close personal, or prior professional relationship with the lawyer.

Poor Drafting

Standards are altogether missing from proposed Rule 7.3(a). It would prohibit business solicitation by an attorney (with certain exceptions) except if the solicitation is protected by the federal or state constitution. A lawyer has to examine constitutional law to find out what is permitted under this rule.

A rule of professional conduct should state on its face what is permitted or what is prohibited. It should not direct an attorney to a laborious study of unspecified case law to determine what the rule means. The convoluted study required to determine the meaning of this provision likely means that it cannot be enforced in disciplinary proceedings.

The difficulty in determining the applicable constitutional standards is illustrated in *Edenfeld v. Fane*, 507 U.S. 761 (1993), where the U.S. Supreme Court held that Florida could not constitutionally prohibit an accountant from personally soliciting business from prospective clients. The Supreme Court determined that a Florida law restricting commercial speech need only be tailored in a reasonable manner to serve a substantial state interest. *See id.* at 767. The Supreme Court agreed that Florida's interests were substantial in assuring the accuracy of commercial information in the marketplace, protecting the privacy of potential clients and maintaining standards of ethical conduct in the licensed professions. However, the Court found that, as applied in the business context, the ban on CPA solicitation did not advance these interests in any direct and material way.

Whether this opinion applies to the solicitation of commercial business by an attorney (which appears likely) requires sophisticated constitutional evaluation that should not impose a risk of professional sanctions for a wrong conclusion.

We note that existing Rule 1-400(C) suffers from these same problems. Indeed, it appears that it has only been applied in a single case, *Leoni v. State Bar,* 704 P.2d 183 (Cal. 1985), where disciplinary proceedings were brought against two lawyers who sent letters to prospective clients with real estate foreclosure actions pending against them. The attorneys involved were found culpable in only some respects, and the only sanction imposed was the public reprimand resulting from the publication of the California Supreme Court opinion itself.

Attorney Solicitation of Business

Second, in our view, California lawyers should be permitted to solicit business from prospective clients in person, by telephone or by real-time electronic contact. We do not perceive the purported evil articulated in comment [1].[1] To the extent that an attorney's solicitation involves undue influence, intimidation or overreaching, proposed Rule 7.3(b) (which we support) covers the problem.

California prospective clients, in our view, have sufficient sophistication to understand and evaluate such solicitation of business by an attorney, provided that the attorney complies with the requirements of proposed Rule 7.3(b) and (c). Improper solicitation of business by an attorney may properly be regulated, in our view. However, our Committee believes banning in person solicitation goes too far in contemporary California business and social contexts.

Furthermore, we think that such solicitation, at least in the business context, is constitutionally protected under *Edenfeld.* As *Edenfeld* states, "A governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.*, 507 U.S. at 770-71. The harm may not be speculative or conjectural.

The required reasonable proportionality in *Edenfeld* is altogether lacking in the proposed rule. If the rule is construed to prohibit attorney solicitation of clients in a business context, it does so in the broadest fashion – by prohibiting attorney solicitation altogether (with three narrow exceptions).

The proposed rule does not satisfy the *Edenfield* concerns, and leaves it to the reviewing courts to address the proportionality issue.

One statement of the Supreme Court in *Edenfield* could give rise to a distinction between the treatment of lawyers and accountants for the purposes of the solicitation of legal work. A CPA, the Supreme Court noted, is not an advocate trained in the art of persuasion. *See Edenfield,* 507 U.S. at 775. The Court also noted that a typical client of a CPA is a sophisticated and experienced business executive with an existing relationship with an

[1] Comment [1] states:

> There is a potential for abuse inherent in direct in person, telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already be overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation and over reaching.

accountant and an independent basis for evaluating the claims of a new CPA seeking professional work. Such a prospective client does not expect to retain the CPA on the spot, but checks references and deliberates before entering into such an engagement.

All of these observations except the first apply also to an attorney seeking work in a business context. In a business context, attorneys and accountants share these expectations equally. Thus, as the Supreme Court said of an accountant in the business context, "to the extent [an attorney] engages in unpleasant, high pressure sales tactics, he can impair rather than improve his chances of obtaining an engagement or establishing a satisfactory professional relation." *Id.* at 776. In short, attorneys stand on the same footing as accountants with respect to using the art of persuasion to attract work in a business context, and should be treated equally.

The Committee, therefore, strongly urges that the Commission not adopt proposed Rule 7.3(a).

Sincerely yours,



Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

ORANGE COUNTY BAR ASSOCIATION

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MEMORANDUM

Date: December 1, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: Orange County Bar Association ("OCBA")

Re: Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California Developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

Subj: Proposed Rule 7.3: Direct Contact With Prospective Clients

Founded over 100 years ago, the Orange County Bar Association has over 9,800 members, making it the second largest voluntary bar association in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared jointly by the Professionalism & Ethics and Administration of Justice Committees.

The OCBA respectfully submits the following comment concerning the subject proposed Rule:

*****

Comment :

We suggest that the language in subsection (c) of the proposed rule, "prospective client known to be in need of legal services in a particular matter," be revised to read, "prospective client known or believed to be in need of legal services in a particular matter."

Rationale for Comment:

The corollary to this provision in the current version of the Rules, 1-400(E), Standard (5), applies to *all* "forms of 'communication,' except professional announcements, seeking professional employment for pecuniary gain, . . . transmitted by mail or equivalent means."

We see no reason for restricting the rule to situations in which the lawyer knows that a specific individual is in need of legal services. We believe that the rationale for the rule seemingly would apply equally to, for example, communications targeted to a person the lawyer suspects, but does not know, to be in need of legal services in a particular matter.

We otherwise support the proposed rule as written.

THE STATE BAR
OF CALIFORNIA

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

June 30, 2006

Members of the Board Committee on Regulation, Admission & Discipline Oversight

Members of the Special Commission for the Revision for the Revision of the Rules of Professional Conduct

Re: Proposed Rule 7.4

Dear Members:

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 7.4 – Communication of Fields of Practice and Specialization and supports the adoption of the proposed rule as drafted.

Thank you for consideration of our opinion in this matter.

Sincerely,

Steven Lewis
Chair
State Bar of California
Committee on Professional Responsibility and Conduct

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 7.4: Communications of Fields of Practice and Specialization

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule 7.4:

* * * * *

Comment 1:

The second sentence of proposed rule 7.4(a) should be reworded.

Rationale For Comment 1:

The second sentence of 7.4(a) states "A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, *if such communication does not imply an unwarranted expertise in the field so as to be false or misleading under Rule 7.1.*" (italics added).

It appears that what the drafters are getting at is the situation in which the claim isn't true. But the wording seems to suggest that even accurately claiming a concentration can be false and misleading. This problem could be eliminated by replacing the italicized words with "subject to the requirements of Rule 7.1."

Comment 2:

The second sentence of proposed rule 7.4(b) should be reworded.

Rationale For Comment 2:

Rule 7.4(d) forbids a claim of specialist certification "*unless (1) the lawyer holds a current certificate issued by . . .*" We would propose replacing the words "a current certificate" with "current certification" to make clear that the rule isn't talking about a piece of paper. (italics added).

Comment 3

If the committee is so inclined, we would propose it consider choosing one of two options to deal with the issue of the specialist claim by an uncertified lawyer:

(i) add 7.4(e) as follows: "A lawyer who has not been certified as a specialist pursuant to Rule 7.4(d) may not state or imply that he or she is a specialist in a particular field of law"; or

(ii) add 7.4(e) as follows: "A lawyer who has not been certified as a specialist pursuant to Rule 7.4(d) may not state or imply that he or she is a specialist in a particular field of law unless he or she accompanies the statement or implication with an express statement to the effect that lawyers can be certified as specialists by state-approved institutions and that he or she has not been so certified."

Rationale For Comment 3:

N/A

CHAMBERS OF SAMUEL L. BUFFORD
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CENTRAL DISTRICT OF CALIFORNIA
ROYBAL BUILDING
255 EAST TEMPLE STREET, SUITE 1582
LOS ANGELES, CALIFORNIA 90012
(213) 894-0992

October 20, 2006

Ms. Audrey Hollins
The State Bar of California
Office of Professional Competence,
Planning and Development
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 7.4

Dear Ms. Hollins:

I am writing with respect to proposed Rule 7.4(d) of the California Rules of Professional Conduct, which would prohibit a lawyer from stating that the lawyer is a certified specialist in a particular field of law unless the certificate is issued by an entity accredited by the California State Bar. This provision fails to take account of the emergence of national certification agencies, which should be recognized in California.

For example, the American Board of Certification ("ABC") (on whose board of directors I briefly sat shortly after its initial formation some 10 years ago), which advertises itself as the nation's premier legal specialty certification organization, certifies attorneys as specialists in business bankruptcy, consumer bankruptcy and creditors rights law. The ABC is sponsored by the American Bankruptcy Institute and the Commercial Law League of America. In addition, its three certification programs are accredited by the American Bar Association, as well as a number of states. I attach a copy of the description of the ABC program printed from its website. To qualify for certification by the American Board of Certification, a lawyer must pass a very demanding examination in the speciality for which certification is sought. While the California State Bar also provides for certification in bankruptcy law, the ABC certification is much better known and prestigious.

Congress has recognized the value of the ABC certification in recent amendments to the bankruptcy law, where the law requires a bankruptcy court to take into account, inter alia, whether a lawyer is board certified in determining what is the appropriate fee to be

awarded by the court in a particular case. *See* 11 U.S.C. §330(a)(3)(E). It is clear that the ABC certification was the certification that Congress had in mind in enacting this provision.

It is certainly appropriate for California to expect rigorous standards for certification of a lawyer as a specialist. The rule should provide for the recognition of appropriate national certification by organizations such as ABC.

Very truly yours,

Samuel L. Bufford

SLB:kd

cc: Harry Sondheim, Esq.
William L. Norton, III, Esq., Chair ABC Board of Directors

American Board of Certification

ABOUT US

The American Board of Certification (ABC) is a non-profit organization dedicated to serving the public and improving the quality of the bankruptcy and creditors' rights law bars. ABC has certified nearly 1,000 attorneys in consumer and business bankruptcy and creditor's rights law nationwide. ABC certification serves the public by allowing potential clients to make an informed decision in choosing bankruptcy and creditors rights counsel. In addition, ABC certification encourages attorneys to strive toward excellence and recognizes those attorneys who have met the rigorous ABC standards. ABC offers separate certification programs in business bankruptcy, consumer bankruptcy and creditors' rights law.

The ABC is sponsored by the **American Bankruptcy Institute** and the **Commercial Law League of America**. All three ABC programs are accredited by the **American Bar Association** and several states have accredited the ABC programs. The ABC Board of Directors consists of many of the nation's finest bankruptcy and creditors rights professionals. ABC certification is available to all qualified bankruptcy and creditors rights attorneys, without regard to membership in the American Bankruptcy Institute or the Commercial Law League of America, and without discrimination on the basis of race, religion, gender, sexual orientation, disability, or age.

The American Bar Association first debated the issue of professional certification in legal specialties more than 50 years ago and, in 1969, decided to "not promulgate a national plan to regulate voluntary specialization". With very limited exceptions, the certification of legal specialists did not become a reality until the Supreme Court's decision in the 1990 case of Peel v. Attorney Registration and Disciplinary Commission of Illinois struck down the most significant legal and regulatory obstacles to voluntary certification programs. Following the Peel decision, the leadership of the American Bankruptcy Institute worked for more than a year to design an objective certification program that distinguishes between lawyers with special expertise in the fields of business and consumer bankruptcy law and those without such expertise. Similarly, the Commercial Law League of America developed a separate program to identify commercial law practitioners with special expertise. On January 1, 1998, The two programs merged to become the American Board of Certification. Rather than to identify "elite" practitioners, the ABC program is designed to recognize lawyers who have met discrete, objective certification standards.

The ABC is committed to providing progressive and responsible leadership in the field of legal specialization. Since the ABC's inception, our goal has been to provide meaningful information to consumers of bankruptcy law services. To this end, we have created a **Directory of Board Certified Attorneys** and we distribute it free of charge. For the past several years, we have produced the directory with generous support from **Thomson West**. The ABC also provides references to any ABC certified attorney for consumers who need assistance locating a qualified attorney in their area.

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Rule 2.4

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Los Angeles County Bar Association

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October 23, 2006

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Amendments to the Rules of Professional Conduct
Comment on Proposed Rule 7.4

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed proposed Rule 7.4. Our Committee agrees with the Commission's recommendation that California adopt proposed Rule 7.4.

Sincerely yours,

Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

Rule 2.4

CALIFORNIA BOARD OF LEGAL SPECIALIZATION
OF THE STATE BAR OF CALIFORNIA

180 HOWARD STREET
SAN FRANCISCO, CALIFORNIA 94105-1639
TELEPHONE: (415) 538-2120

Date: November 9, 2006

To: State Bar Special Commission for the Revision of the Rules of Professional Conduct

From: Myron S. Greenberg, Chair, Board of Legal Specialization

Subject: Proposed New Rule 7.4 - Communication of Fields of Practice and Specialization

The Board of Legal Specialization opposes the addition of subparts (b) and (c) to Rule 7.4 for the reasons set forth below. Existing subpart (a) of Rule 7.4 allows an attorney in any field to communicate that his/her practice is "limited to or concentrated in a particular field of law, if such communication does not imply an unwarranted expertise in the field so as to be false or misleading under Rule 7.1." Therefore, under the current Rules of Professional Conduct, an attorney who is registered to practice patent law may use the designation "Patent Attorney" or a substantially similar designation, and an attorney engaged in admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a substantially similar designation because such communications do not imply unwarranted expertise in the fields so as to be false or misleading. The same reasoning would apply to attorneys who currently limit their practices to landlord-tenant law, personal injury law, tax law, et cetera. In short, proposed subparts (b) and (c) add nothing to the existing Rules but instead appear to put an unwarranted emphasis on areas of law that are already covered by subpart (a). It should be sufficient to say that attorneys may either communicate that their practice is "limited to or concentrated in a particular field of law" pursuant to the limitations of subpart (a) or that they are "certified specialists" pursuant to the limitations of subpart (d).

ORANGE COUNTY BAR ASSOCIATION

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MEMORANDUM

Date: December 1, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct The State Bar of California

From: Orange County Bar Association ("OCBA")

Re: Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California Developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

Subj: Proposed Rule 7.4: Communication of Fields of Practice and Specialization

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The OCBA respectfully submits the following comment concerning the subject proposed Rule:

*****

Comment:

We support the proposed rule as written.

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COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

June 30, 2006

Members of the Board Committee on Regulation, Admission & Discipline Oversight

Members of the Special Commission for the Revision for the Revision of the Rules of Professional Conduct

Re: Proposed Rule 7.5 – Firm Name and Letterheads

Dear Members:

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 7.5 – Firm Name and Letterheads. In general, COPRAC supports the adoption of the rule. However, COPRAC does not believe that the use of the names of retired partners in a law firm name is misleading to the public, and believes that the rule should permit the use of the names of retired partners in law firm names. To accomplish this, COPRAC recommends that Comment [1] to proposed Rule 7.5 be revised by adding the words "or retired" following the word "deceased" on the second line of the Comment.

Thank you for consideration of our opinion in this matter.

Sincerely,

Steven Lewis
Chair
State Bar of California
Committee on Professional Responsibility and Conduct

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 7.5: Firm Names and Letterheads

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule 7.5:

* * * * *

We approve the proposed new rule in its entirety.

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OC TRIAL LAWYERS ASSOC.
OC WOMEN LAWYERS ASSOC.

MEMORANDUM

Date: December 1, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct The State Bar of California

From: Orange County Bar Association ("OCBA")

Re: Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California Developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

Subj: Proposed Rule 7.5: Firm Names and Letterheads

Founded over 100 years ago, the Orange County Bar Association has over 9,800 members, making it the second largest voluntary bar association in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared jointly by the Professionalism & Ethics and Administration of Justice Committees.

The OCBA respectfully submits the following comment concerning the subject proposed Rule:

*****

Comment:

The last phrase of the third sentence of Comment [1] to the rule should read "an express disclaimer that it is *not* a public legal aid agency may be required to avoid a misleading implication."

Rationale for Comment:

Failing to include the word "not" appears to be a typographical error that affects the meaning of the sentence. We assume including "not" restores the sentence to its intended meaning.

We otherwise support the proposed rule as written.

P.O. BOX 17777
IRVINE, CA 92623-7777
TELEPHONE 949/ 440-6700
FACSIMILE 949/440-6710
WWW.OCBAR.ORG

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 8.1 False Statement Regarding Application for Admission to Practice Law

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

The Rule should be adopted as written.

Rationale For Comment 1:

The Rule restates some existing case law (*In the Matter of Ike* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 483; *Spears v. The State Bar* (1930) 211 Cal. 183, 187) and the current Rule 1-200. New section 8.1 (c) appropriately expands the scope of the Rule to pro hac vice admissions, in house counsel and the limited scope admissions under the new California Rules of Court.

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October 11, 2006

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Amendments to the Rules of Professional Conduct
Comment on Proposed Revisions to Rule 1-200 (rule 8.1)

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed the proposed amendments to Rule 1-200 of the Rules of Professional Conduct. The Committee agrees with the Commission's view and supports the changes proposed by the Commission in that they clarify the existing rule.

Sincerely yours,

Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

Rule 2.4

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 8.1.1 Compliance with Conditions of Discipline and Agreements In Lieu of Discipline

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

The proposed Rule should be adopted as written

Rationale For Comment 1:

The proposed Rule essentially restates existing California law (current Rule of Professional Conduct 1-110) and reflects sound public policy.

Rule 2.4

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 8.3: Reporting Professional Misconduct

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

Comment #2 to the Rule should be re-written to be cleaner and more comprehensible.

Rationale For Comment 1:

Suggested language for Comment #2
This Rule is not intended to allow a lawyer to report a violation of these Rules or the State Bar Act if doing so would:
(a) violate the lawyer's duty of protecting confidential information of a lawyer's client as provided in Business and Professions Code section 6068, subdivision (e);
(b) prejudice the interests of the lawyer's client;
(c) involve the unauthorized disclosure of information received by the lawyer in the course of participating in an approved lawyer's assistance program.

Comment 2:

Proposed Rule 8.3 seems to eliminate all references to reporting judicial misconduct. Comment #1 of the original rule stated, "Lawyers have a similar obligation with respect to judicial misconduct." Barring any significant purpose for omitting the reference, we think it would only be advantageous to include it in the proposed rule as well

MEMORANDUM

Via email to: ***randall.difuntorum@calbar.ca.gov***

Date: October 15, 2006

To: Mr. Randall Difuntorum
Staff Counsel, Professional Responsibility
State Bar of California

From: Philip D. Humphreys, Chair
Legal Ethics Committee
Bar Association of San Francisco

Re: ***BASF Legal Ethics Committee comment on certain June 2006 State Bar Rules Revision Commission proposed rule revisions.***

Pursuant to your October 12th telephone conversation with Christopher Muñoz, Secretary of this Committee, we hereby submit the Committee's comment, as approved by Committee resolution, on seven of the proposed new or amended rules in the June 2006 released package.

For the record, we wish to specify that this comment package is submitted as the work product of the Legal Ethics Committee of the Bar Association of San Francisco. We wish to add that, following a review of the substance of these comments, the Board of Directors of the Bar Association of San Francisco has endorsed these work product comments of the Committee as appropriate expressions of the views of the Bar Association of San Francisco.

No inference of either approval or disapproval, by either the Committee or BASF, should be taken from the Committee's declination, at this time, of the opportunity to comment on the remaining twenty rules in the June 2006 package.

/s/ Philip Humphreys
Philip Humphreys

/by/
Christopher Muñoz

Rule 8.3: (CRPC Rule 1–500): *Reporting Professional Misconduct.*

This rule authorizes, but does not require, lawyers to report to the State Bar violations of the Rules of Professional Conduct or of the State Bar Act by other lawyers. While such a rule may not be entirely necessary because anyone already may report or complain to the State Bar about what that person perceives to be a violation of the Rules or of the Act, if this new rule will clarify matters for some lawyers, the Committee does not object to it. However, the Committee proposes to add a Comment [4]:

> [4] *Nothing in this Rule is intended to weaken or abrogate the prohibition contained in Rule [5-100(A)] regarding threatening administrative or disciplinary charges to obtain an advantage in a civil dispute.* (emphasis added)

The reference to Rule 5-100(A) will need to be adjusted to be consistent with the new numbering for that rule.

THE STATE BAR OF CALIFORNIA
PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

This form allows you to submit your comments by entering them in the text box below and/or by uploading files as attachments. You should discuss only **one** Rule per comment submission form. Select the proposed Rule from the drop down list.

Comments submitted are regarded as public record.

DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Alan Konig

Professional Affiliation

*** City** San Francisco

*** State** California

*** email address** ahkcal@comcast.net

A copy of your response will be sent to this email addre

Rule 2.4

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 8.3 Reporting Professional Misconduct [1-500(B)]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

Enter your comments here. To upload files proceed to the ATTACHMENTS section below.

Attachments

You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the next to **Attachment**.

INSTRUCTIONS

1.
In the **Attachment** field, type in the file name (for example -> *c: comments.doc*) or locate the file by clicking on the **Browse** button. For help with browsing and locating the file click .

2.
Once you have selected the file, click **Upload** and wait while your file uploads.

3.
After the file has successfully been uploaded, below **Uploaded file**, your document's file name should appear in blue. If you do not see your file's name then you should go back to step 1 or click for assistance.

4.
To upload another file, repeat steps 1 thru 3.

Rule 2.4

Attachment Browse...

uploaded file: PROPOSED RULE 8.doc (32k)

Upload

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Attachment Browse...

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Contact Support

* Required

Back

PROPOSED RULE 8.3 (REPORTING PROFESSIONAL MISCONDUCT)

With all due respect to the Commission, this is perhaps the most ill-advised proposed rule of any rule that has ever been proposed in the entire history of the Rules of Professional Conduct. The mandatory reporting requirements adopted by the overwhelming majority of the jurisdictions must be adopted if any rule about reporting is to be adopted at all. There are several issues and problems with the proposed rule as follows:

1. If in fact, the goal of the Commission was to establish some form of nationwide consistency between the various jurisdictions' rules, this proposed rule does the exact opposite. From where the permissive standard "may" came from is a mystery to me and every other jurisdiction regulating the practice of law in this country. Of all of the jurisdictions that have a reporting rule, none have a rule that even remotely resembles the proposed permissive standard of "may" report.[1] That would place California in a unique and unprecedented category.

The proposed rule would do more harm than good especially when the rule is seen by the general public. Can anyone fault a member of the public from expressing skepticism about the seriousness of the legal profession in California to regulate itself when meaningless rules such as this are adopted in light of the mandatory requirement in the overwhelming majority of the other jurisdictions? What makes California so unique and beyond reproach that it feels a permissive standard is acceptable?

2. What is the point of the rule? Every attorney in California already possesses the ability to report another attorney's misconduct if he or she so chooses. Why does there need to be adoption of a rule to state the obvious? The proposed rule is absolutely meaningless given the current ability of an attorney to report misconduct. The Commission has taken what every jurisdiction has intended to be a mandatory obligation on an attorney that is designed to protect the public and the profession and turned it upside down by phrasing it as if though it were shielding a reporting attorney from some sort of non-existent liability for making a report of misconduct. The Commission has changed the focus and target of the rule from public protection to the protection of the reporting attorney.[2]

3. A provision of the comments to the proposed rule may, in fact, be invalid as it appears to conflict with legislative enactments. The Commission has created an exception to the reporting requirement that prohibits reporting of misconduct if to do so "would prejudice the interests of the lawyer's client." Notwithstanding the difficulty in some government agencies and corporations of identifying not only who or what the proper client is but also what the client's interests are, the prohibition is in direct conflict with, at the very least, Labor Code § 1102.5, *et seq.*, Government Code § 9149.21, *et seq.*, and Government Code § 12900, *et seq.*

[1] Based on my research, the following jurisdictions mandate reporting by use of the term "shall" in the rule: Arkansas, Arizona, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin. The only other standard that appears in the rule, the suggestive term "should," has only been adopted by two jurisdictions, Georgia and Washington. Thus, every single jurisdiction understands the importance of self-regulation and the role it plays in public protection but apparently is completely wrong on this issue and California, all by itself, is correct in adoption of the term "may."

[2] There exist already numerous provisions of the law that protect all complainants to the State Bar, including attorneys.

(FEHA).[3] All of these legislative enactments encourage and promote the reporting of wrongdoing by any individual, including attorneys. None of them provide a prohibition from making a report if that report may not be in a client's best interests. The State Bar is in no position to legislate into existing law an exclusion that it believes should be applied to these laws when the legislature has failed to include such a prohibition on the reporting of wrongdoing and misconduct.

4. An actual situation where a mandatory reporting requirement would have made a significant difference will hopefully help to underscore the seriousness with which this rule must be viewed and the effect mandatory reporting can potentially have on protection of the public. While I worked as a deputy trial counsel with the Office of the Chief Trial Counsel (OCTC), I was responsible for the largest single misappropriation case in the State Bar's history (*In the Matter of Tehin and Stevens*) (approximately $5.2 million). By the time I and the State Bar learned of the massive misappropriation, it was after approximately a dozen clients had already had millions misappropriated. While we were able to prevent any further misappropriation by placing the two on involuntary inactive enrollment and assuming jurisdiction over their law practice, those actions would have been beneficial to every single client who had funds stolen had the attorney for the first victims of the misappropriation reported the matter to the State Bar. Instead, he did nothing, close to two years passed, and further innocent clients became victims, including several developmentally disabled children. I have no doubt that if that first attorney would have been required to report the misappropriation committed against his clients that there would not have been any additional victims as the State Bar would have put an end to Tehin/Stevens' practice before they had another opportunity to harm the most vulnerable of all clients and the ones with the most urgent and immediate need for their settlement funds to pay for past, current, and future medical needs and expenses just to remain alive.[4]

The Commission and the State Bar should be ashamed if they allow another incident like the above to repeat itself. Yet that is exactly what will happen with this proposed rule. The State Bar is unable to view things in any way other than a reactionary way (e.g., the misconduct occurs and the State Bar acts – although oftentimes too late and with an ineffective and meaningless response to the victims of the misconduct). So much more misconduct and harm could be prevented if the State Bar would simply take the time to every now and then view matters in a proactive approach to preventing misconduct. Adopting a rule that mandates the reporting of misconduct is one of those opportunities for the State Bar to act in a proactive fashion to protect the public but that will be completely undermined with a permissive "may" report rule as currently proposed.

[3] The comment and prohibition therein may also be invalid based on several similar federal laws such as Sarbanes-Oxley and the Federal Whistleblower Protection Act. It may also be contrary to public policy.

[4] Every single victim of misappropriation at some point asked me how the misappropriation could have continued for so long undetected and why none of the involved attorneys ever reported the misconduct. You can imagine the difficulty I encountered in explaining to them that California was the only state that did not require its attorneys to report the misconduct of another attorney and the utter disbelief and disgust expressed by them upon learning of this information. If ever there was justification for a mandatory reporting requirement, these innocent victims provide it.

PROPOSED RULE 8.3 (REPORTING PROFESSIONAL MISCONDUCT)

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The proposed rule would do more harm than good especially when the rule is seen by the general public. Can anyone fault a member of the public from expressing skepticism about the seriousness of the legal profession in California to regulate itself when meaningless rules such as this are adopted in light of the mandatory requirement in the overwhelming majority of the other jurisdictions? What makes California so unique and beyond reproach that it feels a permissive standard is acceptable?

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MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 8.4: Misconduct

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

The Rule should be adopted as written.

Rationale For Comment 1:

The Rule is wholly new. It does something new in California law, draw parameters around the concept of "professional misconduct." Except for the section that deals with criminal conduct as a basis for discipline (where it tracks existing California statutory law, Bus. & Prof. Code §6101(a)) it eliminates the fuzzy moral turpitude concept. Comment [8] acknowledges that this makes no practical difference in light of Bus. & Prof Code section 6106 (providing that acts of moral turpitude provide cause for disbarment of suspension). But it is step in the right direction.

Proposed section (e) is not present in the corresponding ABA Model Rule. This section is intended to replace current Rule of Professional Conduct 2-400(B). The proposed Rule is narrower is scope and would only apply where the conduct has a prejudicial impact on the administration of justice, however, it does not require a finding of discrimination. The Commission's notes on the proposed section note that the prohibition against offensive personality in Business & Professions Code section 6068(f) was found unconstitutional (*U.S. v. Wunsch* (9th Cir.. 1996) 84 F.3d 110).

LACBA
Los Angeles County Bar Association

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October 12, 2006

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Amendments to the Rules of Professional Conduct
Comment on Proposed Rule 8.4(b)

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed the proposed Rule 8.4(b).

Our Committee believes that proposed paragraph [5] of the Comment to proposed rule 8.4 appears to equate "gross negligence" with "moral turpitude" when it states that "a lawyer may be disciplined for acts of moral turpitude which constitute gross negligence." Yet "gross negligence" is not necessarily "moral turpitude." For example, the California Supreme Court, in *Clark v. State Bar* (1952) 39 Cal. 3d 161, 168-169, implies that commingling may be gross negligence and not necessarily be moral turpitude. In *Call v. State Bar* (1955) 45 Cal. 2d 104, 109, the California Supreme Court states that "[s]ome cases have said that gross negligence involves moral turpitude in that such conduct is a breach of his fiduciary duty, but in each instance there was misrepresentation or other improper action, and the statements must be read in the light of the additional facts." Therefore, our Committee believes that it is best to leave any references to gross negligence as applied to "moral turpitude" to the extensive authority developed under Business and Professions Code section 6106.

Furthermore, no statement of "moral turpitude" is found in the American Bar Association Model Rule 8.4 subdivision (b) which provides that "[i]t is a professional misconduct for a lawyer to . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects . . . ." Our Committee believes that there is no need to make references to "moral turpitude" in the proposed rule. Given the complicated nature of gross negligence when equated to moral turpitude, especially in the criminal context where "moral turpitude" may have other connotations, our Committee strongly urges that "moral turpitude" in the proposed rule and the proposed Comment [5] be deleted.

Sincerely yours,

Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

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October 12, 2006

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180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Amendments to the Rules of Professional Conduct
Comment on Proposed Rule 8.4(c)

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed the proposed Rule 8.4(c).

Our Committee believes that "misrepresentation" does not require scienter and should not be a basis for discipline. By including "misrepresentation" in this context, the proposed rule assumes willful misrepresentation. In our Committee's view, "misrepresentation" should not be grouped with other terms "dishonesty, fraud, deceit" which require scienter, in the proposed rule. Our Committee recommends that the word "misrepresentation" be deleted from proposed Rule 8.4(c) and suggests the proposed rule to read "engage in conduct involving dishonesty, fraud or deceit." instead.

Sincerely yours,

Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

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October 12, 2006

Audrey Hollins
The State Bar of California
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180 Howard Street
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Re: Proposed Amendments to the Rules of Professional Conduct
Comment on Proposed Rule 8.4(d) and (e)

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed the proposed Rules 8.4(d) and (e).

Our Committee believes the phrase "prejudicial to the administration of justice" is too vague and fraught with danger and there should be no provision for such vague concept in the rules of professional conduct. Our Committee recommends that this concept be deleted from the proposed rule 8.4 subdivisions (d) and (e) and proposed Comment [6].

Should the Commission intend to keep this concept in the proposed rule, this phrase needs further clarification or definition, including that it shall require an objective rather than a subjective standard, because, in its present open-ended state, it could lead to prosecutorial mischief.

Further, our Committee believes that subdivision (e) is already incorporated in subdivision (d). Therefore, subdivision (e) is redundant and it could be deleted.

Should the Commission be inclined to keep Comment [6] in its present text, our Committee recommends the term "peremptory challenges" should be amended to avoid confusion, to indicate the peremptory challenges "of a juror" and "not of a judge" in Comment [6].

Our Committee also recommends that the last sentence of Comment [6] be amended to read "A trial judge's or an appellate court's finding that the peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (b).", since the appellate court might disagree with a trial judge's finding to the contrary.

Sincerely yours,

Louisa Lau

Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

Rule 2.4

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October 12, 2006

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The State Bar of California
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180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Amendments to the Rules of Professional Conduct
Comment on Proposed Rule 8.4(f)

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed the proposed Rule 8.4(f).

Our Committee disagrees with this proposed rule in its entirety and recommends that the Commission at least remove the word "*imply*", if not whole rule, because "*imply*" is an ambiguous term.

Sincerely yours,

Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

Rule 2.4

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October 12, 2006

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The State Bar of California
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180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Amendments to the Rules of Professional Conduct
Comment on Proposed Rule 8.4(g)

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has reviewed the proposed Rule 8.4(g).

Our Committee agrees an attorney who has assisted or encouraged judicial misconduct should be subject to discipline. However, our Committee recommends that the Commission consider providing a discussion comment to clarify the prohibition. Presently, no such discussion exists in the Comment section.

Sincerely yours,

Louisa Lau
Chair, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

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OC WOMEN LAWYERS ASSOC.

MEMORANDUM

Date: December 1, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct The State Bar of California

From: Orange County Bar Association ("OCBA")

Re: Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California Developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

Subj: Proposed Rule 8.4: Misconduct [1-120]

Founded over 100 years ago, the Orange County Bar Association has over 9,800 members, making it the second largest voluntary bar association in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared jointly by the Professionalism & Ethics and Administration of Justice Committees.

The OCBA respectfully submits the following concerning the subject proposed Rule:

*****

Comment:

1. In general, the rule would be a welcome addition, since it would provide a guide to what constitutes "misconduct".

2. Comment (6) in the clean version of the proposed rule erroneously makes reference to paragraphs (d) and (b) , since the comment is clearly addressing paragraph (e).

3. That part of paragraph (e) that would prohibit manifestation of bias or prejudice by "words" is objectionable. The words "by words or" should be stricken, with the result the manifestation could occur only through conduct. It would be improper to regulate an attorney's words in any manner. An attorney should not be punished for speaking out. A person's free speech right should not be diminished just because they are an attorney. The last sentence of comment (6) should be changed to state that a preemptory challenge shall not establish a violation of paragraph (e) i.e., delete the word "alone".

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THE STATE BAR OF CALIFORNIA
PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

This form allows you to submit your comments by entering them in the text box below and/or by uploading files as attachments. You should discuss only **one** Rule per comment submission form. Select the proposed Rule from the drop down list.

Comments submitted are regarded as public record.

DEADLINE TO SUBMIT PUBLIC COMMENTS: OCTOBER 16, 2006

Your Information

Name Alan Konig

Professional Affiliation

*** City** San Francisco

*** State** California

*** email address** ahkcal@comcast.net

A copy of your response will be sent to this email addre

*** Select the proposed Rule that you would like to comment on from the drop down list.**

Rule 8.4 Misconduct [1-120]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

Enter your comments here. To upload files proceed to the ATTACHMENTS section below.

The addition of paragraph (e) to the rule is inviting a court to declare the rule unconstitutional. While the comments to the rule theoretically address the issue raised by Wunsch, vagueness, the comments are silent on how the proposed addition would ever survive a First Amendment challenge. It is difficult to believe that any sufficient justification could be provided to the Ninth Circuit that would outweigh an attorney's First Amendment right to free speech. The condition that the speech be "prejudicial to the administration of justice" is of little use to save the proposal from a finding of unconstitutionality because it is a nebulous term. What, exactly, is the "administration of justice" and when and for what reasons does pure speech become prejudicial to it?

Rule 2.4

Attachments

You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the next to **Attachment**.

INSTRUCTIONS

1.
In the **Attachment** field, type in the file name (for example -> *c: comments.doc*) or locate the file by clicking on the **Browse** button. For help with browsing and locating the file click .

2.
Once you have selected the file, click **Upload** and wait while your file uploads.

3.
After the file has successfully been uploaded, below **Uploaded file**, your document's file name should appear in blue. If you do not see your file's name then you should go back to step 1 or click for assistance.

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To upload another file, repeat steps 1 thru 3.

Rule 2.4

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Contact Support

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September 17, 2006

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, CA 94105

Re: State Bar Special Commission for the Revision of the Rules of Professional Conduct. Comment re proposed rule 3.6.

Dear Ms. Hollins:

I am in the process of preparing a Professional Responsibility presentation for the State of Oklahoma District Attorneys Council, Annual Fall Training Conference for that state's prosecutors, and have been reviewing the Oklahoma Rules of Professional Conduct which can be found at *http://www.okbar.org/ethics/ethics.htm*. I have done a good deal of seminars for state prosecutors' offices over the last fifteen years and have reviewed their respective rules of professional conduct.

Earlier I had referred several rules of various jurisdictions to the Commission which I felt merited the Commission's consideration. In that respect, I commend to the Commission Oklahoma Rule of Professional Conduct 3.6, "Trial Publicity" with Comments, a copy of which I have enclosed, and request that it be disseminated among the members of the Commission with this letter. I believe the Oklahoma rule is concise and properly adopts a "clear and present danger" test which was recommended in *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1037 ("The drafters of Model Rule 3.6 apparently thought the substantial likelihood of material prejudice formulation approximated the clear and present danger test.")

Thank you.

Sincerely yours,

Roderick W. Leonard

Encl.

Oklahoma Statutes Citationized

Title 5. Attorneys and the State Bar

Chapter 1

Appendix 3-A: Oklahoma Rules of Professional Conduct

Article Advocate

Section Rule 3.6 - Trial Publicity

Cite as: O.S. §, __ __

Oklahoma Rules of Professional Conduct
Chapter 1, App. 3-A
Advocate
Rule 3.6. Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable lawyer would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have an imminent and materially prejudicial effect on the fact-finding process in an adjudicatory proceeding relating to the matter and involving lay fact-finders or the possibility of incarceration.

(b) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(c) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Historical Data

Adopted effective July 1, 1988. Amended by order of June 26, 1997, eff. October 1, 1997 (superseded document available).

Committee Comments

[1] Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to litigation in which incarceration may result or lay persons will serve as fact-finders. While this proposition applies in civil cases, it is particularly salient with respect to criminal prosecutions. If there were no such limits, the result would be practical nullification of the protective effect of the constitutionally-grounded presumption of innocence and the exclusionary rules of evidence. At the same time, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Such rules may be adopted by a tribunal to be generally applicable, to apply to a specific class of litigation, or to govern a particular case, by way of special order. Rule 3.4(c) governs compliance with all such rules; however, a statement in violation of such a rule or order may constitute a violation of Rule 3.6(a), depending on the circumstances.

[3] Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been, involved in the investigation or litigation of a case, and their associates.

[4] Notwithstanding paragraph (a), many statements about a matter made by participating lawyers and their associates are unlikely to materially prejudice the fact-finding process in an adjudicative proceeding. While circumstances can result in an otherwise innocuous statement's having a materially prejudicial effect, accurate, factual statements of the following matters will not ordinarily violate the standard of Rule 3.6(a):

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) the information contained in a public record; (3) that an investigation of the matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto; (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and (7) in a criminal case, in addition to items (1) through (6): (i) the identity and occupation of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation. This list is illustrative, not exhaustive.

[5] There are, on the other hand, certain subjects which are more likely than others to have a materially prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or other proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create an imminent and material risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and the defendant is presumed innocent until and unless proven guilty;

[6] The likelihood of prejudice due to a public statement is different depending on the type of proceeding and the timing of the statement. Statements which may be innocuous when not made in close proximity to an adjudicatory proceeding may be materially prejudicial if made on the eve or in the midst of the proceeding. Criminal jury trials in which laypersons serve as fact-finders and other proceedings that could result in incarceration are most sensitive to extra-judicial speech. Civil trials in which laypersons serve as fact-finder(s) may also be quite sensitive. Non- jury hearing and arbitration proceedings are far less prone to be affected by such speech. The rule places limitations on prejudicial comments only with respect to the most sensitive cases. However, regardless of the likelihood of public dissemination of a statement, regardless of the timing of the statement, regardless of the vulnerability of a proceeding to prejudice as a result of the dissemination of a particular statement, and regardless of whether a lawyer is involved in a proceeding or associated with a lawyer who is involved in it, a lawyer should aspire to refrain from making statements that pose a substantial likelihood of prejudicing the fairness of a proceeding or unjustifiably casting doubt on the fairness of the proceeding or the legal system in general. A lawyer should be especially mindful of the likelihood of such effects when the lawyer's statement is reasonably likely to be disseminated by means of public communication.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is reasonably necessary to mitigate undue prejudice created by the statements made by others.

Oklahoma Modification

The Oklahoma Rule that went into effect on October 1, 1997, differs from ABA Model Rule 3.6 in effect on that date in the following respects:

The standard in the 1997 version of Rule 3.6(a), "will have an imminent and materially prejudicial effect on the fact-finding process," differs from the ABA Model Rules standard, "substantial likelihood of material prejudice," to emphasize that Oklahoma's standard approximates the "clear and present danger" test that is familiar to lawyers, and also to highlight the fact that the Rule is concerned with effects on the factfinding processes of tribunals rather than effects on public opinion.

The 1997 Oklahoma amendments restrict the applicability of Rule 3.6 to statements affecting adjudicatory proceedings "involving lay factfinders or the possibility of incarceration." This differs from the ABA Model Rule, which applies to statements concerning any adjudicative proceeding.

ABA Model Rule 3.6(b) contains a list of types of statements that lawyers are affirmatively allowed to make. A similar list of types of statements appears in the fourth paragraph of the Comment to Oklahoma's Rule 3.6, where the statements are described as "ordinarily" permissible. This emphasizes that the list establishes only a rebuttable presumption as to the permissibility of such statements. Unlike the ABA list of presumptively permissible statements, the Oklahoma Comment does not condone public statements about the residence and family status of a defendant in a criminal case.

The next to last paragraph of the Comment to Oklahoma's Rule 3.6 is somewhat more specific than is ABA Model Rule 3.6 in identifying some of the factors to be considered in determining whether a statement violates the standard of Rule 3.6(a). That same paragraph of the Comment also goes beyond the ABA Model Rule in encouraging lawyers to aspire to be responsible regarding their extrajudicial statements, even if they are not proscribed by Rule 3.6.

The fifth paragraph of the Comment to Oklahoma's Rule 3.6 contains a list of types of statements that are more likely than others" to violate the standard of Rule 3.6(a). Like the Comment to ABA Rule 3.6, this list refers to a statement of "information that the lawyer knows or should know is likely to be inadmissible" at trial. The ABA Comment states that such a statement is presumed to be violative of Rule 3.6 when it poses a "substantial risk of prejudicing an impartial trial, while the Oklahoma Comment states that such a statement is presumed to be violative only when it poses an "imminent and material risk of prejudicing an impartial trial." This change is to conform to the different standard employed in Oklahoma's Rule 3.6(a) as compared with ABA Rule 3.6(a).

The last sentence of the last paragraph of the Comment to Rule 3.6 adds the word "reasonable" to the Comment explaining the safe harbor" created by Rule 3.6(b) to emphasize that the right of reply is not unlimited.

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Los Angeles County Bar Association

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September 27, 2006

Commission for the Revision of the
Rules of Professional Conduct
c/o Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, CA 94105

Re: Request for Extension of Public Comment Period for First Batch of Proposed Rules

To the Commission:

I write on behalf of the Professional Responsibility and Ethics Committee of the Los Angeles County Bar association to request the Commission to extend the public comment period for the first Batch of the proposed rules of professional responsibility and conduct which deadline is currently scheduled on October 16, 2006.

As we understanding that the Commission has taken years to produce these proposed rules. It took the Commission far longer than expected to deliberate and prepare these rules. Our Committee also realizes that it takes longer than we expected to conduct our discussion and generate comments to these proposed rules. We have concerns that such a short period for public comment is inadequate to conduct meaningful discussion and generate comments, and therefore, would like to ask the Commission to extend its public comment period to allow Committees such as ours to provide input.

We thank you tor your anticipated cooperation.

Sincerely yours,

Louisa Lau
Chairperson, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

cc: LAPREC Members

Rule 2.4

SD CBA SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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Lilys D. McCoy

Audry Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Response to Request for Comments
Discussion Draft: Proposed Amendments to the Rules of Professional Conduct of the State Bar of California

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association, I respectfully submit the enclosed with respect to the pending Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California, developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We have also included separate comments (approvals) of the proposed Global Changes related thereto. This is in response to the State Bar of California's request for comments thereon distributed in June, 2006.

Please note that although the comments reflect the position of the San Diego County Bar Association, we have also included dissenting views offered by members of its Legal Ethics Committee. Given the tentative state of the proposed new and amended rules, we wished to provide as much input to the Special Commission as possible, with which to assist them in their efforts.

Thank you for providing our Association the opportunity to participate in this process.

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

● 1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Global Change 1: Adoption of ABA MR numbering system

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

We approve of the proposed change.

Rule 2.4

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Global Change 2: Adoption of ABA MR format, structure and style

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

We approve of the proposed change.

Rule 2.4

MEMORANDUM

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Global Change 3: Replacement of "member" with "lawyer"

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

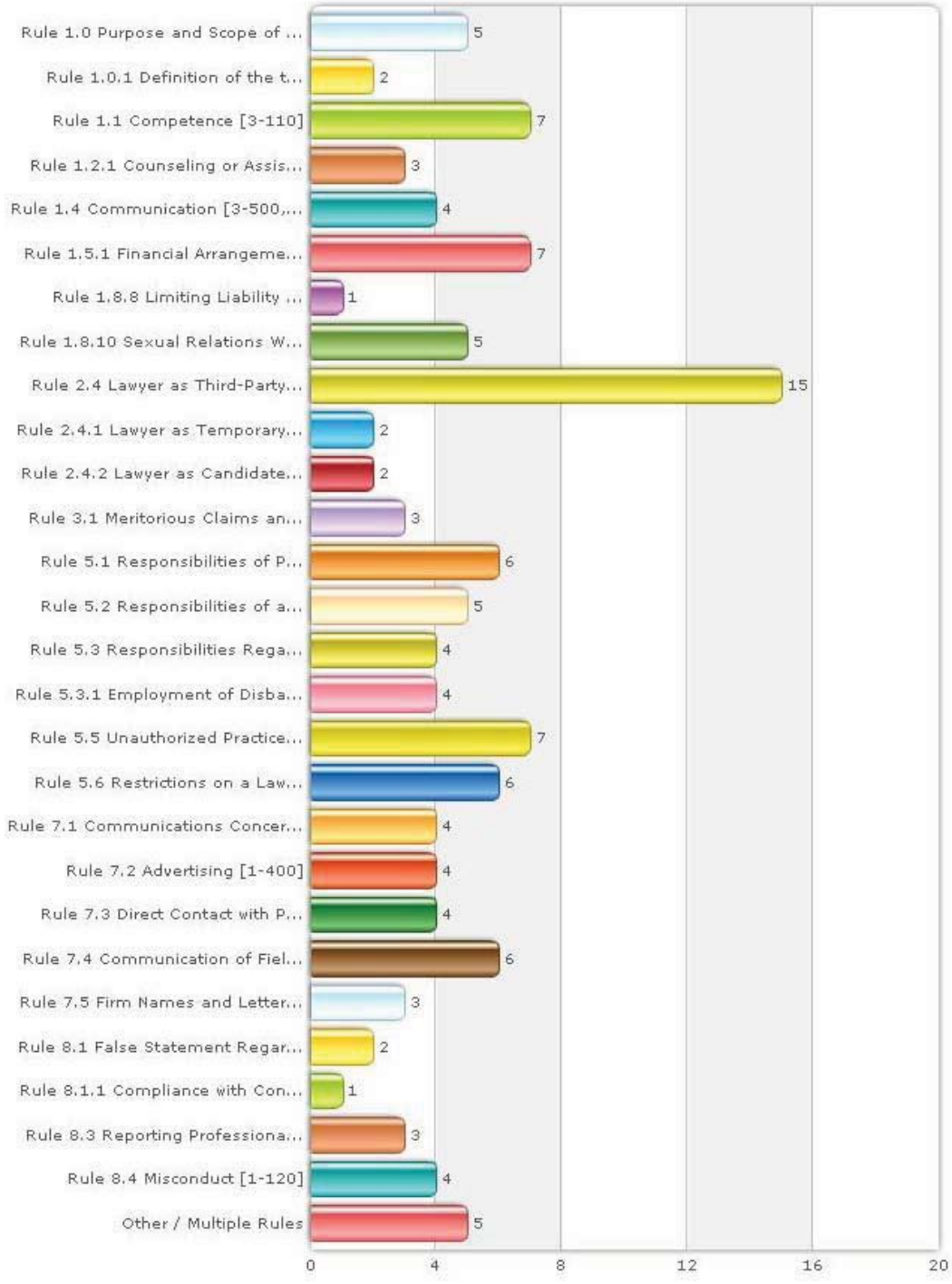
Comment 1:

We approve of the proposed change.

Rule 2.4

BATCH 1

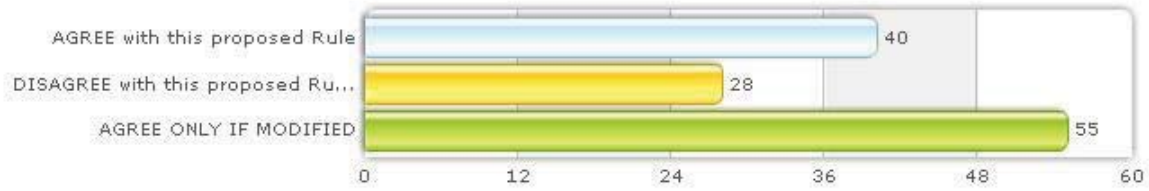
*** Select the proposed Rule that you would like to comment on from the drop down list.**



Total Number of Responses for this Item: 124

BATCH 1

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.



Total Number of Responses for this Item: 124

Public Comments [1.8.3] ~ FILE LIST

B-2007-169a Philip Humphreys [1.8.3]

B-2007-171a Orange County Bar [1.8.3]

B-2007-172a (O) Santa Clara County Bar [1.8.3]

B-2007-173 Robert Sall [1.8.3]

B-2007-175a Ross Simmon-SDCBA [1.8.3]

PHILIP HUMPHREYS
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October 15, 2007

Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

re: Public Comment Submissions to Rules Revision Commission

Dear Ms. Hollins:

Enclosed are our comments on the five draft rules which have been released for public comment.

Our committee appreciates very much the effort and time devoted by all commission members to the revision project.

Yours very truly,

Philip Humphreys, Chair
Ethics Committee of The Bar
Association of San Francisco

cc: Daniel W. Burkhardt, Esq., Executive Director
Bar Association of San Francisco
301 Battery Street, Third Floor
San Francisco, CA 94111
(w/enc.)

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October 15, 2007

Audrey Hollins
Office of Professional Competence,
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State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

re: Proposed Rule of Professional Conduct 1.8.3
Rules Revision Commission, Batch 2
Submitting organization: Bar Association of San Francisco

Dear Ms. Hollins:

These comments have been prepared by the Ethics Committee of the Bar Association of San Francisco. The BASF Board of Directors has authorized us to advise the Rules Revision Commission that our comments reflect the position of the Bar Association of San Francisco.

Our committee endorses the commission's proposal with the following recommended changes:

Paragraph (b): The rule should remain limited to legally defined relationships, including registered domestic partners. In the alternative, if the Bar is going to subject a lawyer to discipline based on the term "close familial relationship", then the rule must define that term.

Comment [1]: We urge the inclusion in this comment of the deleted second sentence of present Discussion paragraph 1, which provides: "The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline."

If the gift is permissible, the lawyer does not provide any advice, and all the lawyer does is act as a scrivener, the lawyer should not be at risk. The lawyer is merely following the instructions of the client. This protection should be reinstated.

Comment [2]: We urge that the requirement be for the member to advise the client to seek independent legal advice. The draft comment requires now that the client obtain independent advice. This is a different standard from that of the conflict rules which require that the client have an opportunity to obtain independent advice. The comment does not address the circumstance where the client refuses or chooses not to seek independent advice.

Comment [3]: The comment states that appointment as a fiduciary creates a potential conflict. However, this makes little sense in the case of a testamentary document because the client is dead. The beneficiaries have no attorney client relationship. The comment should include the requirement that the client be advised of the circumstances and other alternatives which might preserve more of the estate, e.g. the potential of a family member acting without compensation, the comment should not mention conflict of interest. It is better

to describe this provision as a partial gift if, as may be the case, the amount of fees based on the time normally expended is less than the statutory fees a lawyer would receive. Therefore, independent advise should be counseled.

Respectfully submitted,

Philip Humphreys, Chair
Ethics Committee of the Bar
Association of San Francisco

OCBA

ORANGE COUNTY
BAR ASSOCIATION

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OC TRIAL LAWYERS ASSOC.
OC WOMEN LAWYERS ASSOC.

October 25, 2007

Rules Revision Commission
Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Dear Ms. Hollins:

Please see the enclosed comments relating to the California Rules of Professional Conduct Pending for Public Comment from the Orange County Bar Association.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy C. Levindofske
Executive Director

TCL: ms

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OCBA

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To: Rules Revision Commission
Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

From: Orange County Bar Association

Re: California Rules of Professional Conduct Pending for Public Comment

Date: October 25, 2007

The Orange County Bar Association submits the following comments on the proposed Rules of Professional Conduct:

Rule 1.8.3 – Gifts from Client:

The OCBA supports the proposed changes to this rule which will conform the rule more closely to the ABA Model Rule. The OCBA agrees with the RRC's proposal to extend the rule to cover "attempts" to obtain a gift, and agrees that, for client protection, attorneys should be prohibited from drafting the documents that may be necessary to provide a gift to the attorney.

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

The OCBA supports the proposed changes to this rule, with one clarification. Proposed subsection (a)(4) allows the attorney to pay costs and expenses of litigation on behalf of an indigent client. We propose to add pro bono clients to this exception. Attorneys often provide pro bono services to parties who are not "indigent," such as non-profit entities. Lawyers should be able to pay costs and expenses of clients that receive pro bono legal services (due to, for example, the social, political, or moral implications of the litigation). Thus, the OCBA recommends that proposed subsection (a)(4) be changed to read as follows: "pay court costs and reasonable expenses of litigation on behalf of an indigent or pro bono client in a matter in which the lawyer represents the client."

Rule 8.4.1 – Prohibited Discrimination in the Practice of Law

The OCBA supports the proposed changes to this rule, with one exception. The OCBA believes that it is of the utmost importance that discrimination

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within the legal profession be met with the full force of the law. For that reason, the OCBA considered whether the requirement of a prior adjudication of discrimination contained in the rule ought to be eliminated. Because State Bar resources available to investigate discrimination matters are limited, and because other remedies were thought to be adequate, the OCBA's belief is that the rule's requirement of a prior adjudication is appropriate.

The OCBA is also concerned that the rule will impose discipline on associate lawyers who know of unlawful discrimination but do not take steps to rectify the situation. We believe that associate lawyers who commit unlawful discrimination should be subject to discipline, subject to the prior adjudication requirement. However, we believe that an associate's failure to advocate corrective action where a lawyer knows of a discriminatory policy or practice resulting in unlawful discrimination should not subject the associate to discipline. Our view is that discipline under such circumstances should be reserved for those in management and supervisory positions.

Rule 1.8.11 – Relationship with Other Party's Lawyer

The OCBA supports the proposed rule, with two clarifications. While we considered whether written consent was appropriate, we determined that the rule as drafted is sufficient to protect client interests. The first clarification involves the use of the word "inform." We would ask the RRC to consider whether, if it intends to carry forward the concept of "disclosure" set forth in the present Rule 3-310(A), that term should be used in this rule, rather than the term "inform." We like the requirement implicit in the concept of disclosure that would require some information about the consequences of the relationship be communicated to the client. The second clarification involves comment two. We find the language of the comment as drafted unnecessarily difficult. Instead, we would propose the following: "This Rule is not intended to require a lawyer to disclose his or her relationship with lawyers who are not connected to the matter, but who happen to practice with law firms that are involved in the matter."

RECEIVED ONLINE
SEE ATTACHMENT FOR FULL-TEXT

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments on the following page. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
All information submitted is regarded as public record.

DEADLINE TO SUBMIT PUBLIC COMMENTS: October 26, 2007

Your Information

Name
Christine Burdick, Executive Director & General Coun

Commenting on behalf of an organization (?) (●) Yes ( ) No

Professional Affiliation *(click this for details)* --> (?)
Santa Clara County Bar Association

*** City**
San Jose

*** State**
California

*** Email address** **(A copy of your response will be sent here.)**
chrisb@sccba.com

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 1.8.3 Gifts from Client [4-400]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

( ) AGREE with this proposed Rule
( ) DISAGREE with this proposed Rule
(●) AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

The Santa Clara County Bar Association has a special task force dedicated to reviewing and commenting on the proposed these proposed rule revisions. All comments are approved by and are the position of the Santa Clara County Bar Association Board of Trustees. Thank for the opportunity to comment.

Proposed Rule 1.8.3 – Gifts From Clients

Recommendation: 1.8.3 (a)(2): The following should be added to the last sentence of this section to read: "…unless the lawyer…is related to the client or the client has had an independent advice from another lawyer." This change, then eliminates the need for Comment [2] as currently drafted. Comment [2] with the recommended change in the substance of the rule, should read as follows: "It is the intent of this rule that it be applied consistent with PC 21350 et seq."

1.8.3(b): In the third line, "and" should be changed

Contact Support

Name	Christine Burdick, Executive Director & General Counsel
Commenting on behalf of an organization	Yes
Professional Affiliation (click this for details) -->	Santa Clara County Bar Association
City	San Jose
State	California
Email address (A copy of your response will be sent here.)	chrisb@sccba.com
Proposed Rule Commenting On	Rule 1.8.3 Gifts from Client [4-400]
Position	AGREE ONLY IF MODIFIED
ENTER COMMENTS HERE.	The Santa Clara County Bar Association has a special task force dedicated to reviewing and commenting on the proposed these proposed rule revisions. All comments are approved by and are the position of the Santa Clara County Bar Association Board of Trustees. Thank for the opportunity to comment. Proposed Rule 1.8.3 – Gifts From Clients Recommendation: 1.8.3 (a)(2): The following should be added to the last sentence of this section to read: "…unless the lawyer…is related to the client or the client has had an independent advice from another lawyer." This change, then eliminates the need for Comment [2] as currently drafted. Comment [2] with the recommended change in the substance of the rule, should read as follows: "It is the intent of this rule that it be applied consistent with PC 21350 et seq." 1.8.3(b): In the third line, "and" should be changed to "or."
Attachment	
Attachment	
Attachment	
Receive Mass Email?	
Date	10/26/2007
Period	PC
File :	
Commented on:	Rule 1.8.3
Method:	OL

Hollins, Audrey

From: McCurdy, Lauren
Sent: Friday, October 26, 2007 11:08 AM
To: Difuntorum, Randall; Hollins, Audrey; Lee, Mimi
Subject: FW: Public Comment on Proposed Rule 1.8.3 [4-400]

Hi All, Please consider the e-mail below as an official public comment for Batch 2. Please process as normal. Thanks. Lauren

-----Original Message-----
From: Robert K. Sall [mailto:rsall@Sall-Lawoffice.com]
Sent: Friday, October 26, 2007 10:44 AM
To: McCurdy, Lauren
Subject: Public Comment on Proposed Rule 1.8.3 [4-400]

Proposed Rule 1.8.3 fails to provide an answer to the important question that is suggested by the comparison of section (a)(1) to Comment [1]. The comment suggests that a lawyer may accept certain small gifts from a client, but omits discussion of substantial gifts. The rule specifies that the lawyer may not induce or attempt to induce a substantial gift from a client. What is missing is a statement whether the lawyer is prohibited from accepting a substantial gift from a client that the lawyer has not suggested or induced. The comment would lead one to believe that such acceptance might be improper, but the rule itself fails to address the question.

If an non-relative client gives the lawyer a gift, say first class tickets to Paris, and a week in a chic hotel, as a thank you for closing a deal, this gift is worth maybe $30,000. If the lawyer has neither induced the gift nor suggested it, does the lawyer commit an ethical violation by accepting it? The comment creates confusion because it would tend to indicate that the lawyer should not accept it, but the rule ignores this situation. This is an area where I believe the rule needs to be reconciled with the comment.

The comment to the ABA Model Rule does address this situation by referring to more substantial gifts, settling the issue as to whether they may be accepted, and referring generally to the law of undue influence. This type of guidance is preferable to no guidance at all, and I believe the non-induced substantial gift should be at least addressed in the comments.

Robert K. Sall

The Sall Law Firm

A Professional Corporation

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Hollins, Audrey

From: Ross G. Simmons [ross@rblaw.com]
Sent: Friday, November 16, 2007 11:43 AM
To: Hollins, Audrey
Cc: McCurdy, Lauren; Wendy Patrick Mazzarella; judy@rblaw.com
Subject: SDCBA Comments: Five (5) Proposed Amended Rule; State Bar Special Commission For the Revision of the RPC

Dear Audrey:

As discussed at the time of the public hearing in the referenced matter, attached please find the formal comments submitted to the State Bar Special Commission for the Revision of the Rules of Professional Conduct by the San Diego County Bar Association (SDCBA). These comments were approved by the Board of Directors of the SDCBA, and adopted as its position on these matters, at its regular meeting of November 13, 2007.

I regret the timing of this deliverable, and sincerely appreciate the additional time within which to provide it. I thank the Commission for its indulging my appearance in September, and for its consideration of the attached.

I provide in this format in the interest of expediency. We would gladly provide in other, more convenient formats if doing so would be of assistance. Otherwise, as is always true, I welcome your calls, those of your colleagues or those of any Commission members if there are any residual questions concerning the attached, or if we can be of assistance in any other measure. We are grateful for being given the opportunity to participate in this process.

Ross G. Simmons
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U.S. Treasury Circular 230 Notice: Any U.S. federal tax advice included in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding U.S. federal tax-related penalties, or (ii) promoting, marketing, or recommending to another party any tax-related matter addressed herein.

MEMORANDUM

Date: November 16, 2007

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "2nd" PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 1.8.3 Gifts From Client [4-400]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

We propose that the proposed rule be modified to track closer to its ABA Model Rule counterpart, with the exception that the term "induce," which is currently applicable at CRPC Rule 4-400, replace the term "solicit" which otherwise is used at MR 1.8(c). We have preserved the prior Comment of the commission, but have provided additional language consistent with our proposal.

Clean and highlighted versions of our proposal are attached.

Rationale for Comment:

1. There is Merit in Unification Absent Reason for Differentiation

Generally, based on the highlighted version, it is our view that by merely replacing the word "solicit" with the word "induce," use of the phrasing and structure of Model Rule 1.8(c) does not differ in materials respect from Rule 1.8.3, proposed by the Commission.

2. Broader Interpretational Guidance

We view the proposed rule as appropriate and practical in the abstract, but unduly vague in the particulars. As a result, we would prefer greater instruction related to the terms

"substantial" and "modest," in distinguishing between gifts that are permissible and those that are not. This affects proposed Rule 1.8.3(a)(1) & (2), and Comments [1] & [2].

We acknowledge that in taking issue with the term "substantial," we are calling into question a term used in existing CRPC 4-400 and ABA MR 1.8(c), and to a lesser degree in view of its outright prohibition, Restatement of the Law Governing Lawyers §127(2)(b) ("insubsubstantial"). It is our hope that by aligning the structure of proposed Rule 1.8.3 with MR 1.8(c), that the authority of ABA Model Rules jurisdictions will be persuasively applied in California, to provide a larger pool of precedent upon which interpretation of the Rule may draw, and hence assist in providing much-needed guidance in the application of those terms.

Consistent with this strategy, note that we have similarly borrowed the term "general standards of fairness" from ABA MR. 1.8(c), in an attempt to provide practitioners with at least a modicum of guidance relative to a standard of review.

3. Attempt to Induce

We disagree with the addition of the phrase "attempt to induce," and therefore have removed it from our proposal.

Admittedly, addition of the "attempt to induce" adds a broader sweep to proposed Rule 1.8.3 than its predecessor, toward curbing the potential for undue influence exercised by a lawyer as it relates to his or her client. However, it's subjectivity—it is not being dependent upon actual receipt of the gift—makes application of the phrase hopelessly unpredictable. There is, for instance, utterly no differentiation made between an intentional "attempt to induce" as opposed to a negligent "attempt to induce," which is to say that whether or not there was an "attempt to induce" or not could vary dramatically if viewed from the attorney-donor, the client-donee, or an interested third-party seeking to invade the attorney-client relationship. It is a phrase that makes both compliance and enforcement little more than conjecture. Too, nothing in the Commission's work indicates that existing Rule 4-400 has been deficient in its application to date so as to warrant the sort of modification proposed.

Finally, to the extent attempted misconduct is to be subject to discipline, as a general proposition, it would seem to make sense to do that in broad strokes as does ABA MR 8.4(a), rather than piecemeal as this phrase would seem to invite California's body of authority to do.

4. General Standards of Fairness

Exempt relationships have been moved to Comment 4. This permits our proposed version of the rule to track closer to ABA MR 1.8(c), for the reasons discussed above. Too, we do not believe that we undermine the Commission's intent by relocating other examples of excluded relationships to Comment 4, which has been added to explicitly highlight by example the term "close, familial relationship."

Rule 1.8.3 [4-400] Gifts From Client

A lawyer shall not induce a client to make a substantial gift, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

Comment

[1] Lawyers may accept modest holiday, birthday, and other gifts of celebration or appreciation from their clients, provided the transaction meets general standards of fairness. Lawyers also may take steps that might result in their clients making permitted gifts, such as by sending them wedding announcements. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not induce a substantial gift from a client except where the lawyer is related to the client. (Compare Cal. Probate Code, section 21350(b).) Where impermissible influence occurs, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

[2] If effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client must have independent advice from another lawyer. (Cal. Probate Code, sections 21350 et seq.) The sole exception is where the client is a relative of the donee.

[3] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provisions in Rule 1.7(d) [3-310(B)]. In disclosing the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

[4] The term "close, familial relationship," apart from those expressly set out in the Rule, is intended to extend to similarly situated relationships, which by way of example include registered domestic partners or equivalents in other jurisdictions, cohabitants, relatives within the third degree of the lawyer and of the lawyer's spouse (or domestic partner or equivalent, as applicable).

[5] In interpreting the Rule, similarly worded authority from other jurisdictions is intended to be instructive although not binding. The term "induce," however, is intended to be broader than the term "solicit."

Rule 1.8.3 [4-400] Gifts From Client

~~(a)~~ A lawyer shall not~~:~~

~~(1) induce or attempt to~~ induce a client to make a substantial gift, including a testamentary gift, ~~to the lawyer~~ or ~~a person related to the lawyer, or~~

~~(2)~~ prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift~~,~~

unless the lawyer or other recipient of the gift is related to the client.

~~(b)~~ For purposes of this ~~Rule~~paragraph, related persons include a spouse, ~~registered domestic partner or equivalent in other jurisdictions, cohabitant, relatives within the third degree of the lawyer and of the lawyer's spouse,~~child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

Comment

[1] Lawyers may accept modest holiday, birthday, and other gifts of celebration or appreciation from their clients, provided the transaction meets general standards of fairness. Lawyers also may take steps that might result in their clients making permitted gifts, such as by sending them wedding announcements. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not induce ~~or attempt to induce~~ a substantial gift from a client except where the lawyer is related to the client ~~as set forth in paragraph (a)~~. (Compare Cal. Probate Code, section 21350(b).) Where impermissible influence occurs, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

[2] If effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client must have independent advice from another lawyer. (Cal. Probate Code, sections 21350 et seq.) The sole exception is where the client is a relative of the donee.

[3] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provisions in Rule 1.7(d) [3-310(B)]. In disclosing the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

[4] The term "close, familial relationship," apart from those expressly set out in the Rule, is intended to extend to similarly situated relationships, which by way of example include registered domestic partners or equivalents in other jurisdictions, cohabitants, relatives within the third degree of the lawyer and of the lawyer's spouse (or domestic partner or equivalent, as applicable).

[5] In interpreting the Rule, similarly worded authority from other jurisdictions is intended to be instructive although not binding. The term "induce," however, is intended to be broader than the term "solicit."

Public Comments [1.8.5] ~ FILE LIST

B-2007-169b Philip Humphreys [1.8.5]

B-2007-170a COPRAC Maio [1.8.5]

B-2007-171b Orange County Bar [1.8.5]

B-2007-172b (O) Santa Clara County Bar [1.8.5]

B-2007-175b Ross Simmon-SDCBA [1.8.5]

PHILIP HUMPHREYS
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October 15, 2007

Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

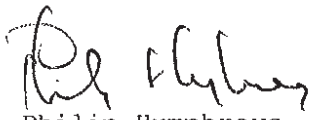
re: Public Comment Submissions to Rules Revision Commission

Dear Ms. Hollins:

Enclosed are our comments on the five draft rules which have been released for public comment.

Our committee appreciates very much the effort and time devoted by all commission members to the revision project.

Yours very truly,



Philip Humphreys, Chair
Ethics Committee of The Bar
Association of San Francisco

cc: Daniel W. Burkhardt, Esq., Executive Director
Bar Association of San Francisco
301 Battery Street, Third Floor
San Francisco, CA 94111
(w/enc.)

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October 15, 2007

Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

re: Proposed Rule of Professional Conduct 1.8.5
Rules Revision Commission, Batch 2
Submitting organization: Bar Association of San Francisco

Dear Ms. Hollins:

These comments have been prepared by the Ethics Committee of the Bar Association of San Francisco. The BASF Board of Directors has authorized us to advise the Rules Revision Commission that our comments reflect the position of the Bar Association of San Francisco.

The Legal Ethics Committee favors the changes to the existing rule. The rule does not change the existing restrictions on or requirements in advancing costs or making loans to a client, but the inclusion of the comments may further the understanding of members of the bar of the rule's purpose and the competing concerns which the rule addresses.

We also favor the provision which requires compliance with Rule 1.8.1 (old 3-300) if an attorney wishes to lend a client funds. This removes any question that such a transaction would place the attorney in an adverse position regarding the client. The inclusion of this requirement removes a potential trap for the unwary.

Respectfully submitted,

Philip Humphreys, Chair
Ethics Committee of the Bar
Association of San Francisco

THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2107

October 18, 2007

Harry B. Sondheim, Chair
The Commission for the Revision of the Rules of Professional Conduct
The State Bar of California
180 Howard Street, 10th Floor
San Francisco, CA 94105

Dear Mr. Sondheim:

The Committee on Professional Responsibility and Conduct (COPRAC) submits the following comment on the proposed Rules of Professional Conduct.

Rule 1.8.11 – Relationship with Other Party's Lawyer

COPRAC believes that a client should not only be "informed" of the existence of a relationship with another party's lawyer, but also should be told of the potential consequences of such a relationship. Although not unanimous, it was COPRAC's consensus that the rule should require "disclosure," as that term is defined in Rule 3-310(A)(1), and also that the client should be required to give written consent to the types of conflicts that are described therein. In COPRAC's view, the existence of a relationship with another party's lawyer is of such significance that a greater safeguard is appropriate for purposes of client protection. Accordingly, COPRAC proposes that the final phrase of this rule be rewritten to read:

> ... unless the lawyer provides written disclosure of the relationship to the client and obtains the client's informed written consent.

COPRAC believes that the comments to this rule should clarify that disclosure is intended to refer to the definition of disclosure contained in Rule 1.7.

Rule 8.4.1 – Prohibited Discrimination in Law Practice Management or Operation

First, and most importantly, COPRAC wishes to emphasize its agreement with the policy expressed in this rule that lawyers managing or operating law firms should be subject to discipline if it is adjudicated that they have unlawfully discriminated as described.

That said, COPRAC has several concerns with the manner in which this rule is drafted, and requests changes to clarify its application. First, COPRAC believes that subpart (b) of the rule as drafted is ambiguous. The first phrase, "In the management or operation of a law

practice," creates a limitation that is arguably eliminated by the last clause, "whether or not the lawyer is a partner or shareholder or serves in a management role." From the substance of Comment [2], COPRAC has speculated that the distinction the Commission is attempting to draw is between formal managers of a law firm and lawyers who may be managing informally, for example, lawyers managing a project or case. The matter, however, is not entirely clear.

Some members of COPRAC are also concerned with the possibility that a lawyer who is not a manager, shareholder, or partner would be subject to discipline under subpart (b) of this rule for "knowingly permitting" unlawful discrimination as defined under subpart (a)(1). "Knowingly permitting" is broadly defined to include failing to advocate corrective action when the lawyer knows of a discriminatory practice resulting in the unlawful discrimination. COPRAC believes that non-manager lawyers should be subject to discipline for unlawful discrimination (following the required adjudication), but that non-manager lawyers who are aware of unlawful discrimination and do not advocate corrective action should not be. Imposing discipline in the latter case seems too great a penalty to impose on a co-worker who may observe discrimination, and therefore know of it, yet not be in a position to act without substantial risk, real or perceived, of jeopardizing his or her own career relationships.

To resolve this concern, COPRAC proposes that subpart (b) of this rule be broken down thus:

(b) a lawyer shall not:

(1) unlawfully discriminate on the basis of race, national origin, sex, sexual orientation, religion, age or disability, whether or not the lawyer is a partner or shareholder or serves in a management role;

(2) in the management of a law practice, knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability.

If this rule is restructured in this way, all lawyers will be subject to discipline after an adjudication finding them liable for unlawful discrimination. But only lawyers acting in a management role (formal or informal) will be subject to discipline for knowingly permitting discrimination, i.e., failing to advocate corrective action after knowing of unlawful discrimination. COPRAC would also delete the phrase "or operation," which it believes inappropriate, since the phrase raises an ambiguity possibly extending the rule to non-managers.

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

The consensus among COPRAC members is that this rule should not permit lawyers to lend money to their clients. Although COPRAC recognizes the existence of compassionate need, it believes that the lawyers should not be able to get cases and clients based on their willingness to lend money to clients. COPRAC also believes that lawyers' loans to clients dilute lawyer's independence, and diminish clients' ability to control settlement. Although some

COPRAC members believe that requiring compliance with Rule 3-300 adequately protects the interests of clients, the consensus is that loans to clients involve greater risks than warranted. Accordingly, COPRAC recommends that the Commission delete subpart (a)(2) of the rule.

COPRAC appreciates the opportunity to comment on the work of the Commission, and stands ready to provide any such further comment that the Commission may desire.

Very Truly Yours,

Dennis Peter Maio

Dennis Peter Maio

Chair

OCBA

ORANGE COUNTY
BAR ASSOCIATION

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Lex Romana
OC Asian American Bar
OC Deputy Public Defenders
OC Trial Lawyers Assoc.
OC Women Lawyers Assoc.

October 25, 2007

Rules Revision Commission
Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Dear Ms. Hollins:

Please see the enclosed comments relating to the California Rules of Professional Conduct Pending for Public Comment from the Orange County Bar Association.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy C. Levindofske
Executive Director

TCL: ms

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OCBA

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J. Reuben Clark Law Society
Lex Romana
OC Asian American Bar
OC Deputy Public Defenders
OC Trial Lawyers Assoc.
OC Women Lawyers Assoc.

To: Rules Revision Commission
Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

From: Orange County Bar Association

Re: California Rules of Professional Conduct Pending for Public Comment

Date: October 25, 2007

The Orange County Bar Association submits the following comments on the proposed Rules of Professional Conduct:

Rule 1.8.3 – Gifts from Client:

The OCBA supports the proposed changes to this rule which will conform the rule more closely to the ABA Model Rule. The OCBA agrees with the RRC's proposal to extend the rule to cover "attempts" to obtain a gift, and agrees that, for client protection, attorneys should be prohibited from drafting the documents that may be necessary to provide a gift to the attorney.

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

The OCBA supports the proposed changes to this rule, with one clarification. Proposed subsection (a)(4) allows the attorney to pay costs and expenses of litigation on behalf of an indigent client. We propose to add pro bono clients to this exception. Attorneys often provide pro bono services to parties who are not "indigent," such as non-profit entities. Lawyers should be able to pay costs and expenses of clients that receive pro bono legal services (due to, for example, the social, political, or moral implications of the litigation). Thus, the OCBA recommends that proposed subsection (a)(4) be changed to read as follows: "pay court costs and reasonable expenses of litigation on behalf of an indigent or pro bono client in a matter in which the lawyer represents the client."

Rule 8.4.1 – Prohibited Discrimination in the Practice of Law

The OCBA supports the proposed changes to this rule, with one exception. The OCBA believes that it is of the utmost importance that discrimination

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within the legal profession be met with the full force of the law. For that reason, the OCBA considered whether the requirement of a prior adjudication of discrimination contained in the rule ought to be eliminated. Because State Bar resources available to investigate discrimination matters are limited, and because other remedies were thought to be adequate, the OCBA's belief is that the rule's requirement of a prior adjudication is appropriate.

The OCBA is also concerned that the rule will impose discipline on associate lawyers who know of unlawful discrimination but do not take steps to rectify the situation. We believe that associate lawyers who commit unlawful discrimination should be subject to discipline, subject to the prior adjudication requirement. However, we believe that an associate's failure to advocate corrective action where a lawyer knows of a discriminatory policy or practice resulting in unlawful discrimination should not subject the associate to discipline. Our view is that discipline under such circumstances should be reserved for those in management and supervisory positions.

Rule 1.8.11 – Relationship with Other Party's Lawyer

The OCBA supports the proposed rule, with two clarifications. While we considered whether written consent was appropriate, we determined that the rule as drafted is sufficient to protect client interests. The first clarification involves the use of the word "inform." We would ask the RRC to consider whether, if it intends to carry forward the concept of "disclosure" set forth in the present Rule 3-310(A), that term should be used in this rule, rather than the term "inform." We like the requirement implicit in the concept of disclosure that would require some information about the consequences of the relationship be communicated to the client. The second clarification involves comment two. We find the language of the comment as drafted unnecessarily difficult. Instead, we would propose the following: "This Rule is not intended to require a lawyer to disclose his or her relationship with lawyers who are not connected to the matter, but who happen to practice with law firms that are involved in the matter."

RECEIVED ONLINE
SEE ATTACHMENT FOR FULL-TEXT

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments on the following page. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
All information submitted is regarded as public record.

DEADLINE TO SUBMIT PUBLIC COMMENTS: October 26, 2007

Your Information

Name
Christine Burdick, Executive Director & General Coun

Commenting on behalf of an organization (Yes / No)

Professional Affiliation *(click this for details)* -->
Santa Clara County Bar Association

*** City**
San Jose

*** State**
California

*** Email address** (A copy of your response will be sent here.)
chrisb@sccba.com

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 1.8.5 Payment of Personal or Business Expenses Incurred by of for a Client [4-210]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule
- DISAGREE with this proposed Rule
- (•) AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

The Santa Clara County Bar Association has a special task force dedicated to reviewing and commenting on the proposed these proposed rule revisions. All comments are approved by and are the position of the Santa Clara County Bar Association Board of Trustees. Thank for the opportunity to comment.

Proposed Rule 1.8.5 -- Payment of Personal or Business Expenses Incurred By or For The Client

Recommendation: 1.8.5(3): Add "or may not" after "may" in the third line of paragraph (3).

Contact Support

Name	Christine Burdick, Executive Director & General Counsel
Commenting on behalf of an organization	Yes
Professional Affiliation (click this for details) -->	Santa Clara County Bar Association
City	San Jose
State	California
Email address (A copy of your response will be sent here.)	chrisb@sccba.com
Proposed Rule Commenting On	Rule 1.8.5 Payment of Personal or Business Expenses Incurred by of for a Client [4-210]
Position	AGREE ONLY IF MODIFIED
ENTER COMMENTS HERE.	The Santa Clara County Bar Association has a special task force dedicated to reviewing and commenting on the proposed these proposed rule revisions. All comments are approved by and are the position of the Santa Clara County Bar Association Board of Trustees. Thank for the opportunity to comment. Proposed Rule 1.8.5 -- Payment of Personal or Business Expenses Incurred By or For The Client Recommendation: 1.8.5(3): Add “or may not” after “may” in the third line of paragraph (3).
Attachment	
Attachment	
Attachment	
Receive Mass Email?	
Date	10/26/2007
Period	PC
File :	
Commented on:	Rule 1.8.5
Method:	OL

Hollins, Audrey

From: Ross G. Simmons [ross@rblaw.com]
Sent: Friday, November 16, 2007 11:43 AM
To: Hollins, Audrey
Cc: McCurdy, Lauren; Wendy Patrick Mazzarella; judy@rblaw.com
Subject: SDCBA Comments: Five (5) Proposed Amended Rule; State Bar Special Commission For the Revision of the RPC

Dear Audrey:

As discussed at the time of the public hearing in the referenced matter, attached please find the formal comments submitted to the State Bar Special Commission for the Revision of the Rules of Professional Conduct by the San Diego County Bar Association (SDCBA). These comments were approved by the Board of Directors of the SDCBA, and adopted as its position on these matters, at its regular meeting of November 13, 2007.

I regret the timing of this deliverable, and sincerely appreciate the additional time within which to provide it. I thank the Commission for its indulging my appearance in September, and for its consideration of the attached.

I provide in this format in the interest of expediency. We would gladly provide in other, more convenient formats if doing so would be of assistance. Otherwise, as is always true, I welcome your calls, those of your colleagues or those of any Commission members if there are any residual questions concerning the attached, or if we can be of assistance in any other measure. We are grateful for being given the opportunity to participate in this process.

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U.S. Treasury Circular 230 Notice: Any U.S. federal tax advice included in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding U.S. federal tax-related penalties, or (ii) promoting, marketing, or recommending to another party any tax-related matter addressed herein.

MEMORANDUM

Date: November 16, 2007

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California ("Commission")

From: San Diego County Bar Association ("SDCBA")

Re: "2nd PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client [4-210]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

The modified rule is approved as proposed.

Public Comments [1.8.11] ~ FILE LIST

B-2007-169c Philip Humphreys [1.8.11]

B-2007-170b COPRAC [1.8.11]

B-2007-171c Orange County Bar [1.8.11]

B-2007-172c (O) Santa Clara County Bar [1.8.11]

B-2007-175c Ross Simmon-SDCBA [1.8.11]

PHILIP HUMPHREYS
Post Office Box 11383
Berkeley, CA 94712-2383

(510) 849-3311

October 15, 2007

Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

re: Public Comment Submissions to Rules Revision Commission

Dear Ms. Hollins:

Enclosed are our comments on the five draft rules which have been released for public comment.

Our committee appreciates very much the effort and time devoted by all commission members to the revision project.

Yours very truly,

Philip Humphreys, Chair
Ethics Committee of The Bar
Association of San Francisco

cc: Daniel W. Burkhardt, Esq., Executive Director
Bar Association of San Francisco
301 Battery Street, Third Floor
San Francisco, CA 94111
(w/enc.)

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October 15, 2007

Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

re: Proposed Rule of Professional Conduct 1.8.11
Rules Revision Commission, Batch 2
Submitting organization: Bar Association of San Francisco

Dear Ms. Hollins:

These comments have been prepared by the Ethics Committee of the Bar Association of San Francisco. The BASF Board of Directors has authorized us to advise the Rules Revision Commission that our comments reflect the position of the Bar Association of San Francisco.

Our committee endorses the draft rule as proposed by the Commission.

In addition we suggest a third comment to the rule, recommending that a client be advised of a relationship with a member of an opposing law firm, as contrasted with a relationship with a member of a law firm representing a party that is not adverse to the client.

Respectfully submitted,

Philip Humphreys, Chair
Ethics Committee of the Bar
Association of San Francisco

THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2107

October 18, 2007

Harry B. Sondheim, Chair
The Commission for the Revision of the Rules of Professional Conduct
The State Bar of California
180 Howard Street, 10th Floor
San Francisco, CA 94105

Dear Mr. Sondheim:

The Committee on Professional Responsibility and Conduct (COPRAC) submits the following comment on the proposed Rules of Professional Conduct.

Rule 1.8.11 – Relationship with Other Party's Lawyer

COPRAC believes that a client should not only be "informed" of the existence of a relationship with another party's lawyer, but also should be told of the potential consequences of such a relationship. Although not unanimous, it was COPRAC's consensus that the rule should require "disclosure," as that term is defined in Rule 3-310(A)(1), and also that the client should be required to give written consent to the types of conflicts that are described therein. In COPRAC's view, the existence of a relationship with another party's lawyer is of such significance that a greater safeguard is appropriate for purposes of client protection. Accordingly, COPRAC proposes that the final phrase of this rule be rewritten to read:

> ... unless the lawyer provides written disclosure of the relationship to the client and obtains the client's informed written consent.

COPRAC believes that the comments to this rule should clarify that disclosure is intended to refer to the definition of disclosure contained in Rule 1.7.

Rule 8.4.1 – Prohibited Discrimination in Law Practice Management or Operation

First, and most importantly, COPRAC wishes to emphasize its agreement with the policy expressed in this rule that lawyers managing or operating law firms should be subject to discipline if it is adjudicated that they have unlawfully discriminated as described.

That said, COPRAC has several concerns with the manner in which this rule is drafted, and requests changes to clarify its application. First, COPRAC believes that subpart (b) of the rule as drafted is ambiguous. The first phrase, "In the management or operation of a law

practice," creates a limitation that is arguably eliminated by the last clause, "whether or not the lawyer is a partner or shareholder or serves in a management role." From the substance of Comment [2], COPRAC has speculated that the distinction the Commission is attempting to draw is between formal managers of a law firm and lawyers who may be managing informally, for example, lawyers managing a project or case. The matter, however, is not entirely clear.

Some members of COPRAC are also concerned with the possibility that a lawyer who is not a manager, shareholder, or partner would be subject to discipline under subpart (b) of this rule for "knowingly permitting" unlawful discrimination as defined under subpart (a)(1). "Knowingly permitting" is broadly defined to include failing to advocate corrective action when the lawyer knows of a discriminatory practice resulting in the unlawful discrimination. COPRAC believes that non-manager lawyers should be subject to discipline for unlawful discrimination (following the required adjudication), but that non-manager lawyers who are aware of unlawful discrimination and do not advocate corrective action should not be. Imposing discipline in the latter case seems too great a penalty to impose on a co-worker who may observe discrimination, and therefore know of it, yet not be in a position to act without substantial risk, real or perceived, of jeopardizing his or her own career relationships.

To resolve this concern, COPRAC proposes that subpart (b) of this rule be broken down thus:

(b) a lawyer shall not:

(1) unlawfully discriminate on the basis of race, national origin, sex, sexual orientation, religion, age or disability, whether or not the lawyer is a partner or shareholder or serves in a management role;

(2) in the management of a law practice, knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability.

If this rule is restructured in this way, all lawyers will be subject to discipline after an adjudication finding them liable for unlawful discrimination. But only lawyers acting in a management role (formal or informal) will be subject to discipline for knowingly permitting discrimination, i.e., failing to advocate corrective action after knowing of unlawful discrimination. COPRAC would also delete the phrase "or operation," which it believes inappropriate, since the phrase raises an ambiguity possibly extending the rule to non-managers.

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

The consensus among COPRAC members is that this rule should not permit lawyers to lend money to their clients. Although COPRAC recognizes the existence of compassionate need, it believes that the lawyers should not be able to get cases and clients based on their willingness to lend money to clients. COPRAC also believes that lawyers' loans to clients dilute lawyer's independence, and diminish clients' ability to control settlement. Although some

COPRAC members believe that requiring compliance with Rule 3-300 adequately protects the interests of clients, the consensus is that loans to clients involve greater risks than warranted. Accordingly, COPRAC recommends that the Commission delete subpart (a)(2) of the rule.

COPRAC appreciates the opportunity to comment on the work of the Commission, and stands ready to provide any such further comment that the Commission may desire.

Very Truly Yours,

Dennis Peter Maio

Dennis Peter Maio

Chair

OCBA

ORANGE COUNTY
BAR ASSOCIATION

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J. Reuben Clark Law Society
Lex Romana
OC Asian American Bar
OC Deputy Public Defenders
OC Trial Lawyers Assoc.
OC Women Lawyers Assoc.

October 25, 2007

Rules Revision Commission
Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Dear Ms. Hollins:

Please see the enclosed comments relating to the California Rules of Professional Conduct Pending for Public Comment from the Orange County Bar Association.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy C. Levindofske
Executive Director

TCL: ms

P.O. BOX 17777
IRVINE, CA 92623-7777
TELEPHONE 949/ 440-6700
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OCBA

ORANGE COUNTY BAR ASSOCIATION

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J. REUBEN CLARK LAW SOCIETY
LEX ROMANA
OC ASIAN AMERICAN BAR
OC DEPUTY PUBLIC DEFENDERS
OC TRIAL LAWYERS ASSOC.
OC WOMEN LAWYERS ASSOC.

To: Rules Revision Commission
Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

From: Orange County Bar Association

Re: California Rules of Professional Conduct Pending for Public Comment

Date: October 25, 2007

The Orange County Bar Association submits the following comments on the proposed Rules of Professional Conduct:

Rule 1.8.3 – Gifts from Client:

The OCBA supports the proposed changes to this rule which will conform the rule more closely to the ABA Model Rule. The OCBA agrees with the RRC's proposal to extend the rule to cover "attempts" to obtain a gift, and agrees that, for client protection, attorneys should be prohibited from drafting the documents that may be necessary to provide a gift to the attorney.

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

The OCBA supports the proposed changes to this rule, with one clarification. Proposed subsection (a)(4) allows the attorney to pay costs and expenses of litigation on behalf of an indigent client. We propose to add pro bono clients to this exception. Attorneys often provide pro bono services to parties who are not "indigent," such as non-profit entities. Lawyers should be able to pay costs and expenses of clients that receive pro bono legal services (due to, for example, the social, political, or moral implications of the litigation). Thus, the OCBA recommends that proposed subsection (a)(4) be changed to read as follows: "pay court costs and reasonable expenses of litigation on behalf of an indigent or pro bono client in a matter in which the lawyer represents the client."

Rule 8.4.1 – Prohibited Discrimination in the Practice of Law

The OCBA supports the proposed changes to this rule, with one exception. The OCBA believes that it is of the utmost importance that discrimination

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within the legal profession be met with the full force of the law. For that reason, the OCBA considered whether the requirement of a prior adjudication of discrimination contained in the rule ought to be eliminated. Because State Bar resources available to investigate discrimination matters are limited, and because other remedies were thought to be adequate, the OCBA's belief is that the rule's requirement of a prior adjudication is appropriate.

The OCBA is also concerned that the rule will impose discipline on associate lawyers who know of unlawful discrimination but do not take steps to rectify the situation. We believe that associate lawyers who commit unlawful discrimination should be subject to discipline, subject to the prior adjudication requirement. However, we believe that an associate's failure to advocate corrective action where a lawyer knows of a discriminatory policy or practice resulting in unlawful discrimination should not subject the associate to discipline. Our view is that discipline under such circumstances should be reserved for those in management and supervisory positions.

Rule 1.8.11 – Relationship with Other Party's Lawyer

The OCBA supports the proposed rule, with two clarifications. While we considered whether written consent was appropriate, we determined that the rule as drafted is sufficient to protect client interests. The first clarification involves the use of the word "inform." We would ask the RRC to consider whether, if it intends to carry forward the concept of "disclosure" set forth in the present Rule 3-310(A), that term should be used in this rule, rather than the term "inform." We like the requirement implicit in the concept of disclosure that would require some information about the consequences of the relationship be communicated to the client. The second clarification involves comment two. We find the language of the comment as drafted unnecessarily difficult. Instead, we would propose the following: "This Rule is not intended to require a lawyer to disclose his or her relationship with lawyers who are not connected to the matter, but who happen to practice with law firms that are involved in the matter."

RECEIVED ONLINE
SEE ATTACHMENT FOR FULL-TEXT

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments on the following page. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
All information submitted is regarded as public record.

DEADLINE TO SUBMIT PUBLIC COMMENTS: October 26, 2007

Your Information

Name
Christine Burdick, Executive Director & General Coun

Commenting on behalf of an organization (?) ◉ Yes ○ No

Professional Affiliation *(click this for details)* --> (?)
Santa Clara County Bar Association

*** City**
San Jose

*** State**
California

*** Email address** (A copy of your response will be sent here.)
chrisb@sccba.com

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 1.8.11 Relationship with Other Party's Lawyer [3-320]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

○ AGREE with this proposed Rule
○ DISAGREE with this proposed Rule
◉ AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

The Santa Clara County Bar Association has a special task force dedicated to reviewing and commenting on the proposed these proposed rule revisions. All comments are approved by and are the position of the Santa Clara County Bar Association Board of Trustees. Thank for the opportunity to comment.

Proposed Rule 1.8.11 -- Relationship With Other Party's Lawyer

Recommendation: Change the title of this rule to "Relationship With Lawyer of Other Person Represented In A Matter." This change makes the title consistent with the proposed revision to the rule. The proposed revision changes "party" to "another person involved in the matter" throughout this rule. Leaving the changed language in the title only confuses what the proposed revision is and what it means.

Contact Support

Name	Christine Burdick, Executive Director & General Counsel
Commenting on behalf of an organization	Yes
Professional Affiliation (click this for details) -->	Santa Clara County Bar Association
City	San Jose
State	California
Email address (A copy of your response will be sent here.)	chrisb@sccba.com
Proposed Rule Commenting On	Rule 1.8.11 Relationship with Other Party's Lawyer [3-320]
Position	AGREE ONLY IF MODIFIED
ENTER COMMENTS HERE.	The Santa Clara County Bar Association has a special task force dedicated to reviewing and commenting on the proposed these proposed rule revisions. All comments are approved by and are the position of the Santa Clara County Bar Association Board of Trustees. Thank for the opportunity to comment. Proposed Rule 1.8.11 -- Relationship With Other Party's Lawyer Recommendation: Change the title of this rule to "Relationship With Lawyer of Other Person Represented In A Matter." This change makes the title consistent with the proposed revision to the rule. The proposed revision changes "party" to "another person involved in the matter" throughout this rule. Leaving the changed language in the title only confuses what the proposed revision is and what it means.
Attachment	
Attachment	
Attachment	
Receive Mass Email?	
Date	10/26/2007
Period	PC
File :	
Commented on:	Rule 1.8.11
Method:	OL

Hollins, Audrey

From: Ross G. Simmons [ross@rblaw.com]
Sent: Friday, November 16, 2007 11:43 AM
To: Hollins, Audrey
Cc: McCurdy, Lauren; Wendy Patrick Mazzarella; judy@rblaw.com
Subject: SDCBA Comments: Five (5) Proposed Amended Rule; State Bar Special Commission For the Revision of the RPC

Dear Audrey:

As discussed at the time of the public hearing in the referenced matter, attached please find the formal comments submitted to the State Bar Special Commission for the Revision of the Rules of Professional Conduct by the San Diego County Bar Association (SDCBA). These comments were approved by the Board of Directors of the SDCBA, and adopted as its position on these matters, at its regular meeting of November 13, 2007.

I regret the timing of this deliverable, and sincerely appreciate the additional time within which to provide it. I thank the Commission for its indulging my appearance in September, and for its consideration of the attached.

I provide in this format in the interest of expediency. We would gladly provide in other, more convenient formats if doing so would be of assistance. Otherwise, as is always true, I welcome your calls, those of your colleagues or those of any Commission members if there are any residual questions concerning the attached, or if we can be of assistance in any other measure. We are grateful for being given the opportunity to participate in this process.

Ross G. Simmons
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MEMORANDUM

Date: November 16, 2007

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California ("Commission")

From: San Diego County Bar Association ("SDCBA")

Re: "2nd PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 1.8.11 Relationship with Other Party's Lawyer [3-320]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

The modified rule is approved as proposed.

Public Comments [1.8.12] ~ FILE LIST

B-2007-169d Philip Humphreys [1.8.12]

B-2007-175d Ross Simmon-SDCBA [1.8.12]

PHILIP HUMPHREYS
Post Office Box 11383
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(510) 849-3311

October 15, 2007

Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

re: Public Comment Submissions to Rules Revision Commission

Dear Ms. Hollins:

Enclosed are our comments on the five draft rules which have been released for public comment.

Our committee appreciates very much the effort and time devoted by all commission members to the revision project.

Yours very truly,

Philip Humphreys, Chair
Ethics Committee of The Bar
Association of San Francisco

cc: Daniel W. Burkhardt, Esq., Executive Director
Bar Association of San Francisco
301 Battery Street, Third Floor
San Francisco, CA 94111
(w/enc.)

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October 15, 2007

Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

re: Proposed Rule of Professional Conduct 1.8.12
Rules Revision Commission, Batch 2
Submitting organization: Bar Association of San Francisco

Dear Ms. Hollins:

These comments have been prepared by the Ethics Committee of the Bar Association of San Francisco. The BASF Board of Directors has authorized us to advise the Rules Revision Commission that our comments reflect the position of the Bar Association of San Francisco.

The Legal Ethics Committee favors the changes to the existing Rule. Limiting the individuals covered by the Rule to the lawyer and any other lawyer affiliated with the lawyer's law firm seems to us to be much more properly focused than the existing Rule's inclusion of individuals who have a personal, business or professional relationship with the lawyer. We believe that the existing Rule is clearly overbroad, and that any effort by the lawyer to circumvent the Rule's coverage by using one of those individuals as a straw man would be precluded by the provision covering both direct and indirect purchases by the lawyer.

We also favor the provision which excepts from the prohibition transactions that comply with Probate Code provisions 9880-9885. The existing Rule appears to us to conflict with those provisions, which provide adequate protection for clients. We also favor the additional condition that the lawyer comply with Rules 3-300 and 3-310.

Our only concern with that condition is that it could be argued that because the Rule requires more than the Probate Code it could be considered a de facto amendment to the Probate Code and, hence, invalid. We assume that you have considered this issue and do not believe it to be a problem.

Respectfully submitted,

Philip Humphreys, Chair
Ethics Committee of the Bar
Association of San Francisco

Hollins, Audrey

From: Ross G. Simmons [ross@rblaw.com]
Sent: Friday, November 16, 2007 11:43 AM
To: Hollins, Audrey
Cc: McCurdy, Lauren; Wendy Patrick Mazzarella; judy@rblaw.com
Subject: SDCBA Comments: Five (5) Proposed Amended Rule; State Bar Special Commission For the Revision of the RPC

Dear Audrey:

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I regret the timing of this deliverable, and sincerely appreciate the additional time within which to provide it. I thank the Commission for its indulging my appearance in September, and for its consideration of the attached.

I provide in this format in the interest of expediency. We would gladly provide in other, more convenient formats if doing so would be of assistance. Otherwise, as is always true, I welcome your calls, those of your colleagues or those of any Commission members if there are any residual questions concerning the attached, or if we can be of assistance in any other measure. We are grateful for being given the opportunity to participate in this process.

Ross G. Simmons
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U.S. Treasury Circular 230 Notice: Any U.S. federal tax advice included in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding U.S. federal tax-related penalties, or (ii) promoting, marketing, or recommending to another party any tax-related matter addressed herein.

MEMORANDUM

Date: November 16, 2007

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California ("Commission")

From: San Diego County Bar Association ("SDCBA")

Re: "2nd PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 1.8.12 Purchasing Property at Foreclosure Sale Subject to Judicial Review [4-300]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

The modified rule is approved as proposed.

Rationale For Comment 1:

Rule 4-300 conflicted with Probate Code sections 9880-9885 which provided that a lawyer could participate in a probate proceeding sale. This revision aligns both statutes.

Public Comments [8.4.1] ~ FILE LIST

B-2007-169e Philip Humphreys [8.4.1]

B-2007-170c COPRAC [8.4.1]

B-2007-171d Orange County Bar [8.4.1]

B-2007-172d (O) Santa Clara County Bar [8.4.1]

B-2007-174 Ross Simmon [8.4.1]

B-2007-175e Ross Simmon-SDCBA [8.4.1]

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October 15, 2007

Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

re: Public Comment Submissions to Rules Revision Commission

Dear Ms. Hollins:

Enclosed are our comments on the five draft rules which have been released for public comment.

Our committee appreciates very much the effort and time devoted by all commission members to the revision project.

Yours very truly,

Philip Humphreys, Chair
Ethics Committee of The Bar
Association of San Francisco

cc: Daniel W. Burkhardt, Esq., Executive Director
Bar Association of San Francisco
301 Battery Street, Third Floor
San Francisco, CA 94111
(w/enc.)

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October 15, 2007

Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

re: Proposed Rule of Professional Conduct 8.4.1
Rules Revision Commission, Batch 2
Submitting organization: Bar Association of San Francisco

Dear Ms. Hollins:

These comments have been prepared by the Ethics Committee of the Bar Association of San Francisco. The BASF Board of Directors has authorized us to advise the Rules Revision Commission that our comments reflect the position of the Bar Association of San Francisco.

Our committee endorses the commission's proposal with the following recommended changes:

Paragraph (a)(1): The term "advocate corrective action" is apparently unique in California law. We therefore recommend this term be replaced with "formally notify the law practice".

Paragraphs (b) and ©: As worded, the draft does not appear to transgender persons as does other California law. We therefore recommend that the word "gender" be inserted between "sex" and "sexual orientation".

Respectfully submitted,

Philip Humphreys, Chair
Ethics Committee of the Bar
Association of San Francisco

THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2107

October 18, 2007

Harry B. Sondheim, Chair
The Commission for the Revision of the Rules of Professional Conduct
The State Bar of California
180 Howard Street, 10th Floor
San Francisco, CA 94105

Dear Mr. Sondheim:

The Committee on Professional Responsibility and Conduct (COPRAC) submits the following comment on the proposed Rules of Professional Conduct.

Rule 1.8.11 – Relationship with Other Party's Lawyer

COPRAC believes that a client should not only be "informed" of the existence of a relationship with another party's lawyer, but also should be told of the potential consequences of such a relationship. Although not unanimous, it was COPRAC's consensus that the rule should require "disclosure," as that term is defined in Rule 3-310(A)(1), and also that the client should be required to give written consent to the types of conflicts that are described therein. In COPRAC's view, the existence of a relationship with another party's lawyer is of such significance that a greater safeguard is appropriate for purposes of client protection. Accordingly, COPRAC proposes that the final phrase of this rule be rewritten to read:

> ... unless the lawyer provides written disclosure of the relationship to the client and obtains the client's informed written consent.

COPRAC believes that the comments to this rule should clarify that disclosure is intended to refer to the definition of disclosure contained in Rule 1.7.

Rule 8.4.1 – Prohibited Discrimination in Law Practice Management or Operation

First, and most importantly, COPRAC wishes to emphasize its agreement with the policy expressed in this rule that lawyers managing or operating law firms should be subject to discipline if it is adjudicated that they have unlawfully discriminated as described.

That said, COPRAC has several concerns with the manner in which this rule is drafted, and requests changes to clarify its application. First, COPRAC believes that subpart (b) of the rule as drafted is ambiguous. The first phrase, "In the management or operation of a law

practice," creates a limitation that is arguably eliminated by the last clause, "whether or not the lawyer is a partner or shareholder or serves in a management role." From the substance of Comment [2], COPRAC has speculated that the distinction the Commission is attempting to draw is between formal managers of a law firm and lawyers who may be managing informally, for example, lawyers managing a project or case. The matter, however, is not entirely clear.

Some members of COPRAC are also concerned with the possibility that a lawyer who is not a manager, shareholder, or partner would be subject to discipline under subpart (b) of this rule for "knowingly permitting" unlawful discrimination as defined under subpart (a)(1). "Knowingly permitting" is broadly defined to include failing to advocate corrective action when the lawyer knows of a discriminatory practice resulting in the unlawful discrimination. COPRAC believes that non-manager lawyers should be subject to discipline for unlawful discrimination (following the required adjudication), but that non-manager lawyers who are aware of unlawful discrimination and do not advocate corrective action should not be. Imposing discipline in the latter case seems too great a penalty to impose on a co-worker who may observe discrimination, and therefore know of it, yet not be in a position to act without substantial risk, real or perceived, of jeopardizing his or her own career relationships.

To resolve this concern, COPRAC proposes that subpart (b) of this rule be broken down thus:

(b) a lawyer shall not:

(1) unlawfully discriminate on the basis of race, national origin, sex, sexual orientation, religion, age or disability, whether or not the lawyer is a partner or shareholder or serves in a management role;

(2) in the management of a law practice, knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability.

If this rule is restructured in this way, all lawyers will be subject to discipline after an adjudication finding them liable for unlawful discrimination. But only lawyers acting in a management role (formal or informal) will be subject to discipline for knowingly permitting discrimination, i.e., failing to advocate corrective action after knowing of unlawful discrimination. COPRAC would also delete the phrase "or operation," which it believes inappropriate, since the phrase raises an ambiguity possibly extending the rule to non-managers.

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

The consensus among COPRAC members is that this rule should not permit lawyers to lend money to their clients. Although COPRAC recognizes the existence of compassionate need, it believes that the lawyers should not be able to get cases and clients based on their willingness to lend money to clients. COPRAC also believes that lawyers' loans to clients dilute lawyer's independence, and diminish clients' ability to control settlement. Although some

COPRAC members believe that requiring compliance with Rule 3-300 adequately protects the interests of clients, the consensus is that loans to clients involve greater risks than warranted. Accordingly, COPRAC recommends that the Commission delete subpart (a)(2) of the rule.

COPRAC appreciates the opportunity to comment on the work of the Commission, and stands ready to provide any such further comment that the Commission may desire.

Very Truly Yours,

Dennis Peter Maio

Dennis Peter Maio

Chair

OCBA

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OC TRIAL LAWYERS ASSOC.
OC WOMEN LAWYERS ASSOC.

October 25, 2007

Rules Revision Commission
Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Dear Ms. Hollins:

Please see the enclosed comments relating to the California Rules of Professional Conduct Pending for Public Comment from the Orange County Bar Association.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy C. Levindofske
Executive Director

TCL: ms

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OCBA

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OC TRIAL LAWYERS ASSOC.
OC WOMEN LAWYERS ASSOC.

To: Rules Revision Commission
Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

From: Orange County Bar Association

Re: California Rules of Professional Conduct Pending for Public Comment

Date: October 25, 2007

The Orange County Bar Association submits the following comments on the proposed Rules of Professional Conduct:

Rule 1.8.3 – Gifts from Client:

The OCBA supports the proposed changes to this rule which will conform the rule more closely to the ABA Model Rule. The OCBA agrees with the RRC's proposal to extend the rule to cover "attempts" to obtain a gift, and agrees that, for client protection, attorneys should be prohibited from drafting the documents that may be necessary to provide a gift to the attorney.

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

The OCBA supports the proposed changes to this rule, with one clarification. Proposed subsection (a)(4) allows the attorney to pay costs and expenses of litigation on behalf of an indigent client. We propose to add pro bono clients to this exception. Attorneys often provide pro bono services to parties who are not "indigent," such as non-profit entities. Lawyers should be able to pay costs and expenses of clients that receive pro bono legal services (due to, for example, the social, political, or moral implications of the litigation). Thus, the OCBA recommends that proposed subsection (a)(4) be changed to read as follows: "pay court costs and reasonable expenses of litigation on behalf of an indigent or pro bono client in a matter in which the lawyer represents the client."

Rule 8.4.1 – Prohibited Discrimination in the Practice of Law

The OCBA supports the proposed changes to this rule, with one exception. The OCBA believes that it is of the utmost importance that discrimination

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within the legal profession be met with the full force of the law. For that reason, the OCBA considered whether the requirement of a prior adjudication of discrimination contained in the rule ought to be eliminated. Because State Bar resources available to investigate discrimination matters are limited, and because other remedies were thought to be adequate, the OCBA's belief is that the rule's requirement of a prior adjudication is appropriate.

The OCBA is also concerned that the rule will impose discipline on associate lawyers who know of unlawful discrimination but do not take steps to rectify the situation. We believe that associate lawyers who commit unlawful discrimination should be subject to discipline, subject to the prior adjudication requirement. However, we believe that an associate's failure to advocate corrective action where a lawyer knows of a discriminatory policy or practice resulting in unlawful discrimination should not subject the associate to discipline. Our view is that discipline under such circumstances should be reserved for those in management and supervisory positions.

Rule 1.8.11 – Relationship with Other Party's Lawyer

The OCBA supports the proposed rule, with two clarifications. While we considered whether written consent was appropriate, we determined that the rule as drafted is sufficient to protect client interests. The first clarification involves the use of the word "inform." We would ask the RRC to consider whether, if it intends to carry forward the concept of "disclosure" set forth in the present Rule 3-310(A), that term should be used in this rule, rather than the term "inform." We like the requirement implicit in the concept of disclosure that would require some information about the consequences of the relationship be communicated to the client. The second clarification involves comment two. We find the language of the comment as drafted unnecessarily difficult. Instead, we would propose the following: "This Rule is not intended to require a lawyer to disclose his or her relationship with lawyers who are not connected to the matter, but who happen to practice with law firms that are involved in the matter."

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THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

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All information submitted is regarded as public record.

DEADLINE TO SUBMIT PUBLIC COMMENTS: October 26, 2007

Your Information

Name
Chrisitne Burdick, Executive Director & General Coun

Commenting on behalf of an organization (Yes / No)

Professional Affiliation *(click this for details)* -->
Santa Clara County Bar Association

*** City**
San Jose

*** State**
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chrisb@sccba.com

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 8.4.1 Prohibited Discriminatory Conduct in a Law Practice [2-400]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ◉ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

The Santa Clara County Bar Association has a special task force dedicated to reviewing and commenting on the proposed these proposed rule revisions. All comments are approved by and are the position of the Santa Clara County Bar Association Board of Trustees. Thank for the opportunity to comment.

Proposed Rule 8.4.1 -- Prohibited Discrimination in Law Practice Management and Operation

Recommendation: The Task Force recommends that this rule be deleted in its entirety from the Rules of Professional Conduct. First, the Task Force is adamantly opposed to lawyers engaging in discrimination of any and all kinds in the management and operation of their law practices or firms. Such conduct is illegal under a number of state and federal statutes (including, without limitation, the California Fair Employment and Housing Act, the Unruh Civil Rights Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act and the

Name	Christine Burdick, Executive Director & General Counsel
Commenting on behalf of an organization	Yes
Professional Affiliation (click this for details) -->	Santa Clara County Bar Association
City	San Jose
State	California
Email address (A copy of your response will be sent here.)	chrisb@sccba.com
Proposed Rule Commenting On	Rule 8.4.1 Prohibited Discriminatory Conduct in a Law Practice [2-400]
Position	DISAGREE with this proposed Rule

ENTER COMMENTS HERE.

The Santa Clara County Bar Association has a special task force dedicated to reviewing and commenting on the proposed these proposed rule revisions. All comments are approved by and are the position of the Santa Clara County Bar Association Board of Trustees. Thank for the opportunity to comment.

Proposed Rule 8.4.1 -- Prohibited Discrimination in Law Practice Management and Operation

Recommendation: The Task Force recommends that this rule be deleted in its entirety from the Rules of Professional Conduct. First, the Task Force is adamantly opposed to lawyers engaging in discrimination of any and all kinds in the management and operation of their law practices or firms. Such conduct is illegal under a number of state and federal statutes (including, without limitation, the California Fair Employment and Housing Act, the Unruh Civil Rights Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act and the Americans with Disabilities Act) as well as a growing number of cases decided under both state and federal law. The Task Force's position is that this conduct is best governed by the civil judicial system and the administrative enforcement mechanisms (such as the EEOC and the DFEH) in place to address workplace discrimination issues. The type of conduct addressed by this disciplinary rule is unique and distinct from all the other disciplinary rules: the other rules of conduct relate directly to the lawyer's conduct relative to his or her client; the court; other persons involved in the legal system and the administration of justice. This is the only disciplinary rule which addresses conduct not directly related to the ethics and standards of these areas and which singles out such conduct for lawyer discipline.

In addition, the current rule (Rule 2-400) was adopted in 1994 at a time when addressing workplace and management discriminatory practices was in much more flux than it is today and when there were either gray areas or areas not covered by existing law or cases. (See, e.g. the expanding statutory definition of "disability", the application of the Federal Americans with Disabilities Act to employers of 15 or more employees, and the expanded statutory protection from sexual harassment). That is not the case today and, as such, the need for this rule is significantly different.

The State Bar and other local bar associations should take steps and implement programs and education directed at assisting lawyers in eliminating the kind of discrimination in law practice management and operation addressed by this rule. Many types of attorney conduct and standards of practice are encouraged and promoted by the State Bar and local bar associations and law firms that are not included in the disciplinary rules. The Task Force believes that the circumstances necessitating this rule in 1994 do not exist today and that this is not the kind of conduct that disciplinary rules have traditionally been intended to address. This changed need for the rule was recognized by the SCCBA Civil Practice Committee which has passed a resolution consistent with the Task Force's proposal.

Alternate Recommendation: In the event the first recommendation of the Task Force is not acceptable and the rule is retained, the Task Force makes the following recommendations relative to the proposed Commission's revisions.

For your convenience, set forth in full below is the Commission's proposed revisions to the old rule 2-400 and what would become Rule 8.4.1. In the rule mark-up below, the black and the lined blue text is the old rule 2-400; the red are the recommended changes to the old rule. There is no comparable ABA Model Rule.

The Task Force recommendations are as follows: Accept all the revisions with these exceptions:

- Delete (b)(2), which reads: "accepting or terminating representation of any client."

- Delete last line of (b)(2), which reads: ", whether or not the lawyer is a partner or shareholder or serves in a management role. "

- Delete proposed new Comments [1] and [2].

- In Comment [5], change the last line reference from "8.4(d) " to (8.4(e)".

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THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
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DEADLINE TO SUBMIT PUBLIC COMMENTS: October 26, 2007

Your Information

Name
Ross G. Simmons

Commenting on behalf of an organization ☐ ○ Yes ● No

Professional Affiliation *(click this for details)* -->
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*** State**
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*** Email address** (A copy of your response will be sent here.)
ross@rblaw.com

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Proposed Rule 8.4.1

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

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October 29, 2007

Audrey Hollins
Office of Professional Competence, Planning and Development
STATE BAR OF CALIFORNIA
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Rule 8.4.1 [presently CRPC 2-400]
Proposed Amended Rules of Professional Conduct of the State Bar of California
State Bar of California Special Commission for the Revision of the Rules of Professional Conduct

Dear Ms. Hollins:

I reply as instructed, and ask that these comments be transmitted to the State Bar of California Special Commission for the Revision of the Rules of Professional Conduct ("the Commission").

I write on my own behalf. Notwithstanding my affiliation with other groups and institutions that have an interest in this process, I wish to be very clear that they do not necessarily share my views, and in certain circumstances, have knowingly rejected them.

* * * * *

Generally, I am of the opinion that political tact impedes constructive discussion of Proposed Rule 8.4.1. My experience is that the subject matter of Proposed Rule 8.4.1, as was true fifteen years ago at the adoption of current Rule 2-400, is such that it is very difficult for institutional participants in this process to speak objectively to and critically of its structural merits (or as summarized in greater detail below, the lack thereof). More than once, I have heard the anthem: "Do we really want to be perceived as condoning unlawful discrimination?" My comments are not intended to do so, and I would hope they are not so viewed by the Commission.

Perhaps I inappropriately cloak myself in naïveté, but I believe that were we to apply William Gladstone's "chill touch and relentless scrutiny of logic," existing Rule 2-400 would never have been adopted, Proposed Rule 8.4.1 would never have been distributed for public comment, interested institutions would be appropriately speaking to the failings of its terms, and I would not be writing nor you indulging this comment.

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Comment 1:

I respectfully propose that the Commission not adopt Proposed Rule 8.4.1 (and hence by implication, repeal current Rule 2-400) in connection with the Proposed New or Amended Rules of Professional Conduct of the State Bar of California ("Proposed/Amended Rules").

Rationale for Comment 1:

The ills sought to be remedied by current Rule 2-400 are indeed unacceptable in our society, rendering the goals of its original enactment laudable. While I adamantly concur with that policy, generally, I do not believe Rule 2-400 an effective device toward that end. Its defects have not been remedied by the terms of Proposed Rule 8.4.1.

To date, the California Rules of Professional Conduct have not generally attempted to provide an exhaustive listing of varieties of misconduct. Current Rule 2-400 stands alone in focusing on a specific form of conduct clearly implicating definitionally "unlawful" activity, and in my view, patent moral turpitude. The risk, of course, is that in striking out to define specific instances of discipline related to *unlawful* actions and/or of moral turpitude, certainly the exclusion of some *unlawful* acts or omissions implicating moral turpitude in light of the inclusion of others has the potential to lead to mischievous results. Current Rule 2-400 presents conduct that involves "moral turpitude, dishonesty or corruption" [Cal. Bus. & Prof. Code §6106], and its presence as California authority has been superfluous since its adoption.

This is to say that existing Rule 2-400 is redundant, and its perpetuation by means of Proposed Rule 8.4.1 is lock step. It appears to stand as a political statement, albeit worthy in concept, which in practice has the potential for breeding confusion at best, and abuse at worst.

Most glaring of the shortcomings of existing Rule 2-400, perpetuated by Proposed Rule 8.4.1, is the threshold "adjudication" requirement of Rule 2-400(C) [Proposed Rule 8.4.1(c)]. Respectfully, I believe that making actual "adjudication" the threshold for discipline, while bringing a helpful level of objectivity to the rule's application, not only ignores the reality of unlawful-discrimination claim resolution, but as a result, creates a gaping, disciplinary "loophole" related to the most glaring purveyors of such misconduct this Rule purports to address.

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- Whether criminal, civil, or administrative in nature, the great majority of claims based on unlawful discrimination (and presumably, the ones where liability is the most obvious and egregious) can be, and I respectfully submit more often than not are, resolved by settlement in advance of adjudication.[1] Hence, escaping discipline are the lawyers whose unlawful misdeeds are so obvious and culpable as to prompt pre-adjudication resolution. If the majority of such claims are "settled" short of adjudication, it follows that the majority of those engaging in unlawful discrimination are not subject to discipline here. I respectfully submit that miscreants should not be permitted to pass muster under the ill-equipped Rule 2-400, and soon, its replacement.

- Conversely, I submit that discipline is reserved solely for those instances of misconduct, either marginal or unprecedented, that require the last resort of a tribunal's scrutiny. These are the "close calls," where good faith may be fairly said to justify the risk of a negative adjudicated result, and hence culpability is at its lowest ebb.

Hence, Rule 2-400 targets the least culpable, while effectively insulating the most culpable from discipline. Preferably in my view, by omitting this rule, this insidious form of misconduct will be subject to discipline whether or not prosecuted to judgment (as is the limiting factor here); this is to say that unlawful discrimination is subject to discipline, "period." This rule duplicates existing rules restricting lawlessness generally, unduly interferes with existing authority in application, and has the potential to limit enforcement of the very issues it purports to address.

The California Rules of Professional Conduct must be rid of this frivolity. Many rules and concepts unique to California are now found in the ABA's Model Rules. On the heels of the ABA's Ethics 2000 efforts, this Rule is not one of them. Both conceptually and in operation, there are ample reasons for its rejection in that context. I respectfully urge the Commission to follow suit in this context.

Comment 2:

With all due respect, I disagree that the scope of Proposed Rule 8.4.1 should extend to non-managerial attorneys. (The specific changes are reflected in the highlighted version of the rule which follows.)

[1] "The penalties for engaging in unlawful employment discrimination differ somewhat based on the law shown to be violated and the agency or court in which the penalty is assessed. All cases can have a substantial financial impact on you and lay the groundwork for similar claims by other employees. For this reason alone, **the resolution of a claim in appropriate cases before a formal complaint is filed may be the best course of action. Once a formal complaint is filed with either the DFEH or EEOC, take part in the mediation process offered by both agencies, which may result in a less onerous, prompt, and confidential settlement of the claims.**" 2 California Labor Law Digest, p. 748 (California Chamber of Commerce 2007) (emphasis added).

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Rationale for Comment 2:

I believe it inappropriate to extend discipline to non-managerial attorneys who took absolutely no part in either the formulation or implementation of a discriminatory policy or practice. It places too great of a burden on the subordinate attorney to suggest that, just by passively witnessing illegal and untoward activity, most likely by happenstance, his or her professional standing is suddenly hanging in the balance.

As it relates to the conscientious attorney, he or she may certainly raise the issue with those actively involved, perhaps to alert them of inadvertent transgressions. However, to place this attorney in a position of taking a stand against his or her superiors over conduct in which the attorney plays no part saddles the attorney with a dilemma between the economics of his or her employment, and the principled "policing" of the legal profession. Indeed, in contrast, it allows "leverage" to the less scrupulous subordinate, essentially bestowing him or her with "whistleblower" status even though he or she may have limited or no understanding of the policy or practice which is being questioned.

Finally, I cannot readily identify substantive law which would give rise to liability for passive knowledge of unlawful discriminatory practices, and hence it is difficult to conceive of a time when the proposed rule would be implicated in that scenario. In purporting to restrict conduct, when all the while, there is no conceivable circumstance where the rule could be so used, this element of the rule, yet again, severely undercuts the rule's credibility, and hence trivializes the important objects which the rule attempts to address.

Comment 3:

With all due respect, I propose that the comment expressly limiting the scope of activity to unlawful discrimination *inside* the practice of law be removed. (The specific changes are reflected in the highlighted version of the rule which follows.)

Rationale for Comment 3:

I believe that the comment which provides, in part, that "[i]t does not apply to lawyers while engaged in providing non-legal services that are not connected with or related to law practice," is superfluous, inasmuch as there is nothing within the rule that suggests otherwise. While I generally take no issue with clarity for its own sake, I would respectfully suggest the removal of this entire phrase, to avoid inartfully distancing the State Bar's interest in such misconduct outside of the management of the law firm.

I note, however, that the final phrase omitted goes precisely to the merits of my initial comment, and lends itself to exclusion of the proposed rule in its entirety. "[L]awyers always have a duty to uphold state and federal law, a breach of which may be cause for discipline." (Proposed Rule 8.4.1, at Comment [2]). I concur, and observe that in the absence of Proposed Rule 8.4.1, this form of conduct would be subject to discipline.

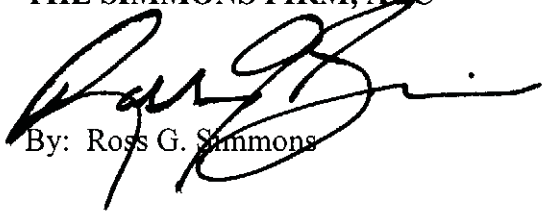
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Closing

While I have strong feelings related to this existing rule and its proposed counterpart, I do not wish them to overshadow my heart-felt, more general sentiment. I am grateful for the incredible effort that each member of the Commission has dedicated to his or her task, and each of them has my admiration and thanks.

Sincerely,

THE SIMMONS FIRM, ALC



By: Ross G. Simmons

RGS:bjm

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Rule 8.4.1 [2-400] Prohibited Discrimination in Law Practice Management and Operation

(a) For purposes of this Rule:

(1) "knowingly permit" means a failure to advocate corrective action where the lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination prohibited in paragraph (b); and

(2) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes prohibiting discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability, and as interpreted by case law or administrative regulations.

(b) In the management or operation of a law practice, a lawyer shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability~~, whether or not the lawyer is a partner or shareholder or serves in a management role~~.

(c) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this Rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this Rule. In order for discipline to be imposed under this Rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

Comment

[1] Consistent with lawyers' duties to support the federal and state constitution and laws, lawyers should support efforts to eradicate illegal discrimination in the operation or management of any law practice in which they participate. Violations of federal or state anti-discrimination laws in connection with the operation of a law practice warrant professional discipline in addition to statutory penalties.

[2] ~~This Rule applies to all lawyers, whether or not they have any formal role in the management of the law firm in which they practice. (But see Rule 8.4(d).)~~ "Law practice" in this Rule means "law firm," as defined in Rule 1.0.1, a term that includes sole practices.~~ It does not apply to lawyers while engaged in providing non-legal services that are not connected with or related to law practice, although lawyers always have a duty to uphold state and federal law, a breach of which may be cause for discipline. (See Bus. & Prof. Code §6068, subd. (a).)~~

[3] In order for discriminatory conduct to be actionable under this Rule, it first must be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this Rule.

[4] A complaint of misconduct based on this Rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding thereafter is appealed.

[5] This Rule addresses the internal management and operation of a law firm. With regard to discriminatory conduct of lawyers while representing clients, see Rule 8.4(d).

Hollins, Audrey

From: Ross G. Simmons [ross@rblaw.com]
Sent: Friday, November 16, 2007 11:43 AM
To: Hollins, Audrey
Cc: McCurdy, Lauren; Wendy Patrick Mazzarella; judy@rblaw.com
Subject: SDCBA Comments: Five (5) Proposed Amended Rule; State Bar Special Commission For the Revision of the RPC

Dear Audrey:

As discussed at the time of the public hearing in the referenced matter, attached please find the formal comments submitted to the State Bar Special Commission for the Revision of the Rules of Professional Conduct by the San Diego County Bar Association (SDCBA). These comments were approved by the Board of Directors of the SDCBA, and adopted as its position on these matters, at its regular meeting of November 13, 2007.

I regret the timing of this deliverable, and sincerely appreciate the additional time within which to provide it. I thank the Commission for its indulging my appearance in September, and for its consideration of the attached.

I provide in this format in the interest of expediency. We would gladly provide in other, more convenient formats if doing so would be of assistance. Otherwise, as is always true, I welcome your calls, those of your colleagues or those of any Commission members if there are any residual questions concerning the attached, or if we can be of assistance in any other measure. We are grateful for being given the opportunity to participate in this process.

Ross G. Simmons
THE SIMMONS FIRM, ALC
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11440 West Bernardo Court
San Diego, CA 92127-1655
v - (858) 676-1668 x304
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U.S. Treasury Circular 230 Notice: Any U.S. federal tax advice included in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding U.S. federal tax-related penalties, or (ii) promoting, marketing, or recommending to another party any tax-related matter addressed herein.

MEMORANDUM

Date: November 16, 2007

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California ("Commission")

From: San Diego County Bar Association ("SDCBA")

Re: "2nd PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subj: Proposed Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation [2-400]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

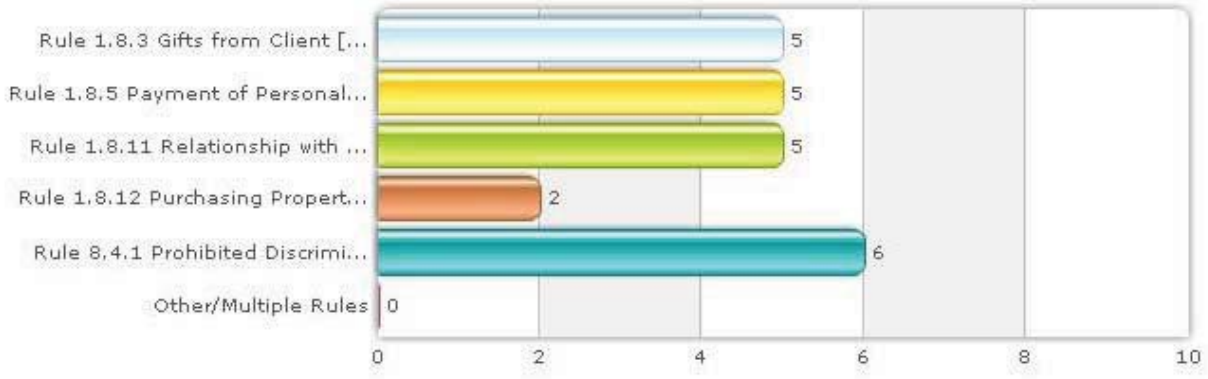
* * * * *

Comment 1:

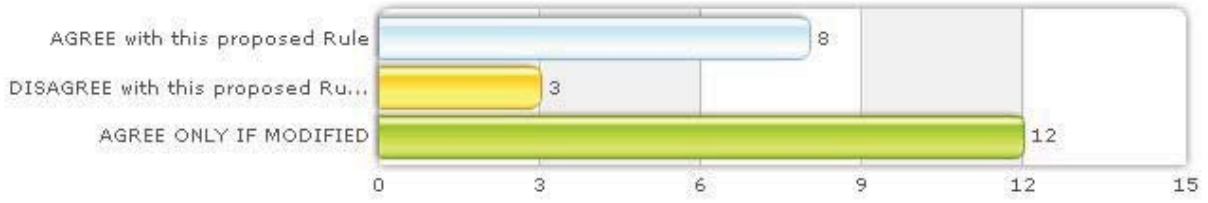
The modified rule is approved as proposed.

BATCH 2

Select the Proposed Rule that you would like to comment on from the drop down list.



From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.



Total Number of Responses for this Item: 23

PUBLIC COMMENTS [1.5] ~ FILE LIST

C-2008-182 Florentino Garza [1.5(f)]

C-2008-183 Nanci Clarence [1.5(f)]

C-2008-184 Roger Jon Diamond [1.5(f)]

C-2008-185 CACJ [1.5(f)]

C-2008-186 Mark Borden [1.5(f)]

C-2008-187 Gary Lincenberg [1.5(f)]

C-2008-188c Evan Jenness [1.5(f)]

C-2008-189 Steve Cron [1.5(f)]

C-2008-190a Matthew Lombard [1.5]

C-2008-192 Barry Tarlow [1.5(f)]

C-2008-196 Robert A. Kahn [1.5(f)]

C-2008-198 Hugh Anthony Levine [1.5]

C-2008-200 Knut Johnson [1.5(f)]

C-2008-201 Kurt David Hermansen [1.5]

C-2008-202 Anonymous [1.5(f)]

C-2008-204 Peter J Hughes [1.5(f)]

C-2008-205 John G Phillips [1.5(f)]

C-2008-209 Michael L. Crowley [1.5(f)]

C-2008-211 Rafael Chodos [1.5(f)]

C-2008-213a SDCBA [1.5]

C-2008-214a Robert Sall [1.5]

C-2008-215 Allen Bloom [1.5]

C-2008-217 David Harris [1.5(f)]

C-2008-218 Michael Stepanian [1.5(f)]

C-2008-220 Charles Sevilla [1.5]

C-2008-221 Jack J. Boltax [1.5]

C-2008-224 Stephen R. Brodsky [1.5]

C-2008-226 Kenneth J. Troiano [1.5]

C-2008-227 Steven Feldman [1.5]

C-2008-228 Randy Sue Pollock [1.5]

C-2008-229b SCCBA [1.5]

C-2008-230a OCBA [1.5]

C-2008-231 Carol M. Langford [1.5]

C-2008-232a COPRAC [1.5]

C-2008-233 Stephen A. Kolodny [1.5]

C-2008-234a NACDL [1.5]

C-2008-236 Daniel J. Russo [1.5]

C-2008-240 Stanley I. Greenberg [1.5]

C-2008-243 Louis Katz [1.5(f)]

C-2008-253a Chief Trial Counsel [1.5]

Law Offices of
Garza & Associates

1980 Orange Tree Lane, Suite #280
Redlands, California 92374

Telephone: (909) 798-0663
Facsimile: (909) 793-5803

EMAIL: florentinogarza@yahoo.com

May 23, 2008

Audrey Hollins
The State Bar of California
Office of Professional Competence,
Planning and Development
180 Howard Street
San Francisco, California 94105

Re: Opposition to Proposed New State Bar Rule 1.5(f) (4-200) (Fees for Legal Services) Abolishing Non-refundable Retainers

Dear Ms. Hollins:

This letter is respectfully presented to you to voice my opposition to the proposed New State Bar Rule 1.5(f) (4-200) (Fees for Legal Services) Abolishing Non-refundable Retainers. I believe that this proposal will severely impact the economics of practicing law in California and will affect the ability of individuals in need of representation to obtain legal services. I have recently been informed of this proposal yet have observed a lack of publicity thereof. As you may know, similar proposals have been rejected both in 1991 and 1997.

I have practiced law in California for over fifty years in the fields of Trial and Appellate practice in Civil matters. A copy of my resume is enclosed which may assist you in evaluating my opinions.

Respectfully yours,

FLORENTINO GARZA

FG/lh
Enclosure

cc: Jeffrey L. Bleich
President, California State Bar Association

PROFESSIONAL RESUME

NAME:

Florentino Garza
Law Offices of Garza & Associates
1980 Orange Tree Lane, Suite 280
Redlands, California 92374

Telephone: (909) 798-0663
Fax: (909) 793-5803
Email: FlorentinoGarza@yahoo.com

EDUCATION:

BA-1950; MA-1952; University of New Mexico
JD-1956; University of California Los Angeles

LEGAL SERVICES:

Emphasis on trial and appellate civil litigation; including all negligence and insurance related cases, all vehicular injury matters, product liability cases, governmental claims, legal and medical malpractice cases and others.

PROFESSIONAL ORGANIZATIONS:

American Board of Trial Advocates - 1974 to the present.
San Bernardino County Bar Association - 1961 to the present. (President 1976)
American College of Trial Lawyers - Fellow, 1974 to present.
International Academy of Trial Lawyers, 1970 to the present (President - 1979/1980).
UCLA Foundation Board of Trustees, 1981 to the present.
Member, B.E. Witken Legal Institute, 1996 to the present.

AWARDS/HONORS:

"AV" rated by Martindale-Hubbell since 1967

John B. Surr Award, San Bernardino County Bar Association for exemplifying the high standards of the legal profession and the administration of justice (1987)

UCLA Alumni Award for Professional Excellence (1991)

Title of "Defender of the Jury" Conferred by the Spanish Bar Association (1992)

Listed in the Best Lawyers in America since first publication in 1984

Recipient, "Trial Lawyer Hall of Fame" Award from California Bar Association (1998)

Recipient, "Trial Lawyer of the Year" CAL-ABOTA (2000)

Florentino Garza Fortitude Award. An annual award established by the San Bernardino County Bar Association (2002)

Recipient, Honorary Doctorate Degree of Humane Letters, California State University, San Bernardino (2004)

Recipient, CAL-ABOTA Presidents' Award for Lifetime of Trial Advocacy (2005)

Nanci L. Clarence
Kate Dyer
Edwin K. Prather
Nicole K. Howell
Craig H. Bessenger

CLARENCE & DYER LLP

Attorneys At Law
899 Ellis Street
San Francisco, CA 94109
Tel: 415.749.1800
Fax: 415.749.1694
www.clarencedyer.com

May 27, 2008

Ms. Audrey Hollins
The State Bar of California
Office of Professional Competence,
Planning and Development
180 Howard Street
San Francisco, CA 94105

Re: Opposition to Proposed New State Bar Rule 1.5(f) (4-200) (Fees for Legal Services) Abolishing Non-Refundable Retainers

Dear Ms. Hollins:

The proposal to abolish non-refundable retainers for legal services will adversely impact the practice of law in California and attorney-client relationships. I wholly disagree with this change and share the concerns of many California attorneys opposing the adoption of this proposal. Moreover, this revision to Rule 1.5(f) (4-200) has not been sufficiently publicized, disseminated, or explained to the majority of bar members and therefore does not permit them the opportunity to respond or object. I only became aware of this proposed change from a colleague who learned of this by chance.

The change carries vast implications and negative effects for both attorneys and their clients. Prohibiting non-refundable retainers will expose lawyers to great financial risk, unnecessary interference in attorney-client relationships, and substantial economic impact on all firms. Ultimately, this will lead to an increase in legal fees and limit the availability of legal services to people of California with low, fixed fee services and their ability to seek the legal representation of their choice. This proposal is not in the public interest and should be rejected. I have enclosed a copy of my curriculum vitae for you to evaluate my background and experiences in assessing the merit of my views.

Very truly yours,

Nanci L. Clarence

NLC/sc
Enclosure

CLARENCE
& DYER LLP

Nanci L. Clarence

nclarence@clarencedyer.com

Professional Experience

CLARENCE & DYER LLP, SAN FRANCISCO, CALIFORNIA

Partner, 1996-Present

Clarence & Dyer LLP is a litigation firm emphasizing the practice of criminal law, including white collar criminal defense, with a focus on securities fraud, antitrust, environmental and computer crimes as well as international extradition, constitutional and civil rights, labor and employment, civil fraud defense, complex torts, and intellectual property matters. The firm also has a depth of experience conducting corporate internal investigations.

Criminal matters include: representation of corporations and individuals charged with alleged foreign corrupt practices, economic espionage and theft of trade secrets; Representation of corporations and employees in federal grand jury investigations including antitrust, banking and securities matters including stock option-backdating practices; Representation of corporations and individuals in SEC investigations, corporate internal and regulatory investigations relating to accounting and securities fraud, antitrust, insurance and employment law violations.

Civil matters include: representation of corporate entities in copyright and trademark infringement, licensing, privacy and First Amendment matters, constitutional law pertaining to permits and licensing, and labor matters. The firm won federal jury award of $750,000 plus punitive damages for client whose constitutional rights were violated by jail deputies;

Environmental law defense includes: representation of employees in a multi-agency investigation probing health and safety and environmental issues arising out of Tosco oil refinery fire in Avon, California, and representation of various corporate entities in federal prosecution alleging Clean Air Act and RCRA; internal investigations and representation of employees in industrial accident investigations including an explosion in Walnut Creek, California during an underground pipeline excavation which led to multiple worker deaths and injuries.

Recent experience includes:

- Conducted statewide internal investigation of State Compensation Insurance Fund concerning contract irregularities.
- Conducted internal investigation into alleged corporate trade secret violation and alleged retaliatory employment actions for Silicon Valley technology company.
- Representation of an energy trader in current Northern District of California prosecution for alleged market manipulation. The prosecution was dismissed and resulted in a deferred prosecution agreement for our client.

- Representation of an individual charged in Southern District of Texas for Enron-related criminal charges and SEC proceedings.
- Representation of the former President of Critical Path Corporation in criminal action in the Northern District of California.
- Representation of an individual charged in Northern District of California under the Economic Espionage Act for theft of trade secrets.
- Representation of an Oakland, California publicly traded corporation for violation of Clean Air Act.
- Representation of an individual charged in a criminal case in the Northern District of California for copyright violations and related civil actions brought by Microsoft Corporation.
- Representation of an individual in criminal proceedings and related civil class actions in Southern District California arising from an investigation by the United States Attorney and investors in the AOL/Homestore.com proceedings.

STEEL, CLARENCE & BUCKLEY, SAN FRANCISCO, CALIFORNIA

Partner, 1992-1996

Criminal and civil trial practice included federal criminal trials and appeals, death penalty habeas corpus actions and major tort and police misconduct cases. Criminal trial practice included acquittal of first degree murder charges against San Francisco adult entertainment mogul James Mitchell of the Mitchell Brothers O'Farrell Theatre.

Represented clients in major criminal trade mark infringement prosecution. First Amendment matters included representation of night clubs and theaters in permit and licensing revocation proceedings and constitutional challenges to municipal statutory schemes.

OFFICE OF THE FEDERAL PUBLIC DEFENDER, SAN FRANCISCO, CALIFORNIA

Assistant Federal Public Defender, 1987-1992

Defended clients in numerous criminal matters, handling more than a dozen felony and misdemeanor jury trials in the Northern and Eastern Districts of California. Briefed seven and argued four appeals in the Ninth Circuit Court of Appeals. Filed three petitions in the United States Supreme Court.

Won dismissal of case filed against banking and real estate magnate J. William Oldenburg in major savings and loan fraud case after successful re-trial of charges.

MORRISON AND FOERSTER, SAN FRANCISCO, CALIFORNIA

Litigation Associate, 1985-1987

Civil and federal criminal case experience included white collar criminal defense and representation of heir to Henry Ford, in a civil fraud action to recover assets lost by financial manager and defense of American business executive charged with aiding and abetting anti-Marcos political activists.

Recognition And Awards

- Top 10 Litigators in Northern California, *San Francisco Magazine*. 2007
- Named by the *San Francisco Daily Journal* as one of the "Top 75 Women Litigators" in the State of California in 2005, 2006 and 2007

- Featured in *Chambers and Partners, USA Guide 2006 and 2007* ("White Collar Criminal Litigation")
- Elected as a Fellow of the American College of Trial Lawyers in 2005
- Top 100 Lawyers in Northern California and Top 50 Women Lawyers in Northern California, *San Francisco Magazine*. 2007, *2006 and 2005*
- Recipient of the Juvenile Justice Task Force, Award of Merit by the Bar Association of San Francisco in 2002
- Recipient of the "Outstanding Service to the Court" by the Ninth Circuit Conference Lawyer Delegate for the Northern District of California in 1996

Clerkships

Law Clerk for the Honorable Charles A. Legge, 1986-1987

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO, CALIFORNIA

Judicial Intern for the Honorable Robert P. Aguilar, 1984-1985

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE, CALIFORNIA

Education

UNIVERSITY OF CALIFORNIA HASTINGS COLLEGE OF LAW

J.D., 1985

UNIVERSITY OF CALIFORNIA AT BERKELEY

Bachelor of Arts, English, 1981

Magna Cum Laude, Phi Beta Kappa
American Field Service (AFS) Scholar in Norway, 1976-77

Bar Memberships

- State Bar of California (Bar No. 122286)
- Northern District of California
- Eastern District of California
- Central District of California
- Western District of Pennsylvania
- Southern District of Texas
- Ninth Circuit Court of Appeals
- United States Supreme Court

Professional Associations

American College of Trial Lawyers 2005- Present
Fellow: Member of the Committee on Federal Criminal Rules:
Member, State Committee

Bar Association of San Francisco (BASF) 2003-Present
President, Board of Directors (term beginning December 2006. see www.sfbar.org)

California Supreme Court Steering Committee on the Commission for Impartial Courts Task Force on Public Information and Education 2007-2008

Northern District Advisory Committee on Professional Conduct 1996-1997

Appointed by Hon. Marilyn Hall Patel to N.D. California committee drafting and implementing local rule governing professional conduct, civility and the elimination of bias in the courts.

California Supreme Court Advisory Committee on Lawyer Regulation 2002
Appointed by Chief Justice Ronald M. George

California Attorneys For Criminal Justice 1997-2000
Board of Governors
Chair, State Bar Committee 2004-2006
Chair, Federal Practice Committee 1997-1998

Senator Barbara Boxer's Judicial Advisory Committee 1996-1999
Appointed by Senator Boxer to interview and recommend applicants for consideration for appointment to the United States District Court and United States Attorney's Office.

Ninth Circuit Conference Lawyer Delegate 1995-1996
Chair, Lawyer Representatives for the Northern District of California

State Bar of California 1996-1998
Chair, Section on Litigation, Tax Litigation Committee

Edward McFetridge American Inn of Court, San Francisco 2001-Present
Member, Executive Board (will ascend to serve as President in 2007)

National Association of Criminal Defense Lawyers 1987-Present
Chair, San Francisco Conference 2002: Warriors for the Defense

Recent Lectures And Teaching Experience

- Speaker, 80th Annual Meeting of the State Bar of California, Anaheim, "Achieving Diversity through the Elimination of Bias." (Sept. 2007)
- Speaker, 2007 California Bench-Bar Annual Conference, Anaheim, "Animation: Tomorrowland Today." (Sept. 2007)
- Speaker, American Bar Association, San Francisco, "Lying Clients and Untruthful Witnesses." (August 2007)
- Speaker, The Bar Association of San Francisco, San Francisco, "The Death and Resurrection of the Attorney Client Privilege." (March 2007)
- Speaker, Association of Business Trial Lawyers Northern California, San Francisco, "Voir Dire and Jury Selection; Who Will Decide the Case?" (February 2007)
- Speaker, Northern District of California Judicial Conference, Chaminade, "Handle with Care: Managing Explosive Evidence in Morally Charged Cases" (April 2006)
- Speaker, The Litigation Section of the Bar Association of San Francisco, Third Annual Bench Bar Conference, San Francisco, "Making the Witness Squirm: Effective Cross-Examination and Impeachment" (November 2006)
- Speaker, American Bar Association Criminal Justice Section, 19th Annual National Institute on White Collar Crime 2005, Las Vegas, "Playing Hard Ball: Tactics for the Defendant Who Still Wants to Fight" (March 2005)

- Speaker, Sarbanes-Oxley and Whistleblowers, American Business Trial Lawyers (ABTL) Conference in Kona, Hawaii (October 2004)
- Speaker, California Public Defenders Association: The Advanced Trial Skills Institute, Palm Springs, "Persuasive Final Argument Techniques" (February 2002)
- Speaker, Trial Skills for the 21st Century: Technology in the Courtroom, Continuing Education of the Bar (1999)
- Lecturer, 28th Annual College of Advocacy, Hastings College of Law, (1998), "Effective Opening Statements"
- Instructor, National Institute for Trial Advocacy (1989-1990)
- Instructor, Orientation Seminar for Federal Defenders (1988-1990)
- Speaker, National Association of Criminal Defense Lawyers, Sex, Lies & Videotape, Fact and Fallacy of Computer Animation, Atlanta (1998)
- Speaker, ABA Annual Meeting, San Francisco, CA Movie Magic, How the Masters Try Cases (1997)
- Speaker, California State Bar Association, Continuing Legal Education, Expert Witnesses in the Criminal Case (1996)
- Lawyer Delegate, U.S.-Jordan Legal Exchange Project, Comparative Law Study of Civil and Criminal Justice Legal Processes of the Hashemite Kingdom of Jordan and the U.S.A. (July, 1995)
- Speaker, San Francisco Bar Association, Continuing Legal Education, Issues The Civil Litigator Should Consider When Confronting A Potential Criminal Problem (1995)
- Speaker, Oregon State Bar Association, Continuing Legal Education, How Expert Trial Lawyers Litigate (1995)
- Member, Local Criminal Rules Revision Committee, 1994. U.S. District Court, Northern District of California
- Speaker, CACJ/CPDA on Capital Case Defense Seminar (1994)
- State Bar of California, Litigation Section Symposium (1994)
- Speaker, Continuing Education of the Bar (CEB), Recent Developments in Criminal Law (1994)
- Seminar, The Right to Counsel, San Francisco (1994)
- Speaker, California Attorneys for Criminal Justice (CACJ), Federal Practice Seminar (October 1994)
- Speaker, CACJ Conferences on Federal Capital Habeas Corpus (December 1994)
- Speaker, American Bar Association Litigation Section Meeting, 1994. "Representing the Unpopular Client"
- Speaker, American Bar Association Litigation Section Meeting, 1994. "The Use of Computer Animation in Trial"
- Instructor, Stanford University Trial Advocacy Program, 1994.
- Speaker, California Attorneys for Criminal Justice (CACJ), Spring Update (1993)

- Speaker, Continuing Education of the Bar (CEB), Effective Use of Video at Trial (1993)
- Speaker, California Attorneys for Criminal Justice (CACJ), Criminal Defense Update, San Francisco (1991)
- Instructor, "Only the Strong Survive" Regional Seminar for CJA Attorneys

Selected Publications

- Continuing Education of the Bar (CEB) October 2006 update, "Advising and Defending Corporate Directors & Officers"
- 19th Annual National Institute on White Collar Crime 2005 "Putting the Government to Its Proof Prior to Trial: Tactics for Forcing the Government's Hand in Complex White Collar Cases
- California Labor & Employment Law Quarterly, January 2003. "Representing a Corporation in a Criminal Investigation"

LAW OFFICES OF
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SANTA MONICA, CALIFORNIA 90405-2215
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rogdiamond@aol.com

May 27, 2008

Ms. Audrey Hollins
The State Bar of California
Office of Professional Competence
Planning & Development
180 Howard Street
San Francisco, California 94105

Re: Opposition to Proposed New State Bar Rule 1.5(f)(4-200)

Dear Ms. Hollins:

I just learned that the State Bar is considering a new rule regarding the abolition of non refundable retainers. The purpose of this letter is to express my deep opposition to this misguided proposal.

I graduated from UCLA School of Law in 1966 with a JD degree. I was an editor of the Law Review and published an article. After I graduated from UCLA Law School I first joined a major law firm and then went out on my own and then formed a small firm. For the last 20 years I have been a sole practitioner. I have been certified as a criminal law specialist since March of 1979. Although I do quite a bit of criminal work I also handle civil cases. I have a fairly wide perspective of the practice of law, which I have done for the last 40 years.

The proposed rule abolishing non refundable fees is a bad idea. As a certified specialist in criminal law who has handled numerous criminal cases I know there is no way that an attorney can handle criminal cases without receiving fees in advance that are deposited in the general account of the attorney, not the trust account. Naturally, the client is informed of all this in advance.

If the fees paid at the beginning of the case are not earned when paid the attorney would be faced with the possibility of having the government seize the funds that are being held in the trust account. Notwithstanding the seizure of the funds, the lawyer will most assuredly be compelled to remain on the case. If an attorney cannot keep the initial retainer he or she will not in all likelihood accept the case in the first place.

The result of all this will be that attorneys will decline to take many cases for fear that fees paid "up front" that are in the trust account will be subject to seizure by the government. Accordingly, most defendants would then go to the public defender, which would put a much greater burden on the criminal justice system and upon the tax payers.

If the retainer in a criminal case is considered refundable the fee will be subject to attachment by creditors and government agents. The proposed rule will interfere with the attorney/client relationship and generate client Bar complaints.

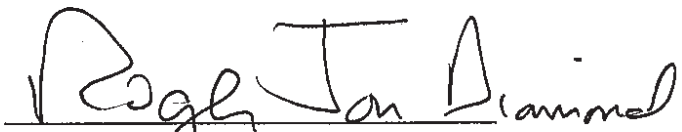
I know that clients are perfectly satisfied to pay retainers that they know are not refundable. The record keeping burden on attorneys who will then have to put the money in trust accounts will be overwhelming.

This will make it much more difficult for sole practitioners to run an office.

Please reject the proposal. I would strongly urge you to reject the proposal. The proposal, if adopted, would disrupt the relationship between the attorney and his or her client and would serve no useful purpose."

Thank you.

Sincerely,



ROGER JON DIAMOND

RJD:jb

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May 28, 2008

Ms. Audrey Hollins
The State Bar of California
Office of Professional Competence,
Planning and Development
180 Howard Street
San Francisco, CA 94105

RE: OPPOSITION TO PROPOSED NEW STATE BAR RULE 1.5(f) (FEES FOR LEGAL SERVICES)

Dear Ms. Hollins:

I write this letter on behalf of California Attorneys for Criminal Justice. Our organization serves the criminal defense bar of California. A substantial percentage of our membership is in private practice. Upon reviewing Proposed New State Bar Rule 1.5(f), substantial concerns arise. The cumulative concerns lead us to conclude that this rule should be rejected by the State Bar.

In reviewing the changes contemplated, no circumstance was cited by the committee to suggest that any problem, abuse, or adverse impact on the public has been identified which merits a sweeping change to the way fees have been historically negotiated. Granted the historical practice relying on non-refundable fee agreements, it seems drastically excessive to abrogate this longstanding approach, in the absence of some indication that this has worked an unfairness or hardship.

The mechanism for negotiating fees, whereby clients agree to a fixed fee at the time of hiring a lawyer, has the advantage of certainty for the client, regarding the cost for representation. For the practitioner, simplification of administration is the byproduct. For those members and clients who chose to agree on costs for services in this fashion, mutual benefits result. To prohibit such practice, as suggested by the proposed new State Bar Rule 1.5(f), seems unwise for the adverse effect it will impose. For the client, who will likely be faced with greater fees and for the lawyer, who will likely be faced with greater administrative overhead, this rule seems unwise and unjustifiable. To the extent that this form of fee agreement has been adopted by clients and lawyers dealing in arms-length transactions, the rule prohibits such informed agreements from being lawfully entered into, despite the fact that both lawyer and client believe it to be in their best interest.

Under the proposed rule, the fee identified will be retained in a trust status by the lawyer, and not be characterized as earned. As a result, it will be subject to claims from a variety of collateral sources. Although the fees were unencumbered and available to pay for needed services at the time they were tendered, the fact that the lawyer cannot confirm, merely by receiving the fee, that it will be available at some later point when services are billed, renders the likelihood and certainty of payment problematic and invites an increase in charges to offset this uncertainty. The net effect here is to increase the cost

of services for clients across the board. Additionally, because some lawyers will merely be unable to survive the economic environment thus created, for some there will be the abandonment of the field of practice. The net effect will be to deprive a client of the opportunity to select the attorney of their choice, because the attorney will no longer be available, granted the economic uncertainty created by the proposed rule.

Because no sound public policy grounds have been advanced in support of this tectonic shift, it is our position that the proposed rule should be abandoned and not adopted.

We appreciate your consideration of our position regarding this matter.

Respectfully Submitted,



Rickard Santwier
President, CACJ Board of Governors

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May 29, 2008

Ms. Audrey Hollins
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, CA 94105

RE: PROPOSED STATE BAR RULE 1.5(f) 4-200
(Abolishment of Non-Refundable Retainers)

Dear Ms. Hollins,

I have used non-refundable retainers for a number of years in my fee agreements, only on cases where I represent people charged with crimes. My non-refundable retainer is exactly what it says, i.e., that the clients pay for my availability any time, any place, anywhere. Six months ago I was on a cruise starting in Dubai and ending in Singapore. I received calls from my clients while I was on tour in India, 4-wheel drive touring in the country of Oman, and in Singapore. I returned those telephone calls immediately because, when my clients who are charged with crimes call, the police could be questioning them, they could need to talk to an attorney regarding witnesses, and so forth. Thus, I am available any time, anywhere, any place.

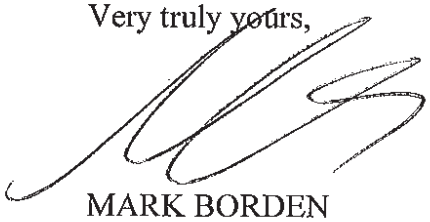
By doing away with this non-refundability, the State Bar would be taking away those clients' ability to reach me at any time and any place.

This cannot be said for the large law firms such as Gibson Dunn or O'Melveny & Meyers where their people cannot be reached any time, any place. But the State Bar, as usual, seems to not want to take any action against large firms for discovery abuses (e.g., Gibson Dunn and their defense of Morgan Stanley in their lawsuit), but they seem to want to "pick on the little guy." Only criminal defense attorneys, usually one- or two-person law firms, use these types of retainers to assure our availability, our knowledge of the legal system, and other "intangibles."

Unlike the large law firms, we do not bill our clients hourly because, in criminal cases, if the client should run out of money, the court will not relieve us. In civil cases, where most of the large law firms represent their clients, if the client runs out of money, the court will relieve them or the client can substitute them out without court permission.

I am sending you this letter to express my opposition to the proposed changes to the State Bar rules regarding elimination of non-refundable retainer fees.

Very truly yours,



MARK BORDEN

MB/shs

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May 30, 2008

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Jeffrey Bleich
State Bar President
Munger, Tolles & Olson
560 Mission Street
27th Floor
San Francisco, CA 94105

Re: Proposed New State Bar Rule 1.5(f)(4-200)

Dear Ms. Hollins and Mr. Bleich:

I write this letter in opposition to Proposed New State Bar Rule 1.5(f) (4-200) calling for the abolition of non-refundable retainers. After spending six years as a federal prosecutor, for the past fifteen years I have been a partner with Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg, P.C. Our firm has 26 lawyers and our practice is about 40% white collar criminal. My practice is predominantly white collar criminal. I currently serve as Co-Chair of the Southern California Regional ABA White Collar Crime Committee and President of the Los Angeles Federal Bar Association. Based upon my experience, non-refundable retainers are not inherently unconscionable. On the contrary, they play a role in preventing potential clients from conflicting attorneys out of cases for strategic reasons, setting a fair market value for flat fee cases, and letting market forces reward accomplished attorneys.

Although our firm generally does not take non-refundable retainers, we do under certain circumstances. Our firm gets contacted by potential clients in a large percentage of the white collar cases being investigated in Southern California. We are always concerned about meeting with a potential client, or being hired only briefly by a client

Sharon Ben-Shahar, Terry W. Bird, Joel E. Boxer, Eric E. Bronson, Paul S. Chan, Jennifer S. Chang, Mark T. Drooks, Thomas R. Freeman, Benjamin N. Gluck, Jason D. Kogan, Lisa M. Lawrence, Benjamin D. Lichtman, Gary S. Lincenberg, Vincent J. Marella, Marc E. Masters, Bonita D. Moore, Ronald J. Nessim, Angela E. Oh, Thomas V. Reichert, Jean Y. Rhee, Ekwan E. Rhow, John K. Rubiner, Peter J. Shakow, Dorothy Wolpert, Steven K. Yoda

before the client changes to another lawyer while conflicting our firm out of representing other potential clients involved in the case. Indeed, from time to time a person under investigation contacts law firms like ours solely for the purpose of conflicting these firms out of representing others. To guard against this, a firm may demand a non-refundable retainer.

Non-refundable retainers also benefit clients who prefer the certainty of a flat fee to the uncertainty of hourly billing. This shifts the risk to the attorney of potentially working long hours for a small fee. In exchange for accepting the risk that a case will require more hours than the flat fee anticipates, the attorney should be able to at least have the comfort of knowing there will be a minimum, non-refundable fee. This also may benefit the clients insofar as it reduces the size of the retainer.

Finally, permitting non-refundable retainers allows the market to properly function. A potential client seeking a well-respected lawyer pays a price for that lawyer agreeing not to represent someone else in the case. If the client does not wish to pay that price, the client may shop for a lower priced attorney. The bottom line is that the market should allow for a range of alternative retainer agreements.

Thank you for consideration of my views.

Very truly yours,

Gary S. Lincenberg

GSL:lak

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May 30, 2008

Via Email (audrey.hollins@calbar.ca.gov)
and Federal Express

Ms. Audrey Hollins
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State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Comments Regarding Proposed Revisions to the California Rules of Professional Conduct - Proposed Rules 3.10, 4.2 and 1.5

Dear Ms. Hollins:

I am writing to share with the Rules Revision Commission my comments on three of the pending proposed revisions to the California Rules of Professional Conduct. I write in an individual capacity and not on behalf of any group. By way of background, however, I am the Co-Chair of the National Association of Criminal Defense Lawyers' Ethics Advisory Committee; a long-standing member of the Los Angeles County Bar Association Professional Responsibility & Ethics Committee; and a Board Member of the Los Angeles Chapter of the Federal Bar Association. I regularly lecture and write on criminal defense ethics, professional responsibility and prosecutorial misconduct.

As a criminal defense lawyer, and member of the California Bar for the past two decades, I am particularly troubled by Proposed Rules **3.10**, Comment 2 (CRPC 5-100, Threatening Criminal, Administrative, or Disciplinary Charges, exemption for government lawyers), **4.2**, Comments 19-20 (CRPC 2-100, Communication With a Person Represented by Counsel,

"Communications Authorized by Law or Court Order," exemption for prosecutors), and **1.5(f)** & Comment 2 (CRPC 4-200, Fees for Legal Services, prohibition on nonrefundable retainers).

The first two Proposed Rules (**3.10, 4.2**) contain special exemptions for government lawyers, and would have the effect of holding prosecutors and other government lawyers to lower standards of professional conduct than those which apply to all other members of the California Bar. Such special-interest carve-outs from the Rules of Professional Conduct are unprincipled, may endorse conduct that is prohibited by the California Penal Code, would foster the kind of government misconduct intended to be addressed by Section 1983 of the Civil Rights Act (42 U.S.C. § 1983), and would create irrational disparities in the positions of government and other lawyers.

Special exemptions for government lawyers also are inconsistent with the Congressional intent reflected in 28 U.S.C. § 530B ("An attorney for the Government shall be subject to State laws and rules . . . governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State"). Our justice system relies heavily on government lawyers being held to the highest standards of ethics – not a lower standard effected by special exemptions from the Rules of Professional Conduct.

Proposed Rule **1.5(f)** also would have a particularly adverse effect on the criminal defense community. By making it unethical for lawyers to enter into nonrefundable fee retainer agreements, the rule would prohibit a common form of retention in criminal cases, and could result in many clients of limited means being unable to hire a lawyer. Although the revision appears motivated by concern about unscrupulous lawyers who over-charge their clients, eliminating a discrete form of retainer will not address that problem. It is not the form of the retainer but a lawyer's lack of integrity that causes client over-billing. Indeed, padded hourly billing by dishonest lawyers undoubtedly is a more serious problem in the aggregate than any problems arising from nonrefundable fee retainers. The "unconscionability" standard provides a suitable and uniform standard for the State Bar Attorney Discipline System to use in addressing client complaints about over-billing and appropriately applies regardless of the form of a retainer.

As requested, I have put my comments to these Proposed Rules on separate pages, which accompany this letter. I appreciate greatly the tremendous time and effort that members of the Rules Revision Commission have committed to their important work, and hope that my comments are helpful in preparing the final rules.

Very truly yours,

LAW OFFICES OF EVAN A. JENNESS

Evan A. Jenness

EAJ:dfm

Enclosures

Proposed Rule 1.5(f) & Comment 2 (CRPC 4-200, Fees for Legal Services, prohibiting nonrefundable retainers)

Proposed Rule 1.5(f) errs insofar as it seeks to prevent attorneys and clients from entering into "nonrefundable" fee agreements.[4] Rules prohibiting lawyers from charging an "unconscionable" fee, and requiring them to return unearned fees upon termination, already provide appropriate uniform standards for *all* types of attorney-client retainer agreements.

Proposed Rule 1.5(f) would have a particularly detrimental impact on criminal defense attorneys and their clients, as described in detail in the May 20, 2008 letter to the Rules Revision Commission by revered criminal defense attorney Barry Tarlow. The impact will be particularly harsh with respect to clients who have insufficient resources to fund their representation on an hourly basis.

Many clients in criminal matters need to know at the inception of a matter that whatever amount they pay to counsel will assure their representation throughout the matter. Such clients could not afford to provide a refundable retainer large enough to assure counsel in every case that s/he would earn a reasonable hourly fee for the potential duration of the matter. A nonrefundable fee is a compromise in which both sides assume a margin of risk regarding what the ultimate hourly fee will be. Indeed, only the client has assurance that the fee will not be unconscionable. A lawyer who agrees to a nonrefundable fee has no assurance regarding what his/her hourly fee will be by the conclusion of the matter. Counsel who misapprehends, for example, the complexity of a matter, the aggressiveness of adversaries, or the length of delays in judicial proceedings, may wind up with an hourly fee well below his or her customary hourly rate.

I understand that on May 22, 2008, at the public hearing regarding this rule, a question was raised to the effect of, "why isn't it misleading to tell a client that a fee is nonrefundable," since the Rules preclude an attorney from collecting an unconscionable fee and early termination of a matter or lawyer could render unconscionable the fee initially agreed upon by the parties or require the return of unearned fees? I believe that the question is misplaced.

At the time that the parties enter into a nonrefundable fee agreement, the fee ***is*** nonrefundable given the present circumstances. Any number of circumstances (*e.g.*, termination by either party, a precipitous conclusion of the matter, the development of an unforeseen conflict, death of either party, *etc., etc.*) may later arise and require the lawyer to provide at least a partial

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[4] It is unclear precisely *what* type of retainer is a "nonrefundable" fee agreement within the meaning of the proposed rule. The proposed revisions do not define the term - *or* numerous other terms commonly used to describe fee arrangements, including "flat," "fixed," "classic retainer," "retainer," "minimum," "advance," "security," "mixed," or "evergreen." An effort is made to clarify the meaning of a "true retainer," but there appears to be broad disagreement among experts regarding the correct definition of this term (in contrast, perhaps, to the terms "hourly" and "contingent").

rebate to the client. That possibility does not make the terms of the retainer misleading at the time it was executed by the parties. If it did, an attorney could make very few representations to a client. For example, an attorney could never tell a client, "my duty of loyalty is to you alone," given the possibility of a circumstantial change rendering the statement no longer true, *e.g.,* a conflict of interest coming to light.

I also understand that a comment was made to the effect that nonrefundable fees adversely impact a client's right to terminate counsel. In fact, a client's right to a rebate is the same regardless of the form of the retainer - counsel is required to remit that portion of fees previously paid (whether on an hourly or nonrefundable fee basis) if the amount otherwise paid to date would be unconscionable. A client's right to terminate counsel is adversely impacted where he or she will lose an attorney's substantial "learning curve" in a matter *regardless of the form of the retainer*.

The proposed rule appears to be a misplaced effort to address a broader problem – unscrupulous lawyers who overcharge their clients. However, the proposed rule would adversely impact a small minority of clients and lawyers while failing to address the more widespread phenomenon of padded hourly bills by dishonest lawyers.

Indeed, our State Bar President recently opined that *hourly billing* is the bane of the legal profession for *numerous* reasons, including the increased costs to clients. *See* Jeff Bleich, *Escaping the Hours Billable Trap*, Cal. Bar Journal (April 2008) (describing how an "a billable hours system is corrupting to our profession in both obvious and more subtle ways. . . . It has made litigation more expensive, and it has largely eliminated accountability for outcomes. In the bargain it has cast an ethical cloud over the work we do . . . The goal of many ethics rules is to ensure that lawyers resolve their clients' problems as cheaply and efficiently as possible. At its core, however, a billable hours model puts that goal directly at odds with the lawyer's economic interest. . . . The problem with this system is that even if lawyers are not corrupted by it, it still casts a shadow over the choices we made.").[5]

In sum, it is the integrity of the lawyer and not the form of the retainer that is significant, and the State Bar's resources would be better directed at addressing client complaints about unconscionable fees irrespective of the type of retainer.[6]

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[5] Available at: http://www.calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/April2008&MONTH=April&YEAR=2008&sCatHtmlTitle=Opinion&sJournalCategory=YES (accessed May 30, 2008).

[6] Promoting national uniformity – one of the reasons for the proposed revisions to California's Rules of Professional Conduct – is another reason to reject Sub-part (f). That provision does not exist in Rule 1.5 of the American Bar Association's Model Rules of Professional Conduct, which many jurisdictions have adopted in whole or in part.

Rule 1.5: Fees For Legal Services

(a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee.

(b) A fee is unconscionable for purposes of this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience, or the lawyer, in negotiating or setting the fee, has engaged in fraud or overreaching, so that the fee charged, under the circumstances, constitutes an improper appropriation of the client's funds. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.

(c) Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:

(1) the amount of the fee in proportion to the value of the services performed;

(2) the relative sophistication of the lawyer and the client;

(3) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(4) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(5) the amount at stake and the results obtained;

(6) the time limitations imposed by the client or by the circumstances;

(7) the nature and length of the professional relationship with the client;

(8) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(9) whether the fee is fixed or contingent;

(10) the time and labor required;

(11) the informed consent of the client to the fee.

(d) Expenses for which the client will be charged cannot be unconscionable.

(e) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(f) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except that a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter.

Comment

Unconscionability of Fee

[1] Paragraph (a) requires that lawyers charge fees that are not unconscionable or illegal under the circumstances. An illegal fee can result from a variety of circumstances, including when a lawyer renders services under a fee agreement that is unenforceable as illegal or against public policy, (e.g., *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950-951 [203 Cal.Rptr. 879] [fee agreement with other lawyer entered under threat of withholding client file]), when a lawyer contracts for or collects a fee that exceeds statutory limits (e.g., *In re Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; *In re Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Bus. & Prof. Code, § 6146]), or when an unlicensed lawyer provides legal services. (e.g., *Birbrower, Montalbana, Condon and Frank v. Superior Court* (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304]; *In re Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896.) Paragraph (b) defines an unconscionable fee. (See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513].) The factors specified in paragraphs (c)(1) through (11) that are to be considered in determining whether a fee is conscionable are not exclusive. Nor will each factor necessarily be relevant in each instance. Contingent fees, like any other fees, are subject to the unconscionability standard of paragraph (a) of this Rule.

Non-refundable Fee

[2] This Rule prohibits a lawyer from making an agreement for, charging, or collecting a non-refundable fee. However, a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter.

Basis or Rate of Fee

[3] In many circumstances, Business and Professions Code, sections 6147 and 6148 govern what a lawyer is required to include in a fee agreement, and provide consequences for a lawyer's failure to comply with the requirements. (See, e.g., *In re Harney* (1995) 3 Cal. State Bar Ct. Rptr. 266.)

[4] With respect to modifications to the basis or rate of a fee after the commencement of the attorney-client relationship, see Rule 1.8.1, Comments [5], [6].

Terms of Payment

[5] A lawyer may require advance payment of a fee but is obliged to return any unearned portion. (See Rule 1.16(d) [3-700(D)(1)].) A fee paid in property instead of money may be subject to the requirements of Rule 1.8.1 [3-300].

[6] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay.

Prohibited Contingent Fees

[7] Paragraph (e)(1) prohibits a lawyer from charging a contingent fee in a family law matter when payment is contingent upon the securing of a dissolution or nullity of a marriage or upon the amount of spousal or child support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of balances due under child or spousal support, or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[8] Division of fees among lawyers is governed by Rule 1.5.1 [2-200].

Hollins, Audrey

From: SMCRON@aol.com
Sent: Monday, June 02, 2008 11:26 AM
To: Hollins, Audrey
Subject: Proposed Rule 1.5(f)

Dear Ms. Hollins
As a former member of COPRAC, a practicing criminal defense attorney for 34 years, and as a Certified Specialist in Criminal Law, I strenuously object to Proposed Rule 1.5(f), which, as I understand it, would prohibit nonrefundable fee agreements. Such a rule would effectively eliminate fixed fee retainer agreements, which would often not be in the best interests of the clients or attorneys.
Often clients in my practice want a flat fee because they might have limited funds and want to know beforehand how much the fees will be. Many of my clients, especially those who have gone through a litigated divorce or who have participated in civil litigation, are wary of paying a lawyer by the hour because they know how quickly the fees add up. Especially for relatively uncomplicated matters, the lawyer is often in a position to anticipate a fair fee for the services rendered.
I don't think the bar should be seeking to eliminate fixed fee agreements in their entirety, but instead should be focusing on fixed fee arrangements which call for unconscionable fees, or those cases where the lawyer clearly doesn't deserve the fees charged based on the services rendered. Often I get paid less on a flat fee agreement than I would on an hourly retainer, but many of those clients would not hire me on an hourly basis because there would be no limit on the fees that might be incurred. If flat fees were eliminated, I would feel the need to require a much larger initial retainer because there would be no ceiling on the fees that might be charged.
I believe that the effect of this proposed rule change would be to make it more difficult or impossible for some clients to hire a privately retained attorney.
For all of the foregoing reasons, I urge the rejection of Proposed Rule 1.5(f). I am available should anyone want to discuss this matter with me.
Very truly yours,
Steve Cron

Get trade secrets for amazing burgers. Watch "Cooking with Tyler Florence" on AOL Food.

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation Law Office of Matthew Lombard

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** Matthew Lombard

*** City** Los Angeles

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) mlombard@lombardlaw.net

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ( ) AGREE with this proposed Rule
- (•) DISAGREE with this proposed Rule
- ( ) AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

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May 20, 2008

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Ms. Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, California 94105

Re: Opposition to Proposed New State Bar Rule 1.5(f) (4-200) (Fees for Legal Services) Abolishing Non-refundable Retainers

Dear Ms. Hollins:

I am a lawyer who has represented individuals and businesses accused of crimes in state and federal courts throughout the country for over forty years. Enclosed is a copy of my biography (Exh. A) so that you can evaluate my background and experience in determining what weight you should give to my analysis. I am seriously concerned as are other California lawyers about the problems raised by the Commission for the Revision of the Rules of Professional Conduct's ("Commission") proposed new Rule 1.5(f) and conforming amendments to Rule 4-200 of the Rules of Professional Conduct of the State Bar of California ("Proposal"). Proposed new Rule 1.5(f) (4-200)[1] abolishes the non-refundable retainer, a widely-accepted historical fee

[1] The new proposed rule 1.5 (4-200), subparagraph (f) states: "A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except that a lawyer

arrangement, and forecloses a lawyer from acquiring an ownership interest in a payment for work that has not yet been completed. Such a rule has profound and disturbing consequences not only for those accused of crimes, criminal defense lawyers and consumers of low cost, fixed fee legal services, but also for lawyers who practice in many areas of the law, including entertainment law, family, securities, bankruptcy, real estate, and tax law.

The Proposal is unnecessary and there has been no demonstrated need for this change. Moreover, if adopted, it will fundamentally alter the practice of law in California, create unnecessary complexity and confusion, and seriously undermine the attorney-client relationship. It is contrary to the interests of the two groups who are most affected, the lawyers and their clients because it:

(1) prevents an attorney from representing clients who desperately need representation;

(2) prevents a fully-informed client and the attorney from knowingly entering into a non-refundable retainer agreement where this fee arrangement is in the client's best interest;

(3) threatens the economic viability of high volume, low fee practices and will increase the cost for many types of legal services by prohibiting the use of any type of advance fees for operating expenses;

(4) inexorably exposes lawyers performing all types of legal services to significant financial peril by facilitating the restraint and/or seizure of fees if any client has a potential criminal or bankruptcy problem or has a dispute with the IRS, the S.E.C. or even a vulnerability to potential creditors' claims;

(5) deprives many individuals who can afford counsel of the practical ability to retain a lawyer because it will substantially increase the risk of attorney fee forfeiture by state and federal prosecutors;

(6) generates increased client bar complaints, for example, when an attorney

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may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter."

and a client cannot agree on the amount of funds that must be returned in an advance fee case even where an attorney is terminated without cause; and,

(7) deprives those accused of crimes, who can afford representation, of their constitutional rights to retain the lawyer of their choice.

Careful analysis of the Proposal reveals the following problems:

1. "When will you make an end?"[2]

The Proposal seeks to amend Rule 1.5(f) (4-200) to abolish non-refundable retainers. Similar though somewhat different proposals were made by the Commission in 1991[3] and by the Committee on Professional Responsibility and Conduct ("COPRAC") in 1997.[4] They were both soundly rejected based on the negative responses from a wide cross section of California lawyers.[5]

With the latest Proposal, the Commission has not published any rationale for

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2 Irving Stone, *The Agony and the Ecstasy* (1961) (Pope Julius II shouting up to Michelangelo, who for years has been on the scaffolding painting the ceiling of the Sistine Chapel).

3 *See* proposed and rejected amendments to State Bar Rule 4-100 (Preserving Identity of Funds and Property of a Client) and Rule 3-700 of the Rules of Professional Conduct (Termination of Employment) (1991). The vast majority of the public comment was in opposition to the proposed 1991 amendments, which were ultimately withdrawn. These comments, echoing many of the arguments in this opposition, are attached as Exh. B.

4 *See* proposed and rejected State Bar Rule 4-110 (Advance Payment of Fees for Legal Services) and amendments to Rules 3-700 (Termination of Employment) and 4-100 Preserving Identity of Fund and Property of A Client) (1997). The public comment information on the proposed 1997 amendments is unavailable for purchase or review on the State Bar website. *See* http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10128&id=1131 (accessed on May 18, 2008).

5 *See* FN 3, *supra.*

enacting this comprehensive change or demonstrated that a need exists to do so. It has failed to explain this revision anywhere in its 209-page March 2008 Discussion Draft of the proposed amendments or anywhere on the State Bar website.[6] The action summary report of the September 2007 meeting in which members of the Commission discussed the amendment of Rule 1.5 and voted to add subparagraph (f) (abolishing the non-refundable retainer) is not publicly available (and similarly not posted on the State Bar website - accessed on May 18, 2008). Strangely, although agenda notes and materials of the September 28-29, 2007 Commission meeting (during which unidentified members voted to add subparagraph (f) to Rule 1.5) are posted on the State Bar website (*see* http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid =10129&id=12041) (accessed on May 18, 2008), the portions of these meeting notes memorializing discussions about Rule 1.5(f) are missing.[7] Indeed, it is difficult to even determine how and why the Proposed New Rule 1.5(4-200), subparagraph (f) originated. Even though they are not binding in California, this stealth provision appears nowhere in the ABA Model Rules.

Considering the significance of the 2008 revision to Rule 1.5(f) (4-200) (abolishing non-refundable retainers), it is especially disturbing that this latest stealth[8]

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6 This is despite the fact that the Commission has scheduled a public hearing on the 13 proposed amended State Bar Rules for May 22, 2008 in Sacramento, California, and written comments must be submitted by May 20, 2008 in order to be considered at the hearing.

7 The Commission's agenda notes and materials of the November 2-3, 2007 meeting on Rule 1.5 (4-200) state that its members discussed and voted on the proposed new subparagraph (f) of Rule 1.5 during the September 23-29, 2007 meeting. These discussion and votes are memorialized in "9/28-29/07 KEM Meeting Notes at ¶ III.H.14a" and "¶ III.H.14b." *See* November 2007 Meeting Materials at p. 2. Although the 9/28-9/29/07 Meeting Notes are available on the State Bar website, sections ¶ III.H.14a and ¶ III.H.14b are missing.

8 Nearly fifteen years ago, COPRAC surreptitiously attempted to amend the state's ethics rules (*see* 1993 proposed amendments to the discussion section of the California Rule of Professional Responsibility 2-100, "Communication with a Represented Party") to permit prosecutors to secretly communicate with represented parties during the investigative phase of a criminal case or in a disciplinary proceeding . This attempt to codify the infamous "Thornburgh Memorandum" was soundly thrashed when many of California's most prominent lawyers galvanized opposition

revision, subparagraph (f), has not been sufficiently publicized, disseminated, or explained in a manner that informs most members of the bar of its existence and permits them to meaningfully respond or object.[9]

2. Traditional Justifications for the Non-Refundable Retainer

The traditional justifications for non-refundable retainers include: (1) where there is a strong likelihood that taking on this client's case will (or did) preclude the attorney from accepting another present or future client; and (2) the experience, reputation, and ability of the attorney which might warrant the use of such a fee.[10]

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against this change. In the fall of 1993, I wrote an article about the "relative secrecy of the process" employed by COPRAC in The Champion, the monthly publication sent to the more than 12,800 attorneys, judges, and other professionals who are members of the National Association of Criminal Defense Lawyers ("NACDL"). It stated:

> ". . . Although the California State Bar did put out a request for comments regarding the proposed ethics rule change, there has been a great deal of discomfort about the relative secrecy of the process, when dealing with proposed ethics rule changes. The California proposal can appropriately be characterized as the "Stealth Amendment." Barry Tarlow, "Stealth California Ethics Amendment Intercepted by Defense Bar," The Champion (September/October 1993).

9 I only recently discovered this specific provision, after reading the May 2008 edition of the California Bar Journal, about the Commission's proposed revisions to 13 Rules of Professional Conduct and learned that the deadline for public comment is June 6, 2008. I was interested in a totally different Rule and it was only by chance on May 9, 2008, after printing and reviewing 209 pages of information from my computer, that I noticed the provision prohibiting non-refundable retainers. This short California Bar Journal article did not describe, discuss or mention the proposed revision to abolish non-refundable retainer fees. This provision no doubt must have previously been mentioned somewhere. However, I certainly never read about it and no lawyer had previously discussed it with me. After discovering this provision I have not yet spoken to any lawyer who was or is aware this specific Proposal existed even though I decided to determine if I could find members of the Bar who were aware of this drastic change.

10 There are a myriad of examples of legal transactions other than criminal matters

John Wesley Hall, Jr., *Professional Responsibility of the Criminal Lawyer*, 2d ed. (1996) §7:6 at p. 165; *see also Bain v. Weiffenbach,* 590 So. 2d 544, 545 (Fla. App. 1991).[11] Indeed, in many jurisdictions, the use of non-refundable retainers is recognized as appropriate, if not essential in both criminal and civil cases. John M. Burkoff, Criminal Defense Ethics: Law & Liability, § 10.1, at 501-505 (2d ed. 2003); John Wesley Hall, Jr, Professional Responsibility of the Criminal Lawyer (2d. ed. 1996) at p. 163.[12]

3. A Solution in Search of a Problem

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that have traditionally involved non-refundable retainers or fixed fees that are earned when received and are not calculated based on the time devoted to the assignment. These include: (1) fees charged by real estate lawyers for documenting and structuring complex financial transactions; (2) fees paid to securities lawyers for a public securities offering; (3) tax advice involved in the planning of sophisticated business or financial transactions; (4) fees paid to entertainment lawyers for negotiating the terms of recording contracts or agreements regarding motion picture deals, and (5) retainers in large and small bankruptcy matters.

11 As the Florida Court of Appeals in the non-refundable fee context recognizes:

> ". . . a lawyer of towering reputation just be agreeing to represent a client may cause a threatened lawsuit to vanish and thereby obtain a substantial benefit for the client and be entitled to keep the entire amount paid to him, particularly if he had lost or declined other employment in order to represent that particular client." *Bain v. Weiffenbach,* 590 So. 2d 544, 545 (Fla. App. 1991).

12 *See also, e.g., Bunker v. Meshbesher,* 147 F.3d 691 (8th Cir. 1998) (Minnesota); Tennessee Op. 92-F-128(b) (1993) (reaffirming earlier opinion approving nonrefundable retainers); Georgia Op. 03-1 (2003) (affirming use of non-refundable retainers); South Carolina Rule 1.16(d) ("The lawyer may retain a reasonable nonrefundable retainer."); Texas Op. 431 (1986) (affirming use of non-refundable retainers); Maryland Op. 87-9 (a non-refundable retainer is ethically proper so long as the amount involved is reasonable); Louisiana Rule 1.5(f)(2) ("When the client pays the lawyer all or part of a fixed or of a minimum fee for a particular representation with services to be rendered in the future, the funds become the property of the lawyer when paid..."); Kentucky Op. 380 (1995) (affirming use of non-refundable retainers).

The Proposal suggested by the Commission is truly a solution in search of a problem. There simply has not been a pattern of abuse by California lawyers resulting from the current rules which mandates the abolition of the non-refundable retainer or which would be remedied by this sweeping change.[13] Randall Difuntorum, Director of Professional Competence for the California Bar, responded to my recent inquiries to the State Bar requesting the Commission's justification for a per se ban on non-refundable retainers. While making clear he "cannot speak for the Rules Revision Commission," Mr. Difuntorum identified three disciplinary cases (none of which post-date the rejection of the 1997 Proposals) as raising "concerns" that are presumably addressed by the abolition of the non-refundable retainer:[14]

1. *Matthew v. State Bar,* 49 Cal.3d 784 (1989)[15]

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13 In my 40+ years of experience using non-refundable retainers, I am not aware of a single Bar complaint from a client, against me or other members of the firm, involving a non-refundable retainer in literally hundreds of criminal cases. The only possible exception involved the wife of a client in a complex RICO multiple murder case in which after I represented the client in federal court for approximately one year, he committed suicide hours before he was to be sentenced. His wife believed that fact entitled her to a refund. I cannot specifically recall if there was a complaint in that matter but if so, I think, it was informally dismissed.

14 On May 15, 208, Mr. Difuntorum explained:

> ". . . The [three] cases cited [] are examples of disciplinary matters where a nonrefundable/minimum fee arrangement was found to be violative of attorney professional responsibility. . . Although I cannot speak for the Rules Revision Commission, I believe that proposed paragraph (f) is being considered as a result of the concerns stated in these types of disciplinary matters."

15 In *Matthew v. State Bar*, 49 Cal.3d 784 (1989), the California Supreme Court upheld the three-year suspension (60 days of actual suspension) of a lawyer for egregious misconduct in three separate matters where he abandoned his clients, failed to return client telephone calls or otherwise communicate with his clients, failed to perform legal services competently, and did not return unearned fees when he was terminated for cause. In one case, Matthews was retained to prepare a living trust, which he failed to complete until four years after retention. *Id.* at 788-89.

2. *In the Matter of Scapa*, 2 Cal. State Bar Ct. Rptr. 635, (Rev. Dept., 1993);[16] and,

3. *In the Matter of Cooperman*, 83 N.Y.2d 465 (1994).[17]

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16 *In the Matter of Scapa*, 2 Cal. State Bar Ct. Rptr. 635, (Rev. Dept., 1993), two personal injury lawyers: (1) hired and paid non-lawyer cappers who engaged in illegal in-person solicitation of clients (whose identifies were obtained by bribing police officers for accident reports prescreened for personal injury case value, *id.* at *6); (2) operated a branch office in which their non-lawyer employees, without supervision, explained sophisticated fee agreements to clients and induced clients to sign those agreements (*id.* at *2-3); (3) when fired by their clients for cause, threatened the clients' new counsel with assertions of liens and threatened insurers with punitive damage actions (*id.* at *3); (4) in circumstances where the agreements were unenforceable because although they were "contingency fee" contracts, contained an unconscionable "minimum fee" provision for the "most perfunctory work" performed by non-attorneys (opening a file and sending initial form letters) (*id.*). After a 23-day trial, the hearing judge found that the lawyers committed acts of moral turpitude and willfully violated rules of professional conduct by using others to engage in prohibited in-person solicitation, conspiring to violate the solicitation rules, dividing legal fees with non-lawyers, and attempting to charge unconscionable fees. On review, the Review Department of the State Bar Court upheld the judge's findings and affirmed a 30-month suspension but increased the period of actual suspension increased from 15 months to 18 months. *Id.* at *57.

17 *In the Matter of Cooperman*, 83 N.Y.2d 465 (1994): a lawyer's two-year suspension was upheld (after being twice warned by the New York Bar's local grievance committee to not use his non-refundable fee agreements) for his refusal to refund non-refundable retainer fees to his clients in three cases where: (1) he was discharged shortly after the execution of the agreements (i.e. two days, one month, *id.* at 466-70), (2) he did not perform legal services (*id.*), and (3) he refused to refund any portion of the non-refundable retainer fees to his clients (*id.*). Do California lawyers really need to consult a Rule of Professional Responsibility to determine that a law license is not a permit to steal, pillage, and plunder?

Critically, not only have other jurisdictions refused to adopt the Cooperman approach and have rejected attempts to impose a per se ban on non-refundable retainers. *See, e.g.,* Hawaii Rule 1.5 (reflecting the fact that a similar Proposal in

A careful review of these three cases demonstrates that they do not describe the problem that would or could be resolved by the Proposal: whether the non-fraudulent and ethical use of non-refundable retainers is so deleterious or harmful as to require a per se ban.[18] First, in each of the cases, the lawyer(s) did not merely abuse the non-refundable retainer, they committed fraud and theft. Each of these cases describes the extreme example of the unscrupulous lawyer who extracted a "non-refundable retainer" from a naïve client, did little or no work, and then, after being fired (for cause in both of the two California cases), kept the clients' money. Each would be controlled by Rule 4-200(A) of the Rules of Professional Conduct which prohibits lawyers from gouging their clients by charging unconscionable fees.

Second, these three cases demonstrate that the non-refundable retainer does not (and has never protected) the public from the unscrupulous lawyer that gouges, cheats, or otherwise exploits their clients.[19] This is because the non-refundable retainer, as with other traditional fee arrangements, has always been subject to well-established professional rules that provide a sufficient basis on which to discipline such troubling

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Hawaii was rejected in 1999, the rule does not even mention "non-refundable retainer" much less prohibit it) and discussion of other jurisdictions at FN 12, *supra.* In New York, the ban resulted in many respectable and formidable attorneys (i.e. David Boise) circumventing such bans by charging "consulting fees" (which, in David Boise's case is $250,000 per case) rather than "non-refundable retainer agreements."

18 The critical question is not whether a rogue, unscrupulous lawyer can gouge, exploit, and steal from his/her client using a non-refundable retainer or whether non-refundable retainers are prudent or wise in any given situation (this should be left to the lawyers and fully-informed clients to decide between themselves). Rather, the critical inquiry is whether the non-fraudulent or ethical use of non-refundable retainers is nonetheless so corrosive as to require a per se prohibition.

19 No one disputes that a lawyer may not charge clearly excessive fees and that a retainer can, and will, be evaluated for reasonableness. *See e.g.,* South Carolina Rule 1.16(d) ("The lawyer may retain a reasonable nonrefundable retainer."); Florida Rule 4-1.5(a) (explicitly acknowledging the propriety of non-refundable retainers subject to review to ensure the fee was not "clearly excessive"); *In the Matter of Scapa,* 2 Cal. State Bar Ct. Rptr. 635, *24 (Rev. Dept., 1993) (finding lawyers attempted to charge "unconscionable fees" under Rule 4-200).

misconduct such as: (1) the case-by-case rule against charging excessive fees (Rule 4-200 of the Rules of Professional Conduct)[20] and (2) the longstanding rule requiring lawyers to refund unearned fees upon withdrawal from representation (State Bar Rule 1.16). Indeed, common sense fairness as well as the existing protections against unreasonable and unconscionable fees, demand that under a non-refundable retainer arrangement, if a lawyer does no work and is fired with or without cause, the client is entitled to a full refund. Similarly, a client would be entitled to a full refund of the non-refundable retainer if his/her lawyer gets sick and does no work. An honorable and honest lawyer would refund the balance of a $50,000 non-refundable retainer

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20 Rule 4-200 (Fees for Legal Services) states in its entirety:

(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.

(B) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:

(1) The amount of the fee in proportion to the value of the services performed.
(2) The relative sophistication of the member and the client.
(3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
(4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.
(5) The amount involved and the results obtained.
(6) The time limitations imposed by the client or by the circumstances.
(7) The nature and length of the professional relationship with the client.
(8) The experience, reputation, and ability of the member or members performing the services.
(9) Whether the fee is fixed or contingent.
(10) The time and labor required.
(11) The informed consent of the client to the fee.

($47,000) if, one week after receiving it, the client fires him/her without cause and the lawyer had only performed $3,000 of services.

Finally, these cases prove too much. Although there is, no doubt, lawyers who cheat and gouge their clients under hourly rates (by padding their bills or charging unconscionable fees or having inexperienced lawyers spending endless hours on a simple legal matter, *see, e.g.*, Cal. Ethics Op. 1996-147 (billing clients for work performed on two or more matters at a time)), there is no effort by the Commission to impose a per se ban on these fee arrangements. Indeed, basic negotiation of fee contracts is still left to lawyer and their clients with some limited exceptions.

In the absence of demonstrable abuses that can be remedied by a per se ban, the primary concern of the State Bar ought to be the protection of the interests of clients and lawyers and not the generation of substantial increases in income for State Bar projects that depend on income from interest earned on lawyers' trust accounts.[21]

4. Realities of Practice:

Unfortunately, the Proposal ignores the realities of practice for thousands of Californian lawyers who have been using the non-refundable retainer for more than 100 years without creating any identifiable problem. The abolition of the well-recognized and often-utilized non-refundable retainer would completely alter the way law has been practiced in California forever.

As the traditional justifications for the non-refundable retainer demonstrate, the Proposal does not account for the civil or criminal lawyer who accepts one case which requires a substantial amount of work by other attorneys in the office, causing other

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[21] The actual motivation for the original proposed changes that were rejected in 1991 was that certain groups within the State Bar wanted to require lawyers to move funds from their general accounts to their trust accounts to generate additional income for projects that receive the interest-earned on lawyers' trust accounts. Although this rationale appeared nowhere in the similar and later rejected 1997 proposals, it seemed apparent at the time that those proposals were intended to serve the same purpose as the 1991 proposals. There appears to be no way to determine from the bare record whether the current changes were motivated by some different reason. While funding of these programs is a vital and worthwhile function of the Bar, it cannot be an appropriate basis for a drastic reworking of the practice of law.

cases necessarily to be turned down because the time is not available.[22] It does not account for the conflict situation in many civil and criminal litigation matters where accepting a particular client in a complex case precludes the lawyer from representing a number of other potential parties or defendants.

The Anthony Pellicano case is a timely example of a complex multi-defendant case in which an attorney may have been precluded from representing the charged defendants because of his/her earlier decision to represent a celebrity who was not charged. On May 15, 2008, Pellicano was found guilty of 76 of 77 counts related to racketeering, along with four co-defendants. *See, e.g.,* C. Hall and T. Abdollah, "Private eye to the stars is guilty," The Los Angeles Times (May 16, 2008); D. Halbfinger, "Investigator to the Stars is Convicted in Wiretaps," The New York Times (May 16, 2008). A total of thirteen people, including prominent entertainment attorney Terry Christenson, was charged in this matter. *Id.* During a trial, a parade of celebrity and other high-profile witnesses[23] admitted that they knew about, paid for, and listened to wiretaps. *Id.* None of these witnesses were charged. *Id.* Indeed, my law firm turned down approximately one-half dozen potential clients to avoid being disqualified in this criminal matter.

Moreover, in the field of commercial transactional law, the lawyer or law firm accepting a client not only often forecloses representation of any other parties involved in the pending transactions but may be precluded in the future from representing other major clients in transactions that come to fruition years later. Nor does it account for the special knowledge, experience and ability an attorney may have already acquired on an issue or area of the law, which might otherwise have to be gathered at the expense of a client with a less experienced or knowledgeable lawyer. These are clearly legitimate bases for compensation and are a substantial part of the traditional factors

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22 Responsible lawyers would have to turn away other business to ensure they devote enough time to defend such a case. In fact, my firm routinely turns away cases each month due to our unavailability to devote the time to a potential client's case.

23 These witnesses included: (1) Alec Gores, a billionaire corporate buyout specialist, (2) Freddy DeMann, a music executive and Madonna's former manager, (3) Adam Sender, a hedge fund manager and onetime movie investor, (4) Andrew Stevens, an actor turned movie producer, (5) Bert Fields, entertainment lawyer, (6) Brad Grey, CEO of Paramount Pictures, (7) Ron Meyer, President of Universal Studios, (8) Michael Ovits, prominent talent manager, and (9) Chris Rock, comedian. *Id.*

justifying non-refundable retainers.

Ironically, it was COPRAC that first suggested (*see* State Bar Memorandum (Oct. 1992), attached as Exh. C) in 1991 that any change to the rules should explicitly add "non-refundable retainers" as part of the definition of "true" retainers earned upon receipt. COPRAC is also on record as stating it is "concerned" that any proposed rule change not "unduly restrict" a lawyer's ability to charge a truly non-refundable retainer in appropriate circumstances.[24] *Id.* Without explanation, the Commission has now abandoned these important principles, heading in the exact opposite direction by improperly eliminating the concept of a legal fee for services that is fully earned when paid.

5. The Proposed Changes Will Fundamentally Alter The Way Law Is Practiced And Ignore Sound Public Policy Considerations

The Proposal fundamentally changes the way law will be practiced in California without regard to the impact it will have on the profession and our clients. A major problem with the Proposal is the effect it will have on the economic viability of low cost, high volume, fixed fee practices that depend on advance payment from relatively routine legal matters. Typically such offices have scores of matters in various stages of completion and rely on the fixed fees generated by these cases to cover overhead expenses. If fixed fees are required to be deposited into a trust account until portions of the services are completed, fees for basic legal services will increase because of the time value of money; that is money available today is worth more than money that is potentially available tomorrow.[25] The complex administrative allocation problems

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[24] The December 1991 proposal, adopted by the State Bar in 1992, instituted minor, reasonable changes to the rules permitting the continued use of "fixed fees", "flat fees" and "non-refundable retainers" to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statements that such fees paid in advance of legal services are "earned when paid." My law firm and others have included this specific phrase "earned when received" in non-refundable retainer fee agreements even though this change was never codified.

[25] See *Missouri v. Jenkins*, 109 S.Ct. 2463, 2469 (1989) (observing in the context of an award, as non-refundable retainer or fixed fee, of attorneys' fees in a civil rights case that "clearly, compensation received several years after the services were rendered... is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings.").

presented for both low cost, fixed fee practices and most criminal practitioners are formidable and will add costs that will be passed on to consumers of legal services. *See Missouri v. Jenkins, supra,* 109 S.Ct at 2469 ("[t]he fact that...the attorneys' [overhead] expenses are not deferred pending completion of the litigation can cause considerable hardship.").

In addition, one important purpose of a "flat fee" or "fixed fee" that is earned when received is to assure the client in advance that the fee will be no more than a particular amount. Many clients who have become relatively sophisticated consumers of legal services do not want fees calculated or related to the effort that is expended. This type of fee is not determined based on fixed values for individual steps in the litigation. Cases develop differently and the "fixed fee" is at best an educated but fair estimate, since there is no way to determine when or how, for example, a criminal case or a civil litigation matter will be resolved. The work will generally differ in cases that at first appear to be similar.[26]

Lawyers using non-refundable agreements often underestimate how many hours are expended on a case. Therefore, the criminal defense bar and other lawyers will find themselves in a troubling position. If the lawyer agrees to an advance non-refundable fixed fee that is earned when received and substantially underestimates the work, he will certainly not be terminated by the client. However, if the lawyer through skill and ability has earned a substantial premium above an hourly rate, the client can then terminate the representation without cause and obtain a refund of a substantial portion of the non-refundable retainer that under this Proposal would no longer be "earned when received."

A lawyer, once in a criminal case, will at times find it difficult or impossible to withdraw even if the client fires him/her. When a lawyer is ordered to do so by the court, the lawyer must continue the representation even if grounds exist for terminating representation. Absent a blatant conflict of interest, it is likely, particularly in federal

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[26] For example, an attorney may expend substantial resources on a presentation to a prosecutor to dissuade the government from filing an indictment, or investigating the case, on plea negotiations, at the trial or on sentencing. A complex case charging a large conspiracy, scheme to defraud, or Continuing Criminal Enterprise, 18 U.S.C. §§ 371, 1341; 21 U.S.C. § 848, could easily consume a thousand hours or more of lawyers' time. *United States v. Aisenberg,* 247 F.Supp.2d 1272, 1310-11 (M.D. Fla. 2003) (defense of frivolous and vexatious false statements prosecution arising out of child's disappearance case justified 2,600 hours of attorney time).

courts, judges will order lawyers to continue representation when a change of lawyers would result in trial delay, even if the client does not want the lawyer and the lawyer does not want the client.[27]

Even when a client has agreed to sign a waiver so that an advance fee can be placed in an operating account, the proposed rule changes may well force a lawyer, after a dispute arises, to remove a fee from the operating account that under current rules would belong to the lawyer, and place those funds out of reach in a trust account. There then may be no funds available to pay operating expenses, including rents and salaries, while the lawyer and his associates are compelled to continue with the trial. This is another example of how the authors of the Proposal appear to have very little appreciation for or sensitivity to the implications of the changes. The incidence of disruptions in lawyers' lives by involvement in large cases are already legion and the financial pressures extreme.[28] The Proposal would put in jeopardy the already troubled

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[27] *See, e.g.. In re Antonio Gonzales*, 726 F.2d 16 (1st Cir. 1984) (finding failure to pay legal fees does not justify withdrawal); *Rophaiel v. Alken Murray Corp.*, 1996 U.S. Dist. Lexis 7796 (S.D.N.Y. 1996)(non-payment of legal fees alone does not justify withdrawal); John M. Burkoff, Criminal Defense Ethics: Law & Liability, § 4.4, at 116-17 (2d ed. 2003); John Wesley Hall, Professional Responsibility of the Criminal Lawyer, § § 21.11-21.14, at 697-700 (2d ed. 1996). Some judges have categorically declared non-payment of fees as insufficient justification for withdrawal, cynically opining it would become "too easy for a defendant to stall proceedings by inducing the withdrawal of its attorney by non-payment of fees." *Whiting v. Lacara,* 187 F.3d 317, 321 (2d Cir. 1999).

[28] Judge Marvin Aspen in United States v. Andrews, 754 F.Supp. 1161, 1174 (N.D. Ill. 1990) accurately describes how attorneys are "deleteriously affected" by lengthy trials even when their fee is secure:

> "It is quite another matter, to expect these attorneys to survive economically... in a case anticipated to last as long as a year or two. Not only would their present earnings be diminished, but there would be long-range adverse effects on their practices due to such a lengthy full-time commitment. These severe repercussions to their professional careers would be particularly damaging in [a] case where most of the attorneys are solo practitioners."

The inherent economic hardships imposed on attorneys involved in increasingly more common mega-trials would become insurmountable should the proposed changes be

economics faced by many lawyers in the private bar and the typical small law firm at a time when committed lawyers are needed to defend those accused of crimes as well as potential middle-class clients who have the ability to retain a lawyer of their choice.

The Proposal would require unnecessary and costly increased record-keeping. For example, in the typical fixed fee drunk driving case, which is never billed hourly, it would be difficult at best to produce the required accounting. Increased accounting costs and overhead would result from the Proposal. It would also eliminate the informed and sophisticated client's ability to contract for a flat/fixed fee which is earned on receipt. This fee arrangement is typically based on the client's sound and informed judgment and preference for knowing in advance the extent of the financial obligation to the lawyer, for all the work to be done in the case, which in many instances will be far less than an hourly billable.

Moreover, fees in a trust account will be vulnerable to attachment by other potential creditors increasing the risk of nonpayment, and increasing fees to account for that risk. Finally if, before the sentencing and/or an eventual appeal in a criminal case, any funds remain the property of the client (as they appear to be under the Proposal), the court can require that they be used for restitution or as payment of a fine rather than as payment of unearned future legal fees or appeal. *See United Stales v. Vincent*, unpublished. Case No. 90-10769 (9th Cir. 1995) (advance fee for post-conviction appeal ordered disgorged to pay criminal restitution). All of these factors will diminish lawyers' willingness to represent clients who based on the Proposal present a greater risk of non-payment.

In criminal matters, putting aside large corporate or business clients, the Proposal affects perhaps the great majority of paying cases in which people are accused of crimes.

5. The Proposal is Offensive and Coercive

The Proposal is offense and coercive to the practitioner and will undermine the trust vital to the attorney-client relationship.

The Commission gives little (if any) thought to the likelihood that a nonrefundable retainer might be the product of rational negotiation between attorney

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adopted. It may allow the client and/or those parties attempting attachment restraint or forfeiture to take away fees altogether in the midst of such a trial.

and client. Clients including highly sophisticated and autonomous professionals and businesspeople and corporations (with their own in-house counsel who are adept at negotiating and protecting the client's interest in the fee arrangement) do not object to these types of fee agreements. In my 40+ years of practice, I have never had the experience where a client, sophisticated or not, found the non-refundable retainer arrangement so unconscionable or incomprehensible that he/she would not consent to one. In fact, those clients who can guarantee eventual payment are offered a choice. They can select a non-refundable fee earned when received or an uncapped hourly computation. [29] Indeed, today, it is the business client who at times offers a non-refundable retainer as an inducement for the attorney to accept a fee cap and/or a reduced hourly rate.

The Proposal also reflects a complete lack of appreciation for what it means to function in real world practice where lawyers must quote fees, be retained by clients, be relatively certain they will be paid, maintain good relationships with those clients, deal with a client's often difficult legal problems, pay operating expenses, the salaries of lawyers and paralegals, and at the same time steadfastly comply with ethical and professional responsibilities. This proposal appears to be created by someone who has never functioned within the realities of the financial burdens placed on law firms or engaged in all of the facets involved in the ordinary private practice of law.[30]

6. <u>Abolishing the Non-Refundable Retainer Enhances the Risk of Seizure,</u>

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29 One client in a complex case was advised by his civil lawyer to obtain an hourly fee arrangement rather than a non-refundable retainer. I told him I would do it but I believed he was not making the best choice. He left, came back, and said that since I was his lawyer, he would accept my advice. However, he asked that I track my time and send him a monthly billing showing what he might have spent at an hourly rate. I did not feel well when I reviewed the final totals. The time spent on his case, calculated hourly, was more than twice the amount of the non-refundable retainer.

30 Based on my review of the Commission's agenda for the September 28-29, 2007 meeting, it is my understanding that the Proposed New Rule 1.5(f) was drafted by Paul W. Vapnek (a patent and trademark lawyer with Townsend & Townsend & Crew), Anthonie M. Voogd (in-house counsel for Technip USA), and Hon. Ignazio Ruvolo. At least two members (Messrs. Vapnek and Voogd) appear to lack the background and experience to appreciate the practical economics and realities of the small firm or ordinary private law practice described in this Opposition.

Restraint, Attachment, and/or Forfeiture of Legal Fees

If a fee paid to a lawyer is earned when received, it is the property of the lawyer. The client's right to have representation in litigation is protected. The per se ban on non-refundable retainer mandates that advance fees belong to the client. These funds may well be then subject to seizure under criminal or civil process.[31] Therefore, in many situations the attorney will lose a fee, the client loses the ability to pay for the attorney, and in federal criminal prosecutions where nonpayment of fee after an appearance in court is often not grounds for withdrawal, the lawyer may be forced to complete all the remaining legal services without pay.

Under the Proposal, the fee continues to belong to the client until earned, unless it fits in the very narrow definition of "true retainer," which in real life experience and in the case law, is rarely, if ever, a substantial amount compared to what would be necessary for a trial. *See* Proposed new Rule 1.5(f). Under many theories of seizure or asset restraint, this may well allow a third party to levy or restrain the use of any unused portion of a fee because it belongs to the client. If the fee belonged to the attorney, as it would in a traditional non-refundable retainer or even a fixed fee that is earned when received, the client is not the owner of the funds and would have no say over whether the fee is deposited in a trust account. We have consistently advised

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[31] Putting the funds in a general account with the permission of the client does not eliminate the problem. Under the Proposal, and the applicable forfeiture and property law concepts, the unexpended portion belongs to the client, not the lawyer. Therefore, it would be subject to seizure or restraint under applicable criminal law principles and also probably by the S.E.C under *S.E.C. v. Interlink Data Network of Los Angeles*, 77 F.3d 1201, 1205 (9th Cir. 1996) (portion of advance fee payment not for services already rendered remains property of client for purposes of determination of whether deposit subject to freeze on client's assets). In *Interlink*, the Ninth Circuit held that advance fees paid to the law firm of Lewis, D'Amato for the performance of future legal services which were directed by a fee agreement to be maintained in the law firm's trust account were therefore subject to seizure. *Id.* In addition, the Second and Ninth Circuit Courts of Appeal have also affirmed a judgment creditors' qualified rights to set aside and recover attorneys' fees paid by insolvent or potentially insolvent debtors. *See HBE Leasing Corp. v. Frank*, 61 F.3d 1054 (2d Cir. 1995) (creditors allowed to disgorge over $750,000 in legal fees from seven attorneys as fraudulent conveyances); *United States v. Vincent*, unpublished. No. 93-10769 (9th Cir. 1995) (advance fee for post-conviction appeal ordered disgorged to pay criminal restitution as asset of client and not property of attorney).

lawyers in this situation that funds are generally not seized or restrained if they belong to the lawyer and are in the lawyer's general account and are fees earned on receipt, so that the client has no right to the funds. Under the Proposal, any portion of the fee that is for future legal services would be the property of the client, and may well be subject to restraint or forfeiture.

The only way the client is guaranteed to obtain legal services and the lawyer is guaranteed to receive a fee when a client is potentially involved in a bankruptcy, SEC, criminal or jeopardy tax situation or has potential creditors, is if there is a non-refundable assignment or absolute transfer of the funds. This is the key principle of defense historically utilized to protect legal fees from seizure or restraint.[32]

When the client maintains the right to the funds before they are used, the state,

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[32] In *Buker v. Superior Court*, 25 Cal. App. 3d 1085 (1972) and *People v. Vermouth*, 42 Cal. App. 3d 353 (1974), the trial court denied the defense motions for the return of the funds seized under a jeopardy assessment by IRS agents. The funds were needed to retain the attorney of the defendants' choosing (Mr. Tarlow). Defendants had (prior to any assertion of any tax lien by the IRS) irrevocably assigned these funds to Mr. Tarlow as payment for legal fees. *People v. Buker, supra,* 25 Cal. App. 3d at 1090; *People v. Vermouth, supra,* 42 Cal. App. 3d at 358. The prosecution claimed that an IRS lien had priority over Mr. Tarlow's irrevocable assignment. *Id.* In *People v. Buker,* the court of appeal issued a writ of mandate directing the trial court to set aside its previous orders and to conduct a hearing on Mr. Tarlow's entitlement to the seized funds. *See People v. Buker, supra,* 25 Cal. App. 3d at 1091. On remand, the trial court instituted a civil interpleading action to determine Mr. Tarlow's entitlement to these funds while, at the same time, denying the defense motions to continue the criminal case until the interpleader action could be heard. *People v. Vermouth, supra,* 42 Cal. App. 3d at 358. Several days later, the defendants were tried and subsequently convicted. *Id.* at 359. The *Vermouth* court reversed the conviction holding that the trial court deprived the defendants of their right to be represented by the counsel of their choice by failing to determine the validity of Mr. Tarlow's irrevocable assignment (treated as a non-refundable retainer) of the seized funds had priority over the IRS lien. *People v. Vermouth*, 42 Cal. App. 3d at 359. *See also* Tarlow, *Criminal Defendants and Abuse of Jeopardy Tax Procedures*, 22 UCLA L. Rev. 1191 (1976). The principles developed in *Vermouth* and *Buker* involved an "irrevocable assignment," the equivalent of a non-refundable retainer, enabling the client to receive representation and the lawyer to maintain the fee. *See People v. Vermouth, supra*, 42 Cal. App. 3d at 359.

the SEC, and IRS, or the bankruptcy lawyers or state and federal prosecuting agencies could make a persuasive argument that the fee is the client's property and therefore it can be seized. Even if the bar disagrees with my interpretation of the impact of this Proposal, they still subject the lawyer to an enormous risk. In *Interlink, supra*, 11 F.3d at 1205, the lawyers completed all the work and lost the fee because the money belonged to the client under the financial arrangement drafted in the fee agreement. Because the funds were characterized as an advance fee payment that was to be placed in trust, they were the assets of the client and thus subject to restraint or seizure by the SEC. *Interlink,* along with the other cases cited above, foreshadow the serious problems for California lawyers and their clients if the Proposal adopted.

A client's funds that are deposited in a trust or general account under this Proposal will always be subject to federal or state restraint and/or forfeiture or attachment by potential creditors. The Proposal will substantially increase the risk of attorney fee forfeiture or civil seizure because it will be impossible for an attorney who holds a fixed fee payment in trust or who has deposited it in a general account even when it is owned by the client to assert that he or she is a bona fide purchaser for value without knowledge. Therefore, compliance with the proposed rule and amendments will make it impossible for a client to be represented by counsel in many criminal cases.[33]

Forfeiture of attorneys' fees is an increasingly common occurrence in state and federal court. Numerous articles have appeared in the legal press on the effect of fee forfeiture on the ability of clients to retain criminal defense lawyers to represent them

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[33] *See Caplin & Drysdale Chartered v. United States*, 109 S.Ct. 2646 (1989); *United States v. Monsanto*, 109 S.Ct 2657 (1989) (upholding the constitutionality of government forfeiture of attorneys' fees); *People v. Superior Court, (Clements)*, 200 Cal. App. 3d 491 (1988) (refusing to recognize an exemption for attorneys' fees under California's forfeiture statute).

The additional advantage of the non-refundable retainer for the client is that by having the fee earned in advance, the lawyer can rest assured that, if the fee was legitimate when received, they will not risk generally forfeiting the fee if they "learn too much" about the client's source of income and, therefore, will not face any disincentive to thoroughly investigating the case. *See Caplin & Drysdale, supra,* 491 U.S. at 632 n.10.

in serious criminal cases.[34]

For almost two decades, Bar Associations throughout the country have vigorously opposed the concept of forfeiture or restraint of legal fees because it destroys an individual's Sixth Amendment right to counsel of choice.[35] In light of the extraordinary effort by these concerned representatives of the organized Bar to safeguard the right to counsel in fee forfeiture situations, it is particularly disturbing that my own Bar would pass rules that will greatly facilitate fee forfeiture and deprive the citizen accused off private counsel of his or her choice.

Under federal law, attorneys' fees may be subject to restraint or forfeiture under a number of statutes, including 21 U.S.C. § 853,[36] 18 U.S.C. §§ 981[37] and 982[38] or 18

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34 Taylor, Stuart. *Trench Warfare over Fee Forfeiture*, The American Lawyer (July/August 1995); Pike, David. *Winter of Discontent for Defense Lawyers*, Los Angeles Daily Journal (February 9, 1994); Mintz, Howard. *Paying a Fee or Playing a Game*, The Recorder (November 16, 1992). *See* Tarlow, *Fee Forfeiture, Apocalypse Now or Business as Usual*, Trial (April 1990), Tarlow, *Fee Forfeiture, Getting it up Front May Not Mean You Get it at the End,* The Champion (May 2002, reprinted August 2006), Strassner, *The Defense Bar Hedges its Bets 2 Months after Fee Rulings*, The National Law Journal (August 28, 1989). Indeed, it is the policy of the United States Department of Justice to pursue such forfeiture whenever the Department deems it appropriate to do so. *See Justice Department Guidelines on Forfeiture of Attorneys' Fees*, 38 Crim. L. Rep 3001 (BNA) (October 2, 1985).

35 *See, e.g., ABA Criminal Justice Section Report to House of Delegates* (Resolution 108A opposing use of fee forfeiture under Comprehensive Crime Control Act of 1984) (that was overwhelmingly adopted by the House of Delegates in July, 1985, and in August of 1986, the ABA House of Delegates passed related Resolution 125A, which opposed the use of pre-trial restraining orders that interfered with a client's ability to hire counsel and pay the other costs related to the defense of a criminal case).

36 21 U.S.C. § 853 provides for forfeiture of any property constituting, derived from, used or intended to be used in a federal drug offense. Additionally, if the property to be forfeited has been dissipated or cannot be found, any other property of the defendant, including funds used to pay an attorney may be substituted and forfeited. 21 U.S.C. § 853(p). Therefore, even funds that were lawfully acquired and are unrelated to criminal activity are subject to forfeiture under this "substitute assets" provision.

U.S.C. § 1963 (RICO).[39]

If the government or the state of California seeks forfeiture of funds a defendant has used to pay his lawyer under 21 U.S.C. § 853, the lawyer's sole defense is that he or she is "a bona fide purchaser for value of the right, title or interest in the property and was at the time of the purchase was reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. § 853(n)(6)(B); *United States v. Saccoccia VI,* 165 F.Supp.2d 103, 111-13 (D.R.I. Aug. 3, 2001) (lawyers often qualify as bona fide purchasers for value and without knowledge with regard to the fees received before conviction). The federal RICO statute provides the same language with regard to forfeiture under RICO. 18 U.S.C. § 1963(c). An attorney or other third party

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[37] The civil forfeiture statute, 18 U.S.C. § 981, similarly provides for civil forfeiture of any property involved in or derived from a host of federal offenses. These include violation of the federal currency reporting requirements (18 U.S.C. §§ 5313(a) and 5324) or federal money laundering statutes (18 U.S.C. §§ 1956 and 1957). Additionally, property or funds may be forfeited under 18 U.S.C. § 981 if they constitute, are derived from or are traceable to any proceeds obtained directly or indirectly from an offense against a foreign nation involving trafficking in a controlled substance, or if they constitute or are derived from proceeds traceable to a violation of federal statutes prohibiting bribery of a bank officer, embezzlement by a bank officer, misapplication of bank funds, making false entries in bank records, bank fraud, federal program fraud, false statement, fraud against the United States, mail fraud and wire fraud.

38 The criminal forfeiture statute, 18 U.S.C. § 982, provides for forfeiture for the same litany of offenses upon a criminal conviction.

[39] RICO applies to a laundry list of federal state and offenses. The predicate offenses under RICO include, among others, mail fraud, bank fraud, murder, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, dealing drugs, counterfeiting, theft, obstruction of justice, witness tampering, welfare fraud, money laundering, transportation of stolen vehicles, trafficking contraband cigarettes, and securities fraud 18 U.S.C. § 1961(1). It is important to emphasize that RICO forfeiture is not limited to unlawfully acquired funds but also applies to the proceeds of legitimate business purchased with lawfully acquired funds if the owner is charged with a RICO violation involving one of the many predicate crimes. *See* 18 U.S.C. § 1963(2)(D).

can defend a forfeiture proceeding under 18 U.S.C. §§ 981 and 982 to the extent that the lawyer can show an interest as an owner. 18 U.S.C. § 981(2). If these funds remain the property of the client, the attorney would not be able to assert the defenses that are specifically provided by these statutes. Even if they were deposited in a general account, they would be subject to seizure and/or forfeiture if the client had not irrevocable transferred the funds to the lawyer.

Money laundering under 18 U.S.C. § 1957 applies to the fruits of a laundry list of federal crimes. It is a money spending statute, not a money concealing statute. Therefore, a client's funds alleged to have some relationship to a laundry list of crimes deposited in his/her own account at local banks are subject to seizure and/or civil or criminal forfeiture and are characterized as "receipt and deposit" cases. 18 U.S.C. §§ 981 and 982.

California law provides for various forms of asset restraint and/or forfeiture in insurance and health fraud cases.[40] California law also provides for forfeiture for drug and so-called racketeering offenses.[41] So-called racketeering offenses include a vast cross section of crimes that do not resemble the traditional image of racketeering.[42] As

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[40] For example, California Penal Code § 186.11(e)(2) (1996) provides that any person who is charged with two or more fraud or embezzlement-related felonies involving a "pattern of related felony conduct" implicating more than $500,000 is subject to asset seizure and other asset restraint until after a trial is conducted in order to preserve those assets for criminal restitution and fines should there be a conviction.

[41] Under California Health and Safety Code § 11470(f), "all moneys, negotiable instruments, securities, or other things of value furnished by any person in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, or securities which were used or intended to be used to facilitate" any a number of violations of the Health and Safety Code are subject to forfeiture. A third party may challenge such a forfeiture by filing a claim of interest in the property. Cal. Health and Safety Code § 11488.5.

[42] The forfeiture section of California's "Control of Profits of Organized Crime Act," provides for forfeiture of "all proceeds of a pattern of criminal profiteering activity," which includes "all things of value that may have been received in exchange for the proceeds immediately derived from the pattern of criminal profiteering activity" Cal. Penal Code § 186.3. The crimes that make up a pattern of "criminal profiteering" under California Law include but are not limited to bribery, felonious assault, embezzlement, forgery, gambling, kidnapping, mayhem, murder, receiving stolen

in the federal system, the legislature has provided that lawyers may challenge a fee forfeiture under this section by proving that the fee is "solely owned by a bona fide purchaser for value." Cal. Penal Code § 186.7(a).

In order not to chill the right of every person to have the opportunity to retain a lawyer in criminal matters, the United States Congress and the California legislature have even specifically determined to exempt legal fees paid with funds derived from criminal activities from many ordinarily applicable criminal laws.[43]

Whether the fee once it is accepted is subject to forfeiture, however, is a different question. An attorney cannot be a "bona fide purchaser for value" or claim that he or she has an interest in the fee, if the attorney is prohibited by the Proposal from taking title to the fee. *See United States v. Veon*, 549 F.Supp. 274, 283, n. 18 (E.D. Cal. 1982). Because the Proposal would prohibit non-refundable retainer fees per se, the fee would always belong to the client and would leave clients and their lawyers vulnerable to fee forfeiture, under the provisions of federal and California law.

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property, robbery, solicitation of crime, grand theft, motor vehicle theft, trafficking in controlled substances, securities law violations, obscenity, insurance fraud, money laundering and computer crimes. Cal. Penal Code § 186.2(a).

[43] 18 U.S.C. § 1957(f)(l) excludes fee payments to lawyers from the coverage of this money laundering statute (the term monetary transaction...does not include transactions necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the constitution."); California statutes permit a lawyer to receive, as fees, funds that may be derived from consideration of the constitutional right to counsel afforded by the Sixth Amendment to the United States constitution and Section 15 of Article I of the California Constitution, when a case charged under [§ 11379.4(a)] involves an attorney who accepts a fee for representing a client in a criminal investigation or proceeding, the prosecution shall additionally be required to prove that the monies or negotiable instruments were accepted by the attorney with the intent to participate in the unlawful conduct... or to disguise or aid in disguising the source of the funds or the nature of the criminal activity").

The use of non-refundable retainers and/or the payment of "fixed fees" or "flat fees" which are earned when paid historically has been an accepted practice among criminal defense attorneys throughout the country for a variety of reasons unique to the practice of criminal law.[44] However, non-refundable retainers have taken on an increased importance in the face of aggressive attempts by prosecutors to seize or restrain legal fees. Several ABA panels have examined the issue of attorney fee forfeiture and the use of non-refundable retainers. One of the ABA panel members, the Honorable Marvin Garbis of the United States District Court for the District of Maryland, observed that the purpose of federal forfeiture action is "to prevent [the attorney] from taking the money in the first place," and observed that the acceptance of a non-refundable retainer is consistent with professional ethics." *ABA Meeting Features Programs on Fee Forfeiture, Government Investigative Tactics*, 49 Crim.L. Rep. 1499 (BNA) (November 11, 1991).

Judge Garbis' view is consistent with the position of the ABA Model Rules, which does not ban non-refundable retainers. ABA Model Rule 1.5. As one commentator has noted, the prevailing view is that "prepaid legal fees should . . . be considered to be attorney's funds not clients' funds, and need not be placed in a client trust account" J.M. Burkoff, *Criminal Defense Ethics: Law and Liability*, §11.7, p. 11-27 (Rev. Ed. 1991).

CONCLUSION

The use of fixed fees and non-refundable retainers which are earned when received has been common practice for generations of California lawyers and lawyers throughout the country for a number of important and appropriate reasons. Fixed fees that are earned when received allow lawyers to provide lower cost, routine legal services at prices that could not be justified if the lawyer was forced to rely on an interim or payment billing system. Advance payment of fees allows lawyers to represent people who would otherwise present an unacceptable risk of non-payment,

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[44] These include the enhanced risk of non-payment and the great reluctance of courts to recognize non-payment as a ground for withdrawal. Federal district court judges will generally not permit a limited appearance. It is practically impossible for a lawyer to withdraw as counsel of record in federal court because of non-payment of a fee. *See* discussion, *supra*, at FN 27. This same principle would apply at many stages of a state case (when a conflict of interest does not exist, *see People v. Marsden*, 2 Cal. 3d 118 (Cal. 1970)), particularly when a firm trial date is approaching in a complex case.

including people accused of serious crimes and those whose property may be subject to forfeiture or restraint. A fixed fee paid in advance and a non-refundable retainer "earned when received" gives a well-informed client certainty and permits the client to retain a lawyer for an amount that is acceptable and affordable. The Proposal will profoundly change the way many attorneys practice in California and will raise the cost of legal services and decrease the availability of retained counsel of choice to those who desperately need representation, including people accused of crimes.

In the April 28, 1997 Opposition to the 1997 Proposals concerning State Bar Rule 4-110 (Advance Payment of Fees for Legal Services) and amendments to Rules 3-700 (Termination of Employment) and 4-100 Preserving Identity of Fund and Property of A Client), I stated:

> "Since there has not been a meaningful number of cases in which traditional fee policies that have worked well for generations have been abused, and since it cannot be demonstrated that any changes will prevent rogue lawyers from misappropriating client funds, there is no need for change."

My preliminary review of the recent cases affirms these views. This Proposal remains a solution in search of a problem. As demonstrated by Mr. Difuntorum's identification of a mere three disciplinary cases (none of which post-date the 1997 Proposals) as raising "concerns" that are presumably addressed by the abolition of the non-refundable retainer, there simply has not been a pattern of abuse by lawyers resulting from the current rules that must and can be remedied by this sweeping change.

For all the reasons discussed in this letter, the Proposal is not in the public interest and should be rejected.

Very truly yours,

TARLOW & BERK, PC

Barry Tarlow

Enclosures

EXHIBIT A

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BIOGRAPHY

Barry Tarlow is a nationally prominent Los Angeles criminal defense lawyer who was profiled in *The National Law Journal* as one of "Ten of the Best Winning Trial Lawyers" in America. In 1992, he was selected for the Robert Heeney Memorial Award for lifetime achievement by the National Association of Criminal Defense Lawyers. In 1993, Mr. Tarlow received a "Special Award" from the Los Angeles Criminal Courts Bar Association recognizing: "His Prominence as a Brilliant Advocate and as a Zealous Defender of Constitutional Rights." In 1994, he was profiled in *The New York Times Magazine* as one of six attorneys in "L.A.'s Exclusive Club of Celebrity Lawyers," and in 1998, he was selected as a Fellow of the International Academy of Trial Lawyers.

A recent article described how "a specialty of Mr. Tarlow's is heading off indictments before big names hit headlines." He is recognized as one of the country's leading authorities in the defense of RICO prosecutions. Barry Tarlow, who practices criminal law exclusively, was certified as a specialist in criminal law by the California Board of Legal Specialization in 1975, and has been recertified in 1980, 1985, 1990, 1995, 2001 and 2005. In 1992, he received the "Criminal Defense Lawyer of the Year" Award from the Century City Bar Association. Mr. Tarlow has been selected as one of the finest criminal lawyers in the country by publications ranging from *The National Law Journal's* "Directory of the Legal Profession," Martindale-Hubbell's "Bar Register of Preeminent Lawyers," each of the 13 bi-annual editions from 1983-2008, of Naifeh and Smith's "The Best Lawyers in America," to *Town and Country Magazine*. In 1991, *The National Law Journal* selected Mr. Tarlow among the "Who's Who in Defense Among the Nation's Top White-Collar Experts." In 1989, he was profiled in *The Los Angeles Times* as one of the eight best criminal defense lawyers in Los Angeles, and was named in a survey by the *California Lawyer* among "California's Most Respected Lawyers." He was described as "one of the country's leading criminal-defense lawyers" in a *Washington Legal Times* article entitled "The Lawyer Who Hates Snitches." In a 1998 "List of the Most Powerful Lawyers in Town," published by *Los Angeles Magazine*, Mr. Tarlow was named the top "gunslinger" among the 40,000 lawyers in Los Angeles County. In 2004-2008 he was selected each year as one of California's "Super Lawyers" based on ballots sent to 65,000 lawyers.

In 1964, Barry Tarlow graduated first in his class from Boston University Law School where he was senior editor of the law review. In 1965, he served as a prosecutor for the Justice Department as an Assistant United States Attorney for the Central District of California, Criminal Division. During this period, he prosecuted cases ranging from kidnaping and bank robbery to complex white-collar crimes. Since 1966, he has defended individuals and corporations in cases ranging from tax and environmental violations to RICO, money laundering and homicide, in state and federal trial and appellate courts throughout the country. His law firm maintains an extensive federal and state appellate practice. He has represented defendants in numerous significant criminal appeals which have had widespread implications for attorneys engaged in the practice of criminal law. His firm has represented clients in complicated white-collar matters involving ITT, National Health Laboratories, SmithKlein Beecham, General Dynamics, Waste Management, Hyundai, Airgas, Inc., Avant!, and GTE. Recently, a substantial portion of Mr. Tarlow's practice has consisted of the defense of lawyers, health care providers, and other professionals under investigation by federal and state prosecutors. He has often represented celebrities accused of crimes and was named as one of eight of "L.A.'s Celebrity Defenders" in an article entitled "The Stars' Bar," published in an issue of *California Law Business*.

Mr. Tarlow has been an outspoken critic of overzealous prosecutorial tactics that have led to abuses of individual rights and liberties. He first coined the now widely accepted theme that: "The War on Crime Had Become a War on the Defense Bar." Since that time, he has written, spoken, and also litigated cases defining this attack on the right to counsel. A front page profile in *The National Law Journal* observed: "If the phrase weren't Barry Tarlow's by dint of originality, he's earned title to it." Adversaries and defense lawyers describe Mr. Tarlow as a "fighter

scholar," the "ultimate advocate," and "the tiger," and his approach to trials as "innovative," "confrontational," and "obsessive." A 1998 article in *Los Angeles Magazine* concluded his "reputation as a contentious advocate in the courtroom is unmatched."

Barry Tarlow has been selected as an expert witness by clients ranging from the State Bar of California to plaintiff or defense counsel in complex litigation matters including the Howard Weitzman-John DeLorean fee disputes. He has been retained as a RICO or forfeiture litigation consultant to the trial lawyers in numerous high-profile criminal cases including the Princeton Newport prosecution. Mr. Tarlow is often consulted by the country's major newspapers including *The New York Times*, *Washington Post*, and *The Los Angeles Times* for commentary about his own cases and developing legal affairs issues. He is regularly interviewed on these subjects by all the network news programs as well as *60 Minutes*, *Nightline*, *Crossfire*, *Larry King Live*, Court TV, and CNN.

Mr. Tarlow was lead counsel in the Chance/Powell case, in which two innocent men, framed by rogue police detectives, were freed after serving 18 years in prison for the murder of a Los Angeles Sheriff, and received "The Pro Bono Award" for this case when *The National Law Journal* announced its "Great Moments in the Law Awards" for 1992. In 1989, he was awarded a commendation from the State Bar of California Board of Governors, "In recognition of outstanding contributions to the delivery of pro bono legal services."

Barry Tarlow has lectured at law schools and seminars throughout the country (see Attachment A). The topics have included: "Defense of Federal Conspiracy Cases," "White Collar Criminal Prosecutions," "Defense of RICO Prosecutions," "Representation of Witnesses and Attorneys Before Grand Juries," "Defense of Federal Forfeiture Cases," "Cross-Examination," "Closing Argument," "The Aggressive Defense of a Criminal Case," and "Federal Rules of Evidence Developments." Mr. Tarlow has participated in educational programs sponsored by organizations such as: Continuing Education of the Bar, Practicing Law Institute, National College of Criminal Defense Lawyers, American Bar Association, California Attorneys for Criminal Justice, American Trial Lawyers Association, and the American Law Institute.

For the past 15 years, Barry Tarlow has served as editor of the *National Directory of Criminal Lawyers*. He is a prolific author who has written over 325 books and articles dealing with criminal practice and procedure issues (see Attachment B), including "RICO Revisited," 17 Ga. L. Rev. 291; "RICO: The New Darling of the Prosecutor's Nursery," 49 Fordham L. Rev. 165; "Defense of a Federal Conspiracy Prosecution," 4 National Journal of Criminal Defense 183; "Criminal Defendants and Abuse of Jeopardy Tax Procedures," 22 UCLA L. Rev. 1191; "Admissibility of Polygraph Evidence: An Aid in Determining Credibility in a Perjury-Plagued System," 26 Hastings L.J. 917. He is an author of *California Criminal Defense Practice*, Vols. 1-6 (Matthew Bender, 1980), as well as each of the annual supplements, and is a member of the National Editorial Board of *Forecite*, the criminal jury instruction publication. He was the Criminal Law Editor of the *RICO Litigation Reporter* and a Contributing Editor of *The Champion*, the publication of The National Association of Criminal Defense Lawyers, and since 1982 has authored "The RICO Report."

He has been extremely active in various local and national bar organizations. In 1978, Mr. Tarlow served as President of California Attorneys for Criminal Justice — the 3,000 member state criminal defense lawyers' bar association — and from 1981 through 1991, he was Chairman of the RICO Committee. Mr. Tarlow was the Vice-Chairperson of the American Bar Association, Criminal Justice Section, and Chairperson of the Criminal Law Subcommittee of the Prosecution and Defense of RICO Cases Committee. He was a member of the Board of Directors for the National Association of Criminal Defense Lawyers from 1979 through 1990, and from 1978 through 1990, he was Co-Chairman of the RICO Prosecutions Committee. From 1992-1995, Mr. Tarlow co-chaired the NACDL Committee to Free the Innocent Imprisoned. He was a member of the Board of Directors of the ACLU Foundation of Southern California from 1997-2005. Since 2005, he has been a member of the Criminal Law Advisory Commission of the State Bar that reviews all Criminal Law Specialist applications for certification and recertification.

EXHIBIT B

REQUEST THAT THE SUPREME COURT OF CALIFORNIA APPROVE AMENDMENTS TO RULES 3-700 AND 4-100 OF THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA AND MEMORANDUM AND SUPPORTING DOCUMENTS IN EXPLANATION

MEMORANDUM

PREPARED BY
OFFICE OF PROFESSIONAL COMPETENCE, PLANNING AND DEVELOPMENT
STATE BAR OF CALIFORNIA
100 Van Ness Avenue, 28th Floor
San Francisco, California 94102

October, 1992

REQUEST THAT THE SUPREME COURT OF CALIFORNIA APPROVE AMENDMENTS TO RULES 3-700 AND 4-100 OF THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA AND MEMORANDUM AND SUPPORTING DOCUMENTS IN EXPLANATION

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SUPPORTING DOCUMENTS

The following enclosures are attached to this Memorandum for the Court's convenience.

ENCLOSURE 1: Rules 3-700 and 4-100 of the Rules of Professional Conduct as Proposed

ENCLOSURE 2: Rules 3-700 and 4-100 Showing the Proposed Amendments in Legislative Style

ENCLOSURE 3: Resolution Adopted by the State Bar Board of Governors at its June 6, 1992, Meeting

ENCLOSURE 4: Membership of the Commission for the Revision of the Rules of Professional Conduct

ENCLOSURE 5: Portions of Discussion Draft: Proposed Amendments to the Rules of Professional Conduct (January 1991) as Published for Public Comment on January 25, 1991, that Relate to Proposed Amendments to Rules 3-700 and 4-100

ENCLOSURE 6: State Bar of California Press Releases Regarding Publication of Discussion Draft: Proposed Amendments to the Rules of Professional Conduct (January 1991) as Published for Public Comment on January 25, 1991

ENCLOSURE 7: Synopsis and Text of Written Comment Received on Proposed Amendments to Rules 3-700 and 4-100 as Published for Public Comment on January 25, 1991

ENCLOSURE 8: Text of Rules 3-700 and 4-100 as Published for Public Comment on August 30, 1991. Showing Proposed Amendments in Legislative Style

REQUEST THAT THE SUPREME COURT OF CALIFORNIA APPROVE AMENDMENTS TO RULES 3-700 AND 4-100 OF THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA, AND MEMORANDUM AND SUPPORTING DOCUMENTS IN EXPLANATION

I

RECOMMENDATION

The Board of Governors of the State Bar of California respectfully requests that this Court approve amendments to rules 3-700 (Termination of Employment) and 4-100 (Preserving Identity of Funds and Property of a Client) of the Rules of Professional Conduct of the State Bar of California in the form set forth in Enclosure 1.* (For the Court's convenience, Enclosure 1 is attached hereto.)

The proposed amendments to rules 3-700 and 4-100 were adopted by the Board of Governors at its June 6, 1992, meeting and would require that all advance fees for legal services received by a member be deposited in the member's client trust account unless the member's written fee agreement with the client expressly provides that the fee paid in advance is earned when paid or is a "true retainer" (as set forth in rule 3-700(D)(2)). (The rules in legislative style showing the proposed amendments to the current rules are set forth in Enclosure 2.) A history and a summary of the proposed amendments follow.

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* Business and Professions Code section 6076 provides: "With the approval of the Supreme Court, the Board of Governors may formulate and enforce rules of professional conduct for all members of the bar in this State.

Rules of Professional Conduct adopted by the Board are binding upon members of the State Bar only when approved by this Court. (See Business and Professions Code section 6077.)

Responding to this charge, the Commission, in January, 1991, submitted its Discussion Draft: Proposed Amendments to the Rules of Professional Conduct (January 1991). Included in the Discussion Draft were proposed amendments to rules 3-700 and 4-100. (The portions of the Discussion Draft relating to rules 3-700 and 4-100 are set forth in Enclosure 5.) Those proposed amendments would have amended rule 4-100 to require that all advance fees be placed in a member's client trust account, except for "non-refundable" fees and "true retainer" fees expressly designated in the member's written attorney-client fee agreement. Additionally, the Commission proposed a new Discussion section to rule 4-100 which would have clarified that use of the term "non-refundable" in a written retainer agreement was not intended to preclude the duty of a member to promptly refund that portion of a fee paid in advance that was not earned. Finally, the Commission proposed an amendment to the Discussion section to rule 3-700 to clarify that: 1) an unearned "non-refundable" advance fee may be repaid to a client from a member's own funds; and 2) that advances for costs and expenses must be placed in a member's client trust account.

On January 25, 1991, the Board Committee on Admissions and Competence ("Board Committee") published the Discussion Draft for a 90-day public comment period. The public comment period began on February 20, 1991, and ended on May 21 1991. Additionally, the Board Committee appointed a member of the Board to work closely with the Commission during its review of the public comment. The availability of the Discussion Draft was published and approximately 550 copies were distributed. (The various press releases distributed by the State Bar regarding the Discussion Draft are set forth in Enclosure 6.)

Eight of the written comments received on the Discussion Draft addressed the proposed amendments to rules 3-700 and 4-100 (A synopsis and the text of those eight comments are set forth in Enclosure 7.) The Commission reconsidered its proposed amendments in light of the comment received and determined not to amend its recommendations regarding proposed amendments to rules 3-700 and 4-100.

Fifty-four written comments were received on the second proposed amendment of rules 3-700 and 4-100. (A subject matter summary and synopsis of the written comment received are set forth in Enclosure 10. The text of the written comment is set forth in Attachment A.) The State Bar Client Security Fund Commission, Legal Services Trust Fund Commission and Office of the Chief Trial Counsel supported the proposed amendments, asserting that it was appropriate to require that members place all advance fee payments, except for "true retainers," in a client trust account and that the proposed amendments were important to provide clear guidance to the membership regarding which fees must be placed in a member's client trust account.

However, the vast majority of public comment was in opposition to the proposed amendments. The forty-three comments opposing the proposed amendments raised the following objections:

a) the proposed amendments were not in the best interests of attorneys, the State Bar, clients or the public;

b) there existed no statistical, legal or social basis for the proposed amendments, which represented a radical departure from the historical and non-problematic use of "fixed fee" arrangements by attorneys and their clients;

c) many clients prefer "fixed" or "flat" fee arrangements, and attorneys and their clients should enjoy freedom to contract;

d) those attorneys who are dishonest, which are only a tiny fraction of the State Bar membership, would be dishonest no matter what rules are in place;

amend both rules 4-100 and 3-700. (These proposed amendments, in legislative style showing changes to current rules 3-700 and 4-100, are set forth in Enclosure 2.)

On February 21, 1992, and March 20, 1992, the Board Committee considered the public comment and the further amendments proposed by the Commission. The Board Committee determined to forward amended rules 3-700 and 4-100, in the form proposed by the Commission, to the Board of Governors with the recommendation that they be adopted by the Board and transmitted to the Supreme Court of California for approval.

These amendments to rules 3-700 and 4-100 would require that all advance fees paid by a client to a member be placed in the member's client trust account unless the member's written fee agreement expressly provides that the fee paid in advance is earned when paid or is a "true retainer" as defined in proposed amended rule 3-700(D)(2). Additionally, the recommended amendments would clarify that:

1) advances for costs and expenses must be placed in the member's client trust account;

2) the fact that a fee is not placed in the member's client trust account does not by itself mean that the member may not have to refund a portion of the fee if the member has not completed or only partially completed the agreed-upon services;

3) a written fee agreement may provide how and when the member's fee is to be earned if such provision reasonably can be understood by the client and does not make the earned fee unconscionable;

4) a "true retainer" is paid solely to ensure the availability of the member for a matter or for a given period of time; and

III

SUMMARY OF PROPOSED AMENDMENTS TO RULES 3-700 AND 4-100 OF THE RULES OF PROFESSIONAL CONDUCT

A. Overview of Proposed Amendments

The emphasis of the proposed amendments is on written disclosure to the client and the client's informed consent to the fee agreement. The proposed amendments to rules 3-700 and 4-100 are intended to present a well-reasoned, balanced approach which would protect both clients' and members' interests and would provide much-needed guidance to members.

The proposed amendments to rules 3-700 and 4-100 would require that all advance fees for legal services received by a member be deposited in the member's client trust account unless the member's written fee agreement with the client expressly provides that the fee paid in advance is earned when paid or is a "true retainer" (as set forth in rule 3-700(D)(2)). Although the proposed amendments would avoid use of the terms "fixed fee," "flat fee" or "non-refundable fee" such types of retainer fee agreements would be permissible under the proposed amendments. However such fees would be required to be placed in the member's client trust account unless the member's written attorney-client fee agreement expressly provides that such fees, paid in advance of the provision of legal services, are earned when paid.

The proposed amendments recognize that lawyers can have legitimate reasons to have fees earned when paid. This can be provided for in an agreement freely entered into by both lawyer and client so long as the

and expenses must be placed in a trust account pursuant to rule 4-100 (case authority is provided in support of this proposition).

Rule 4-100. Preserving Identity of Funds and Property of a Client.

Proposed amendment to subparagraph (A)(2) would delete unnecessary language and substitute the term "earned" for the term "fixed." The proposed amendment is intended to conform the subparagraph to the language employed in current rule 3-700, subparagraph (D)(2), and to the language of proposed new paragraph (B) of rule 4-100. No substantive change is intended.

Proposed paragraph (B) is entirely new and would require that, unless a written fee agreement expressly provides that a fee paid in advance is earned when paid or is a true retainer (as defined in rule 3-700(D)(2)), all advance fees for legal services received by a member must be deposited in one or more bank accounts defined in paragraph (A) of the rule.

Proposed amendments to current paragraphs (B) and (C) would conform their lettering to accommodate inclusion of proposed new paragraph (B). No substantive changes are intended.

The proposed Discussion section is entirely new and would clarify that a member's written fee agreement may provide how and when the member's fee is to be earned, if such provision reasonably can be understood by the client and does not make the earned fee unconscionable. Reference to rules 3-700 and 4-200 is included.

ENCLOSURE 1:

Rules 3-700 and 4-100 of the Rules of Professional Conduct as Proposed

Rule 3-700. Termination of Employment.

(A) In General.

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission

(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

(B) Mandatory Withdrawal

A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:

(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or

(3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively; or

(4) The member or the member's law firm is discharged.

(C) Permissive Withdrawal.

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The client

(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

(b) seeks to pursue an illegal course of conduct, or

(c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or

(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or

Chapter 4. Financial Relationship With Clients.

Rule 4-100. Preserving Identity of Funds and Property of a Client.

(A) All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labelled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction. No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows:

(1) Funds reasonably sufficient to pay bank charges.

(2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest becomes earned. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) Unless a written fee agreement expressly provides that a fee paid in advance is earned when paid or is a true retainer (as set forth in rule 3-700(D)(2)), all advance fees received shall be deposited in one or more bank accounts defined in paragraph (A).

(C) A member shall:

(1) Promptly notify a client of the receipt of the client's funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.

(4) Promptly pay or deliver as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.

(D) The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by members and law firms in accordance with subparagraph (C)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

ENCLOSURE 2:

Rules 3-700 and 4-100
Showing the Proposed Amendments in Legislative Style

Rule 3-700. Termination of Employment.

(A) In General.

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission

(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

(B) Mandatory Withdrawal

A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:

(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or

(3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.; or

(4) The member or the member's law firm is discharged.

(C) Permissive Withdrawal

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The client

(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

(b) seeks to pursue an illegal course of conduct, or

(c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or

(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or

Paragraph (D) is not intended to prohibit a member from making, at the member's own expense, and retaining copies of papers released to the client, nor to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.

Chapter 4. Financial Relationship With Clients.

Rule 4-100. Preserving Identity of Funds and Property of a Client.

(A) All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labelled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction. No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows:

(1) Funds reasonably sufficient to pay bank charges.

(2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest ~~in that portion~~ becomes ~~fixed~~ earned. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) Unless a written fee agreement expressly provides that a fee paid in advance is earned when paid or is a true retainer (as set forth in rule 3-700(D)(2)), all advance fees received shall be deposited in one or more bank accounts defined in paragraph (A).

(~~B~~C) A member shall:

(1) Promptly notify a client of the receipt of the client's funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.

(4) Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.

(~~C~~D) The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by members and law firms in accordance with subparagraph (~~B~~C)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

ENCLOSURE 3:

Resolution Adopted by the State Bar Board of Governors at its June 6, 1992, Meeting

RESOLUTION

BOARD OF GOVERNORS

THE STATE BAR OF CALIFORNIA
(Adopted by the Board of Governors June 6, 1992)
(Subject to approval by the Supreme Court)

RESOLVED, following publication for comment, upon consideration of comments received and upon recommendation and report of the Board Committee on Education and Competence that the Board hereby adopts rules 3-700 and 4-100 California Rules of Professional Conduct, in the form attached to these minutes and made a part hereof, and hereby directs that said rules be transmitted to the Supreme Court with the request that they be approved by the Court.

I hereby certify that the foregoing is a full, true copy of the resolution adopted by the Board of Governors at its meeting held on June 6, 1992 in San Francisco, California

Herbert M. Rosenthal
Secretary

Date:

ENCLOSURE 4:

Membership of the Commission for the Revision of the Rules of Professional Conduct

The membership of the Commission for the Revision of the Rules of Professional Conduct consists of ten attorney members and one public member expert in the field of professional responsibility as follows:

Harry B. Sondheim, Chair

Former Chair of the Committee on Professional Responsibility and Conduct; former Chair, former Ethical Considerations Committee for the American Bar Association Section of Criminal Justice; currently Head of the Appellate Division Habeas Corpus Litigation Team, and Professional Responsibility Unit of the Los Angeles District Attorney's Office.

Nelson G. Dong

Former Chair of the State Bar Committee on Professional Responsibility and Conduct; former member of the Board of Directors, Secretary and co-founder of the Asian American Bar Association of the Greater Bay Area; and currently an associate in the Minneapolis firm of Dorsey and Whitney.

JoElla L. Julien

Public member· Member State Bar Committee on Professional Responsibility and Conduct; and currently an educational consultant in Oakland.

Edward P. George, Jr.

Former Presiding Referee, State Bar Court; former Chair, Executive Committee of the State Bar Court; former Chair, Review Department of the State Bar Court; former Chair, State Bar Board of Governors Committee on Discipline; member, California State Judicial Performance Committee; and currently in private practice in Long Beach

Raul L. Martinez

Former Chair of the State Bar Committee on Professional Responsibility and Conduct; and currently a partner in the Los Angeles firm of Lewis, D'Amato, Brisbois and Bisgaard.

Responsibility at Hastings College of the Law: and currently a partner in the San Francisco firm of Townsend and Townsend

Anthonie M. Voogd

Former Chair of the State Bar Committee on Professional Responsibility and Conduct; former Professor of Law, Southwestern University School of Law; and currently Vice President and General Counsel, Kinetics Technology International Corporation.

The Commission was assisted by Judy Johnson, member of the State Bar of California Board of Governors.

ENCLOSURE 5:

Portions of Discussion Draft: Proposed Amendments to the Rules of Professional Conduct (January 1991) as Published for Public Comment on January 25, 1991, that Relate to Proposed Amendments to Rules 3-700 and 4-100

DISCUSSION DRAFT

PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT

Commission for the Revision of the Rules of Professional Conduct

State Bar of California

January, 1991

PROPOSED RULES OF PROFESSIONAL CONDUCT

(C) If, despite the member's actions in accordance with paragraph (B), the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of law and is likely to result in substantial injury to the organization, the member's response is limited to the member's right, and, where appropriate, duty to resign in accordance with rule 3-700.

(D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

(E) A member representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-310. If the organization's consent to the dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members.

Discussion:

Rule 3-600 is not intended to enmesh members in the intricacies of the entity and aggregate theories of partnership.

Rule 3-600 is not intended to prohibit members from representing both an organization and other parties connected with it, as for instance (as simply one example) in establishing employee benefit packages for closely held corporations or professional partnerships.

Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, nor is it the purpose of the rule to deny the existence or importance of such formal distinctions. In dealing with a close corporation or small association, members commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty. (See People ex rel Deukmejian v. Brown (1981) 29 Cal.3d 150 [172 Cal.Rptr. 478]; Goldstein v. Lees (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; Woods v. Superior Court (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; In re Banks (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) In resolving such multiple relationships, members must rely on case law.

Rule 3-700. Termination of Employment.

(A) In General.

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

(B) Mandatory Withdrawal.

A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:

(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or

(3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

(4) The member or the member's law firm is discharged.

(C) Permissive Withdrawal.

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

Rule 4-100. Preserving Identity of Funds and Property of a Client.

(A) All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labelled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction. No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows:

(1) Funds reasonably sufficient to pay bank charges.

(2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) For purposes of this rule, unless a written fee agreement expressly provides that a fee paid in advance is non-refundable or is a true retainer (as set forth in rule 3-700(D)(2)), all advance fees received shall be deposited in one or more bank accounts defined in paragraph (A).

(C) A member shall:

(1) Promptly notify a client of the receipt of the client's funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.

(4) Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.

(C) The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by members and law firms in accordance with subparagraph (B)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

Discussion:

The use of the term "non-refundable" in a written retainer agreement is not intended to preclude the duty of a member to promptly refund that portion of a fee paid in advance that has not been earned. (See rule 3-700(D)(2).)

Rule 4-200. Fees for Legal Services.

(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.

(B) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:

(1) The amount of the fee in proportion to the value of the services performed.

(2) The relative sophistication of the member and the client.

(3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.

(4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.

(5) The amount involved and the results obtained.

(6) The time limitations imposed by the client or by the circumstances.

(7) The nature and length of the professional relationship with the client.

Subparagraph (B)(4) is new and adds a mandatory withdrawal requirement where a client has discharged the member. It is derived from ABA Disciplinary Rule 2-110, subparagraph (B)(4) and ABA Model Rule 1.16, subparagraph (a)(3).

Rule Discussion, new paragraph three, addresses the issue of advance fees and costs. The new third Discussion paragraph takes the last two sentences from the second paragraph of the current rule Discussion and modifies them in a non-substantive manner. Additional language is then added addressing the situation in which an advance fee is paid to a member pursuant to a non-refundable retainer agreement. This amendment is intended to conform the Discussion regarding rule 3-700, subparagraph (D)(2) to the recommended amendments to rule 4-100 [new paragraph (B) and new Discussion]. (See related amendments to rule 4-100 below.) The final sentence of the new third Discussion paragraph conforms the rule Discussion to rule 4-100, paragraph (A), which requires that advances for costs and expenses be placed in the member's client trust account. Case authority in support of this requirement is provided.

Rule 3-700. Termination of Employment.

(A) In General.

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

(B) Mandatory Withdrawal.

A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:

(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or

(3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

(4) The member or the member's law firm is discharged.

(C) Permissive Withdrawal.

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The client

(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law,.or

(b) seeks to pursue an illegal course of conduct, or

(c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or

(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or

The Discussion to rule 4-100 is new and clarifies (for purposes of amended rules 3-700 and 4-100) that simply because a member chooses to label an advance fee payment "non-refundable" does not preclude the duty of the member to refund that portion of the "non-refundable" advance fee which has not been earned by the member.

Rule 4-100. Preserving Identity of Funds and Property of a Client.

(A) All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labelled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction. No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows:

(1) Funds reasonably sufficient to pay bank charges.

(2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) For purposes of this rule, unless a written fee agreement expressly provides that a fee paid in advance is non-refundable or is a true retainer (as set forth in rule 3-700(D)(2)), all advance fees received shall be deposited in one or more bank accounts defined in paragraph (A).

(~~B~~C) A member shall:

(1) Promptly notify a client of the receipt of the client's funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.

(4) Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.

(C) The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by members and law firms in accordance with subparagraph (B)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

Discussion:

The use of the term "non-refundable" in a written retainer agreement is not intended to preclude the duty of a member to promptly refund that portion of a fee paid in advance that has not been earned. (See rule 3-700(D)(2).)

Rule 4-200. Fees for Legal Services.

Paragraph (B) and subparagraph (B)(11) delete the word "agreement" following the word "fee." These recommended amendments clarify that paragraph (B) focuses on the broad issue of the unconscionability of the fee obtained and not on the narrower issue of the unconscionability of the fee agreement. The recommended amendments also conform paragraph (B) to the language and focus of paragraph (A).

Rule 4-200. Fees for Legal Services.

(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.

(B) Unconscionability of a fee ~~agreement~~ shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate

ENCLOSURE 6:

State Bar of California Press Releases Regarding Publication of
Discussion Draft: Proposed Amendments to the Rules of Professional Conduct (January 1991)
as Published for Public Comment on January 25, 1991

State Bar of California

555 Franklin Street, San Francisco, California 94102-4498

Media, Contact: Anne Charles 415/561-8283
Susan Scott 415/561-8272

STATE BAR ISSUES FOR PUBLIC COMMENT
PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT

SAN FRANCISCO, February 20 – The State Bar of California has issued proposed amendments to the Rules of Professional Conduct for public comment for 90 days. **The comment period will close on May 21.**

California's Rules of Professional Conduct were last fully reviewed in the late 1980s and took effect on May 27, 1989. The State Bar Board of Governors called for the rules to be reviewed further to address issues which previously had been left unresolved, or new issues arising out of the application of the rules, and to clarify any remaining ambiguities.

The board re-established the Commission for the Revision of the Rules of Professional Conduct, which has recommended the additional amendments. The final report of the commission is expected to be submitted to the Board of Governors this summer. If the board adopts the revisions, the rules will be submitted to the California Supreme Court for approval under Business and Professions Code §6076.

To obtain copies of the proposed amendments to the rules, contact: Daniel Stimmerman, 415/241-2157.

Written comments on the proposed amendments must be submitted by 5 p.m. on Tuesday, May 21, to: Commission for the Revision of the Rules of Professional Conduct, Attention: Daniel Stimmerman, State Bar of California, Office of Professional Competence, Planning & Development, 100 Van Ness Avenue, 28th Floor, San Francisco 94102-5238. Comments on each rule should be submitted on a separate piece of paper.

###

0204/1991/dgk

For Public Comment...

Issue: Proposed Amendments to the Rules of Professional Conduct. Included are rules affecting advance fees, conflict of interest and definition of "lawyer."
Source: State Bar Commission for the Revision of the Rules of Professional Conduct
Deadline: May 21
Contact: Daniel Stimmerman, Commission for the Revision of the Rules of Professional Conduct, State Bar of California, Office of Professional Competence, Planning & Development, 100 Van Ness Avenue, 28th Floor, San Francisco 94102-5238, 415/241-2157

Issue: Fee Arbitrations. Rule 21 raises the amount in dispute necessary for a three-person panel from $3,000 to $7,500.
Source: State Bar Committee on Mandatory Fee Arbitration
Deadline: May 6
Contact: Linda Harrington, Mandatory Fee Arbitration, State Bar of California, 100 Van Ness Avenue, 28th Floor, San Francisco 94102, 415/241-2020

Issue: Proposed Revision to Section 7.4 of the MCLE Rules and Regulations (automatic approval of out-of-state CLE activities).
Source: Board Committee on Education
Deadline: April 29
Contact: Karen Betzner, Office of Professional Competence, Planning and Development, State Bar of California, 100 Van Ness Avenue, 28th Floor, San Francisco, 94102-5238, 415/241-2112.

Fee Dispute Increase

The amount of money in dispute necessary for consideration by a three-person Mandatory Fee Arbitration panel will be raised from $3,000 to $7,500 under a proposal issued for public comment.

The proposal concerns Rule 21 of the "Rules of Procedure for the Hearing of Fee Arbitrations by the State Bar of California." Proposed by the Committee on Mandatory Fee Arbitration, the issue will be open for public comment for 90 days. **The deadline for submitting comments is May 6.**

Comments must be submitted to: *Mandatory Fee Arbitration, State Bar of California, 100 Van Ness Avenue, 28th Floor, San Francisco 94102, 415/241-2020.*

Professional Conduct Rules Amendments

The State Bar has issued proposed amendments to the Rules of Professional Conduct for public comment for 90 days. **The comment period will close on May 21.**

California's Rules of Professional Conduct were last fully reviewed in the late 1980s and took effect on May 27, 1989. The State Bar Board of Governors called for the rules to be reviewed further to address issues which previously had been left unresolved, or new issues arising out of the application of the rules, and to clarify any remaining ambiguities. The board re-established the Commission for the Revision of the Rules of Professional Conduct, which has recommended the additional amendments. Among the proposed amendments are: Rule 1-100 — definition of the term "lawyer;" Rule 3-310 — conflicts of interest; Rule 4-100 — advance fees; and Rule 4-300 — purchase of property at foreclosure. **The final report of the commission is expected to be submitted to the Board of Governors this summer. If the board adopts the revisions, the rules will be submitted to the California Supreme Court for approval under Business and Professions Code §6076.**

To obtain copies of the proposed amendments to the rules, contact: *Daniel Stimmerman, 415/241-2157.* **Written comments on the proposed amendments must be submitted by 5 p.m. on Tuesday, May 21, to:** ***Commission for the Revision of the Rules of Professional Conduct, Attention: Daniel Stimmerman, State Bar of California, Office of Professional Competence, Planning & Development, 100 Van Ness Avenue, 28th Floor, San Francisco 94102-5238.*** **Comments on each rule should be submitted on a separate piece of paper.**

Supreme Court Amends 'Pro Hac Vice' Rule

Rules under which an out-of-state attorney not licensed in California may appear in a California court have been amended by the state Supreme Court.

The rule, known as "Counsel Pro Hac Vice," permits attorneys licensed in another jurisdiction to apply to a California court to appear in a particular matter, with applications granted at the discretion of the court. These attorneys must hire an associate who is an active member of the State Bar of California, and they must serve the State Bar with a copy of the application and the notice of hearing, along with a filing fee.

The amendments to Rule 983, California Rules of Court, require copies of pro hac vice applications and notices of hearing to be served on the State Bar at its San Francisco office, 555 Franklin Street, instead of its Los Angeles office. Also, the time prescribed for the notice of hearing has been changed from "at least 10 days before the time designated for the hearing" to the time prescribed in the Code of Civil Procedure, §1005.

ENCLOSURE 7:

Synopsis and Text of Written Comment Received on Proposed Amendments to Rules 3-700 and 4-100 as Published for Public Comment on January 25, 1991

Comments preceded with an asterisk were received after the comment period closed.

Rule 3-700. Termination of Employment.
Rule 4-100. Preserving Identity of Funds and Property of a Client.

Los Angeles County Bar Association (Committees on Evaluation of Professional Responsibility, State Bar, Professional Responsibility and Conduct) recommends that the language "is non-refundable or" be deleted from rule 4-100, new paragraph (B), because the only "true retainer" is a non-refundable fee and the juxtaposition of these two terms ("true retainer" and "non-refundable") in the rule paragraph creates confusion.

William Monroe (Attorney) supports the proposed amendments to these two rules.

Santa Clara County Bar Association Client Relations Committee believes that current rule 3-700, paragraph (D)(2), and the amendments to the rule 3-700 Discussion section and rule 4-100, are ambiguous. While the amendments suggest that attorneys and clients may enter into a "true non-refundable retainer" agreement, they also imply that attorneys must account to the client and refund any unearned portion of the fee. However, the Client Relations Committee can envision a non-refundable retainer which is unrelated to the completion of services for which counsel is engaged or the amount of the fee "earned."

State Bar Client Security Fund Staff are pleased at the proposed addition of rule 4-100, amended paragraph (B), which they feel will afford greater client notice and protection. However, they suggest that:

1) the reference to non-refundable advance fees be deleted;

2) a future rule be created regarding offsets of attorney fees from settlements in unrelated cases; and

3) a future rule be created regarding responsibility for coverage in cases of the attorney's death or disability.

State Bar Committee on Professional Responsibility and Conduct (COPRAC) believes that the proposed amendments are positive. However, COPRAC believes that non-refundable retainers, like "true retainers," are presumptively "earned" upon receipt, subject to the requirements of rule 4-200 concerning unconscionability of fees. COPRAC is concerned that the proposed rule 4-100 Discussion section, when read together with current rule 3-700, paragraph (D)(2), may unduly restrict a lawyer's ability to charge a truly non-refundable retainer in appropriate circumstances. COPRAC suggests that:

1) the rule 4-100 Discussion section be deleted;

2) rule 3-700, paragraph (D)(2), be amended to add truly non-refundable retainers and to explain that these and other "true" retainers are earned upon receipt; and

3) the rule 3-700 Discussion section, new paragraph three, be further amended to provide that non-refundable fees are presumptively earned subject to rule 4-200.

Regarding these suggestions, new language is offered by COPRAC.

Los Angeles County Bar Association

617 South Olive Street
Los Angeles, CA 90014

Mailing address:
P.O. Box 55020
Los Angeles, CA 90055-2020

(213) 627-2727

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(213) 896-6500

Direct Line:

RECEIVED
MAY 23 1991
THE STATE BAR OF CALIFORNIA



May 17, 1991

MEMORANDUM

TO: Commission for the Revision of the Rules of Professional Conduct
State Bar of California

FROM: Patrick M. Kelly
President, LACBA

RE: Comments to Proposed Amendments to the Rules of Professional Conduct

On behalf of the Board of Trustees of the Los Angeles County Bar Association (Association), I am forwarding the enclosed report which represents the comments of the Association on the Discussion Draft of the Proposed Amendments to the Rules of Professional Conduct issued in January 1991.

Thank you for the opportunity to comment.

Encl.

cc: Association Trustees
M. John Carson, Esq.
LeAnne E. Maillian, Esq.
Hon. Samuel Bufford
Richard Walch, Esq.

Patrick M. Kelly
President
Andrea Sheridan Ordin
President-Elect
Richard Chernick
Senior Vice-President
Gerald L. Chaleff
Vice-President/Treasurer
Richard Walch
Executive Director
David R. Pascale
Associate Executive Director & Director of Finance
Joseph Komowski
Assistant Executive Director & General Counsel

Trustees
Gary L. Barr
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Eudon Ferrell
Fred J. Fujioka
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Janice Kamenir-Reznik
Robert N. Kwan
Richard M. Macias
F. Bentley Mooney, Jr.
Christopher M. Moore
Nancy L. Newman
Andrew J. Nocas
David J. Pastemak
Barbara A. Reeves
Andria Kay Richey
[illegible] J. Segura
[illegible] Miller Siegel
[illegible]bert S. Span
[illegible]an J. Troy
Laurie D. Zelon

T.R.-203

SANTA CLARA COUNTY BAR ASSOCIATION

CLIENT RELATIONS COMMITTEE

2001 GATEWAY PLACE, SUITE 220 WEST
SAN JOSE, CALIFORNIA 95110
(408) 453-3448

May 15, 1991

Commission for the Revision of The Rules of Professional Conduct
Attention: Daniel Stimmerman
State Bar of California, Office of Professional Competence
Planning and Development
100 Van Ness Avenue, 28th Floor
San Francisco, CA 94102-5238

Dear Commission Members:

I am writing to you as Chair of the Santa Clara County Bar Association Client Relations Committee. The Santa Clara County Bar Association requested that my Client Relations Committee review the 1991 draft changes to the Rules of Professional Conduct and to provide commentary, where deemed appropriate. Below is a summation of my Committee's report, the County Bar Association authorized my Committee to provide you with my Committee's comments, with the exception of comments to Proposed Rule 3-100. The position of the Santa Clara County Bar Association concerning Proposed Rule 3-100 will be provided to you by separate cover.

Please note that the following comments reflect the views, thoughts and opinions of the Client Relations Committee of the Santa Clara County Bar Association only, and have not been adopted as positions of the Santa Clara County Bar Association.

1. **Proposed Rule 4-300.** Proposed Rule 4-300 conflicts with the Probate Code. There should be consistency between the statutory rule and Rules of Professional Conduct. Rule 4-300 should not be adopted unless the Probate Code is first amended.

2. **Rule 3-310.** Rule 3-310 concerning avoiding the representation of adverse interests is troublesome. Proposed new Section (b)(2) requires the attorney to disclose to clients or prospective clients whether the member has or had a legal, business, professional or personal relationship with a person or entity who would be "affected substantially" by resolution of the matter. This Rule would seemingly impose a duty of diligent investigation by the attorney to determine those who "would be affected substantially by resolution of the matter" not just those

actually known to the attorney. Our Committee recommends that the Rule be modified to limit the requirement of disclosure those the attorney "reasonably knows" would be affected substantially by resolution of the matter.

3. **Rule 3-310(c).** One member of the Executive Committee opposes the language of Rule 3-310(c) requiring written consent of each client for representation in certain matters involving actual or potential conflicts.

4. **Rules 3-700(d)(2) and 4-100(b).** These Rules are ambiguous. The Rules and discussion suggest that attorneys can enter into agreements with clients for advance payment of true non-refundable retainers but also imply that attorneys must account to the client and refund any unearned portion of the fee. While recognizing the importance of a clearly drafted retainer agreement, our Committee can envision a non-refundable retainer which is unrelated to the completion of services for which counsel is engaged or the amount of the fee "earned".

I hope that these comments are helpful to the Board of Trustees. Four copies of this letter are provided for your convenience in organizing commentary on the proposed rules.

Thank you in advance for your consideration of this commentary.

Yours very truly,

Jeffrey A. Barnett
A Professional Corporation

By
Jeffrey A. Barnett

JAB/as

cc: Patrick E. Tondreau, Esq., President SCCBA
Christine A. Burdick, Esq., Executive Director SCCBA
Client Relations Committee

THE STATE BAR
OF CALIFORNIA

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

100 VAN NESS AVENUE, 28th FLOOR, SAN FRANCISCO, CALIFORNIA 94102-5238 TELEPHONE: (415) 241-2157

RECEIVED
MAY 21 1991
PROF. RESP. AND CONDUCT DEPT.
THE STATE BAR OF CALIFORNIA

DATE: May 20, 1991

TO: State Bar of California Commission for the Revision of the Rules of Professional Conduct

FROM: State Bar of California Committee on Professional Responsibility and Conduct

SUBJECT: Comment on Proposed Amendments to the California Rules of Professional Conduct

1. Rule 1-100(B)(3)

The Committee approves of the proposed amendment to rule 1-100(B)(3).

2. Rule 3-310

The Committee has considered the proposed changes to rule 3-310. While we find that many of the proposed changes will provide needed clarity to the rule, we are deeply troubled by the proposed change that would do away with the requirement of written consent in certain instances. In addition, we find that there are certain portions of the rule that are still unclear and could benefit by further clarification.

We approved of the changes to subsections B and C which delineate situations posing potential conflicts of interest. We believe that by identifying situations in which a potential conflict of interest exists, the practitioner will be educated by the rule itself. This is a change for the better. We believe that the addition of the word "relevant" to section A of the proposed rule is likewise a change for the better. We believe that the present rule requiring the disclosure of "the circumstances" to too broad and that the addition of the word "relevant" will focus the practitioner on exactly what it is the client need be told in these situations.

However, we disagree strongly with the Commission's decision to delete the requirement of written consent in situations delineated in subsection B of the proposed rule. It is our belief that written consent should be required in each of those situations. We further believe that requiring consent in writing will make this portion of the rule consistent with the other portions.

persons or entitles involved in litigation may cause clients or outsiders to question the personal interest of the member. We believe this is one of the most important rules contained in the Rules of Professional Conduct. From our own work with the Rules of Professional Conduct, we recognize that many times drafting a clear and concise rule is extremely difficult, and we applaud the Commission for its efforts in this regard. However, we wish to reiterate our strong belief in the need for written consent in each of the situations covered by rule 3-310.

3. Rules 3-700 and 4-100

Generally, the Committee believes that the proposed amendments are positive ones, in that they help clarify the existing language and protect the interests of the consumers of legal services.

The Committee believes, however, that non-refundable retainers, like "true retainers," are presumptively "earned" upon receipt, subject to the requirements of rule 4-200 concerning unconscionability of fees.

Specifically, the Committee is concerned that the language of the proposed discussion section of 4-100, when read together with the last sentence of 3-700(D)(2) and the new discussion paragraph on subsection (D)(2), may unduly restrict the lawyer's ability to charge a truly non-refundable retainer in appropriate circumstances.

Non-refundable retainers in many cases have virtually the same purpose as the "true retainers" defined in 3-700(D)(2). They may represent the reasonable value of the process of establishing a file, obtaining initial information, precluding the representation of other clients with conflicting interests, and the commitment and reservation of time in furtherance of the client's cause.

For example, a lawyer in a domestic case may be unwilling to open a file and make time for the case (and a troubled client) without a non-refundable retainer of, say, $1000. The lawyer may agree to credit the client at the lawyer's hourly rate, while still insisting on a minimum "start-up" fee.

It may be argued that the current proposed language allows lawyers the opportunity to show that a particular non-refundable retainer was indeed "earned." But the present language of 3-700(D)(2) and its discussion implies, by the concept of inclusio unius est exclusio alterius, that excepting "true retainers" from the rule distinguishes them from non-refundable retainers. This implication is exacerbated by the discussion language of 4-100, which singles out such retainers for possible refund under 3-700.

I.B.-249

5. Rule 5-320

The Committee approves of the proposed amendment to rule 5-320.

II.B.-251

Another concern of commission members goes beyond the particular experience of the Trust Fund Program. That is the possibility that a second result of decreasing the funds in trust accounts will be an increased risk that clients will lose money. The more lawyers are free to spend fees they have not yet earned, the more likely it is that some of the money will be unavailable for return to clients when the lawyer withdraws or is discharged.

Moreover, some commission members believe the rule as drafted will confuse clients and put attorneys at an unfair advantage. The rule gives lawyers an incentive to characterize advanced fees as "non-refundable," even when the lawyer knows the fee must be refunded if the work is not done. But while the lawyer knows that, the client does not. The client may not request a refund of the fee if the work is not completed, or may not complain if the fee is not refunded. During the course of the representation, the client is likely to avoid discharging the lawyer even for good cause, believing the advanced fee is gone forever.

For these reasons, the Legal Services Trust Fund Commission opposes the revision of Rule 4-100 as proposed.

As for how the rule should be revised, the Commission sees more than one possibility. A majority of Trust Fund Commission members believe that whenever a fee paid in advance would be partially or completely refunded if the work being paid for is not completed, the money should go in a trust account. They would favor Rule 4-100 saying as clearly and unequivocally as possible that all fees for legal work that is to be done in the future, whether the fees are characterized as "non-refundable" or not, must be placed in a trust account, to be withdrawn on a pro rata basis as the work is completed. This is the Commission's recommended solution to the problem.

The Trust Fund Commission recognizes this is a difficult issue, however, on which there are many views and competing interests. Consequently it may be necessary to consider other ways of approaching the problem. One possibility would be to add paragraph (B) to Rule 4-100 as follows:

> For purposes of this rule, unless a fee paid in advance is a true retainer (as set forth in rule 3-700(D)(2)), all advance fees received shall be deposited in one or more bank accounts defined in paragraph (A).

This might work as a definition of "advance fee." On the other hand, you may conclude that the difficulties of trying to define "advance fee" in a way that will eliminate confusion and uncertainty outweigh the possible benefits. Or it may be that such a definition is possible but that the unlikelihood of acceptance by the bar of a rule that is either so inclusive or not inclusive enough argues against it. In that event the Trust Fund Commission would favor a rule that would continue what is

IV.B.-753

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May 21, 1991

RECEIVED
MAY 22 1991
THE STATE BAR OF CALIFORNIA

Commission for the Revision
of the Rules of Professional Conduct
The State Bar of California
Office of Professional Competence,
Planning and Development
100 Van Ness Avenue
28th Floor
San Francisco, CA 94102-5238

Re: Proposed Amendments to Rules 3-700 (D) and 4-100

Dear Commission:

I wish to comment briefly on COPRAC's recommendations that the discussion language of 4-100 be eliminated, that the second sentence of Rule 3-700(D)(2) be amended to include non-refundable fees and that the third sentence of the discussion concerning Rule 3-700(D)(2) provide that non-refundable fees are presumptively earned subject to Rule 4-200 on unconscionability of fees. These comments are my own, and not submitted on behalf of either COPRAC or the BASF Legal Ethics Committee, of which I am a member.

The Commission's proposed changes to Rules 3-700(D), and 4-100 largely take care of the concerns expressed in COPRAC's letter to the Commission. Rule 4-100(B) expressly permits non-refundable advance fees be placed in an attorney's commercial account. Rule 3-700(D)(2) correctly provides that on termination of employment a member must promptly refund any part of the fee paid in advance that has not been earned. These proposed rules do not preclude a written fee agreement with a client providing that non-refundable advance fees are "earned" upon receipt.

The only issue is whether the second sentence of paragraph (D)(2) of 3-700 is inconsistent with Rule 4-100. Although I do not believe it is, this issue can easily be resolved by either striking the last sentence of 3-700(D)(2) or moving the last sentence to the discussion section of Rule 3-700.

The discussion section of 4-100 is a correct statement of the law and need not be eliminated. Written fee agreements expressly providing for non-refundable advance fees can be

A0001478.DOC/PC-30/052191

I.B. - 257

TULARE COUNTY BAR ASSOCIATION
208 W. MAIN STREET, SUITE 2
VISALIA, CALIFORNIA 93291

PHONE (209) 732-2513

RECEIVED
MAY 17 1991
THE STATE BAR OF CALIFORNIA

May 15, 1991

COMMISSION FOR THE REVISION OF
THE RULES OF PROFESSIONAL CONDUCT
State Bar of California,
Office of Professional Competence,
Planning and Development
100 Van Ness Avenue, 28th Floor
San Francisco, CA 94102-5238

ATTN: Daniel Stimmerman

Re: Proposed Amendments to the Rules of Professional Conduct

Dear Mr. Stimmerman:

I am writing on behalf of the Tulare County Bar Association Board of Directors regarding the proposed amendments to the Rules of Professional Conduct. We have reviewed and analyzed the same and are in support of the proposed amendments.

Yours very truly,

E. Warren Gubler, Secretary
Tulare County Bar Association

EWG:jh
cc: President Richard Cochran
Charlotte Wittig, Esq.

II.B.-259

ENCLOSURE 8:

Text of Rules 3-700 and 4-100 as Published for Public Comment on August 30, 1991, Showing Amendments in Legislative Style

Rule 3-700. Termination of Employment.

(A) In General.

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

(B) Mandatory Withdrawal.

A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:

(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or

(3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.; or

(4) The member or the member's law firm is discharged.

(C) Permissive Withdrawal.

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The client

(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

(b) seeks to pursue an illegal course of conduct, or

(c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or

(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or

As defined in subparagraph (D)(2), a "true retainer" arrangement does not include a "fixed fee," "flat fee," or "non-refundable fee" situation which sets the compensation for a specific service or engagement. In a "true retainer," the stipulated sum is only to secure the member's availability, and is not for the performance of the service or engagement.

Paragraph (D) is not intended to prohibit a member from making, at the member's own expense, and retaining copies of papers released to the client, nor to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.

Chapter 4. Financial Relationship With Clients.

Rule 4-100. Preserving Identity of Funds and Property of a Client.

(A) All funds received or held for the benefit of clients by a member or law firm, including advances for costs, ~~and~~ expenses, and fees except for true retainers as defined in rule 3-700(D)(2), shall be deposited in one or more identifiable bank accounts labelled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction. No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows:

(1) Funds reasonably sufficient to pay bank charges.

(2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A member shall:

(1) Promptly notify a client of the receipt of the client's funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.

(4) Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.

(C) The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by members and law firms in accordance with subparagraph (B)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

ENCLOSURE 9:

State Bar of California Press Releases
Regarding Circulation of Proposed Amendments to Rules 3-700 and 4-100
as Published for Public Comment on August 30, 1991

State Bar of California

555 Franklin Street, San Francisco, California 94102-4498

Media, Contact: Anne Charles 415/561-8283
Susan Scott 415/561-8272

STATE BAR ISSUES 8 PROPOSALS FOR PUBLIC COMMENT

SAN FRANCISCO, September 11 — The State Bar of California currently is circulating eight proposals for public comment. They are:

Placement of Advance Fees

Issue: *Proposed amendments to Rules of Professional Conduct 4-100 and 3-700 address the issue of placement of advance fee payments made by a client to his or her attorney. The proposed amendments would require that all advance fee payments, except for "true retainers," be placed in a member's client trust account. The proposed amendments clarify that a "fixed fee," "flat fee" and "non-refundable fee" agreement is not a "true retainer" for purposes of these rules.*

Source: State Bar Board Committee on Admissions and Competence

Deadline: December 2

Contact: Michael Simon, Office of Professional Competence, Planning and Development, State Bar of California, 100 Van Ness Avenue, 28th Floor, San Francisco 94102-5238, 415/241-2157

Circulating for Public Comment...

Mandatory Fee Arbitration

Issue: *Proposed Amendments to Business and Professions Code §§6200-6206 from the Committee on Mandatory Fee Arbitration. The amendments would 1) provide that evidence relating to claims of malpractice shall be admissible to the extent that the claims bear upon the disputed fees, costs or both; 2) clarify that arbitrators may award a refund of fees and/or costs that have already been paid by the client; and 3) prohibit a party who has willfully failed to appear at an arbitration hearing from requesting a trial after arbitration.*

Source: State Bar Board Committee on Discipline

Deadline: September 6

Contact: Linda Harrington, Mandatory Fee Arbitration, State Bar of California, 100 Van Ness Avenue, 28th Floor, San Francisco 94102-5238, 415/241-2020

Legal Specialization

Issue: *The Board of Legal Specialization has revised the standards in all specialty areas to 1) redefine an education "unit" as 60 minutes of attendance (instead of 50) to conform the standards to the MCLE rules and regulations, and 2) require that all providers of approved legal specialization education activities agree to the requirements set forth in section 7.2 of the MCLE rules and regulations. The revisions will assure that education activities approved for legal specialization credit also will count toward California's MCLE requirements. The legal specialization specialty areas are family law; criminal law; immigration and nationality law; probate, estate planning and trust law; taxation law; and workers' compensation law.*

Source: State Bar Board of Legal Specialization

Deadline: November 21

Contact: Lorna Maynard, Office of Certification, State Bar of California, 100 Van Ness Avenue, 28th Floor, San Francisco 94102-5238, 415/241-2115

Member Fee Challenges

Issue: *Rules and Regulations of the State Bar, article IA. This action amends the procedures, pursuant to Keller v. State Bar (1990), which govern the manner in which a member may make an advance reduction of membership fees and challenge the bar's calculation of the chargeable and nonchargeable amounts of the annual membership fee. The amendments will: 1) change the deadline for making the advance reduction or the challenge to coincide with the deadline set by the Board of Governors for attachment of delinquent penalties; 2) require a member making the advance reduction to sign the form provided by the State Bar; 3) clarify that the board may place in escrow the total or a portion of the challenged amount; 4) clarify that at its next regular meeting or as soon thereafter as possible, the board may make a determination as to the challenges or refer them to arbitration; 5) change the time in which challengers and the bar may agree to an arbitrator from seven to 30 days; 6) provide that an arbitrator may be selected by agreement between the bar and 75 percent of the challengers; 7) provide that the decision of the arbitrator shall be subject to such judicial review as may be determined by the California Supreme Court; and 8) clarify that the phrase "close of arbitration" refers to the submission of final briefs by the challengers and the bar.*

Source: State Bar Board of Governors

Deadline: November 22

Contact: Pat Bermudez, Office of General Counsel, State Bar of California, 555 Franklin Street, San Francisco 94102-4498, 415/561-7431

Fee Agreement Forms

Issue: *Proposed sample contingent fee agreement forms.*

Source: State Bar Board Committee on Discipline

Deadline: December 2

Contact: Linda Harrington, Mandatory Fee Arbitration, State Bar of California, 100 Van Ness Avenue, 28th Floor, San Francisco 94102-5238, 415/241-2020

Allocation of Filing Fees

Issue: *Guidelines and minimum standards for the operation of Mandatory Fee Arbitration programs. The proposal adds a requirement that local bar program rules authorize the arbitrators to allocate the filing fee in their award. It also eliminates duplicative language and clarifies current practices and procedures.*

Source: State Bar Board Committee on Discipline

Deadline: December 2

Contact: Linda Harrington, Mandatory Fee Arbitration, State Bar of California, 100 Van Ness Avenue, 28th Floor, San Francisco 94102-5238, 415/241-2020

Attending Hearings

Issue: *Rule 25.2, Rules of Procedure for the Hearing of Fee Arbitrations by the State Bar, amends the rule to permit either a family member or non-family member to attend the arbitration hearing with the client.*

Source: State Bar Board Committee on Discipline

Deadline: December 2

Contact: Linda Harrington, Mandatory Fee Arbitration, State Bar of California, 100 Van Ness Avenue, 28th Floor, San Francisco 94102-5238, 415/241-2020

Placement of Advance Fees

Issue: *Proposed amendments to Rules of Professional Conduct 4-100 and 3-700 address the issue of placement of advance fee payments made by a client to his or her attorney. The proposed amendments would require that all advance fee payments, except for "true retainers," be placed in a member's client trust account. The proposed amendments clarify that a "fixed fee," "flat fee" and "non-refundable fee" agreement is not a "true retainer" for purposes of these rules.*

Source: State Bar Board Committee on Admissions and Competence

Deadline: December 2

Contact: Michael Simon, Office of Professional Competence, Planning and Development, State Bar of California, 100

continued on next page

Joseph M. Thornhill (Attorney) raises concerns regarding the proposed amendments as follow:

1) in business reorganization under Chapter 11, it is customary to obtain a substantial retainer

2) the Rules of Professional Conduct governing retainers and the disposition thereof should not be applicable to Chapter 11 business reorganizations

3) there is already a substantial amount of judicial and administrative supervision of Chapter 11 retainers

4) the proposed amendments pose a risk of imposing inconsistent obligations on counsel, since the Ninth Circuit may construe the Bankruptcy Code in a case arising in another state, so that the inconsistency is not apparent

5) a portion of the syllabus entitled "Recent Developments in Business Bankruptcy" which accompanied a panel presentation by the Commercial Law and Bankruptcy Section of the Bar Association of San Francisco is enclosed for consideration

James E. Wasson (Attorney) strenuously objects to the proposed amendments and makes the following points:

1) the proposed amendments would create a tremendous detriment to the small practitioner and those attorneys operating near the break-even line and may very well be the causation to cease the practice of law

2) as a sole practitioner specializing in family law and criminal law, minimum non-refundable retainers provide a source of funds to pay fixed overhead and allow him to continue his practice of law

3) minimum non-refundable retainers ensure that a client is serious about their case

4) the entire inception is not well thought out, nor do I think that the Commission really understands the nature of the practice of criminal law in the State of California, let alone the practice of family law in the State of California

5) the proposed amendments are not in the best interests of the consumer public in California

David S. White (Attorney) strongly urges the State Bar not to adopt the proposed amendments and makes the following points:

1) the proposed amendments would drastically discriminate against solo practitioners and small firms who have conducted their business in these regards quite satisfactorily for many years without regulation

2) the proposed amendments are an unwarranted intrusion in the finances of small and solo practices, particularly in these dire economic times

3) the proposed rules would be subject to constitutional challenge, unnecessary litigation, and ultimately to the devising of various vehicles to avoid the rule altogether

4) the less regulation in this area the better - leave this area well enough alone

5) the State Bar should be much more concerned with policing the truly incompetent practitioners and curbing the sometimes astounding sharp practices of litigators, particularly in the larger cities

ENCLOSURE 10:

Subject Matter Summary and Synopsis of Written Comment Received on Proposed Amendments to Rules 3-700 and 4-100 as Published for Public Comment on August 30, 1991

The forty-three critical/opposed comments received on proposed amended rules 3-700 and 4-100 make the following points:

1) these modifications fail to accomplish and genuine benefit for society or for the profession and in fact result in a profound change in the practice of law

2) the proposed changes are contrary to the interests of the two groups who are affected by the changes, the lawyers and their clients

3) the proposed amendments are not in the best interests of the bar or the public, will result in much confusion, and will act as a trap for the unwary

4) the notion that the proposed rule changes are needed to protect "consumers" has absolutely no statistical, legal, or social merit

5) this is perceived as being a remedy for a problem that is non-existent

6) if there have been significant problems in this area, which is doubtful, can we not address those problems specifically rather than turning a well-established and non-problematic system into chaos

7) to alter the practice of law in such a way that effects every attorney just to remedy a situation that applies to few members of the State Bar is like using an atomic bomb to kill a few flies

8) the proposed amendments are another example of the State Bar fixing something that is not broken and protecting "public rights" that do not need protection

9) proposed rule 4-100(A) in effect eliminates the traditional "fixed fee" arrangement that historically has been the basis in which an attorney-client relationship is established in many areas on the law i.e., criminal, bankruptcy, wills, real estate, contracts, divorce, immigration, etc. and will touch every lawyer who practices in these areas

10) lawyers have never had a duty to deposit fixed, prepaid, non-refundable fees in trust accounts

11) the proposed amendments represent a radical, short-sided departure from the way in which client trust accounts have always been handled in California

12) the proposed new rules would adopt without cause the position characterized by the Supreme Court as "novel" (Baranowski v. State Bar (1979) 24 Cal.3d 153, 164 [154 Cal.Rptr. 752, 593 P.2d 613]

13) the proposed amendments would unnecessarily infringe on the ability of lawyers and their clients to negotiate their contractual relationships

14) it is quite clear that lawyers and client's are able to enter into fee agreements on their own without any interference from the State Bar

15) if a client demands a fixed fee and the lawyer or firm is willing to enter into such an agreement, then the parties should be free to do so

16) corporate attorneys and firms are entering into fixed fee arrangements with clients because that's what the client wants

17) the average client wants to be assured that the fee that he pays will be of a specific amount of money and no more

36) the proposed amendments are detrimental both to the public and to the majority of attorneys who do not have the luxury of practicing in major firms which are the beneficiaries of traditional naming retainers

37) sole practitioners and small firms will be discouraged from representing clients in domestic relations, estate planning, business formation, immigration, or criminal defense cases in which the clients want a fixed fee, as opposed to an hourly fee

38) sole practitioners and small firms will be discouraged from representing clients in business litigation and similar cases in which the fee agreements often call for a non-refundable retainer against a contingent fee

39) the end result of the proposed amendments is to inhibit small or less wealthy law firms or sole practitioners from competing with larger legal corporations

40) the real effect of the proposed new rules, namely enriching the rich, but suppressing non-rich, attorneys will occur

41) attorneys cannot perform services and then hope that 1) the client is satisfied and 2) the client allows the attorney to withdraw earned fees without a dispute

42) the fact that fees are to be placed in a trust account is meaningless if the lawyer cannot withdraw from it after completing the legal work and the client then objects

43) requiring fees paid in advance to be deposited in the attorney's trust account will expose the attorneys to the risk that they may never be paid

44) the proposed amendments assume that lawyers are crooks

45) is the State Bar now taking the unconscionable position that attorneys are a disfavored class, so that all other creditors can be paid, but attorneys may not

46) other professionals, such as certified public accountants, architects, orthodontists, and others who customarily receive fixed, flat or non-refundable retainers have no similar requirement that their fees be placed in a trust account - to require this of lawyers suggests that lawyers as a group are less honest and require more policing

47) the requirement of placing a flat-fee into trust and withdrawing as services are completed would create an undue hardship in the accounting area

48) setting up separate accounts for each client who has paid a substantial retainer fee would be an absolute nightmare for administrative and accounting staff

49) the effect of this amendment most likely would be to result in greater fees for smaller cases than are presently being charged under flat or fixed fee arrangements

50) it would be difficult for our type of office to continue serving the segment of society that is generally unable to afford legal services

51) under the proposed amendments, clients may be deprived of counsel of choice or counsel entirely

52) although the Rules of Professional Conduct are promulgated for the protection of the public, they should not be manipulated to deprive members of the public of access to their attorneys of choice

53) the proposed amendments would adversely affect the ability of defendants in criminal cases to retain counsel

54) the proposed amendments are retrogressive and discriminatory against criminal defense attorneys

55) nonrefundable retainers and fixed fees are an essential part of private criminal defense practice

56) the criminal defense attorney who is not paid up front likely will never be paid

57) the proposed amendments would change the long standing practice of California criminal defense attorneys, and in all probability would prevent these attorneys from representing clients who require representation

58) it is doubtful that the average criminal law practitioner would be able to operate a practice successfully without reliance upon fixed fee retainer agreements

59) for the criminal practitioner who handles higher profile cases, the new proposals will also be disastrous in that the deposit of a client's funds into a trust account will be subject to Federal or State forfeiture

60) under the proposed amendments, a criminal law practitioner could not take title to a fixed fee and avail himself of the status of a bona fide purchaser, which would necessarily require him to commit to trials with no assurance of payment for either services or expenses

61) the proposed amendments runs squarely into the relatively new 18 USC §982 which makes forfeiture mandatory regarding "any property traceable" to the offenses at issue

62) non-refundable retainers have taken on an increased importance in the face of aggressive attempts by prosecutors to seize legal fees

63) the proposed amendments threaten the independence of defense attorneys who will be impeded from vigorous client representation and vulnerable to prosecution threats to initiate fee forfeiture

64) when a criminal defense attorney gets into a case, in most instances it is for the duration, whether or not the fees and costs can continue to be paid - in order to compensate the attorney for being put at such potential economic risk, a nonrefundable retainer is both essential and fair

65) the proposed amendments will create a problem for bankruptcy practitioners

66) there is extreme concern regarding the impact of the proposed rule changes on bankruptcy practice, and, in particularly, upon the ability of debtors to retain and pay counsel for handling Chapter 11 reorganization proceedings

67) in bankruptcy law practice, the requirement that fees be placed in a trust account prior to being "earned" makes it very likely that the retainer will be subject to attack by creditors, leaving the debtor unrepresented in the bankruptcy proceedings

68) in bankruptcy matter, the court passes upon the reasonableness of the attorney's compensation, and, in appropriate cases, can and does require counsel to pay back to the estate any amounts received by it which the court feels to be unreasonable

69) bankruptcy courts have had difficulty in interpreting the status of pre-filing retainers, with questions as to whether such retainers really are "earned on receipt" or if they are truly trust funds

84) the proposed amendments expose members to discipline without benefit of adequate guidelines for the withdrawal of undisputed flat or fixed fees - the rules should provide that fixed or flat fees for a specific service or engagement may be computed on a pro rata basis in proportion to the amount of work accomplished by the member, or alternatively, on the basis of the member's reasonable hourly rate multiplied by the hours of services rendered

85) proposed rule 3-700 should not be applicable to any fee which is paid by a client in contemplation of a bankruptcy case

86) proposed rule 4-100 should be amended to provide that it is not applicable to funds received or held for the benefit of clients that have delivered funds to the attorney in contemplation of filing a bankruptcy case

87) it is suggested that no change be made in the handling of criminal cases, or, at least, that an exclusion be made for criminal representation

88) it is suggested that the rule only apply to retainers in excess of $1000.00, $2000.00 or $3000.00

89) it is suggested that an exception be created to the proposed rules where the client is not in need of "consumer" type protection because it is a partnership or a corporation, or because the client otherwise enjoys the protection of a "watch-dog" (the U.S. Trust) or of the reviewing court

90) a blanket exclusion of any such rules should be created in any situation where the retention of and amount of the fees are subject to control and determination by a court of competent jurisdiction

91) if the proposed amendments are to be implemented, it is recommended that either (i) the attorney be given a senior statutory lien on or a right of offset against funds which the attorney is provided by his or her client, or (ii) the proposed amendments explicitly state that they do not apply to earned upon receipt retainers

92) if the proposed amendments are to be implemented, it is recommended that (i) the flat fee be excluded or (ii) the rules elaborate on the conditions under which the flat fee will be deemed fully or partially earned or (iii) the rules require that a flat fee agreement specify the conditions under which the flat fee will be deemed fully or partially earned

93) clarification should be made that fixed and prepaid fees should not be deposited in the attorney's trust account if the attorney and client have agreed that those fees belong to the attorney at the time they are paid

94) the proposed amendments would wrongly suggest the non-refundability of "true retainers"

95) current rule 3-700(D)(2) should be amended to delete reference to "true retainers"

96) rule 3-700(D)(2) should be deleted in its entirety - it is in error because even if a "true retainer" were paid, if the attorney is not available to the client during the entire term of the retainer, a proportional refund would be due the client

97) the proposed rules would be subject to constitutional challenge, unnecessary litigation, and ultimately to the devising of various vehicles to avoid the rule altogether

98) the proposed new rules create inherent ambiguities that make them unenforceable

99) the less regulation in this area the better - leave this area well enough alone

member's or law firm's fees are or will be subject to review, examination or allowance by a state or federal court or governmental agency

Richard P. Berman (Attorney) has serious concerns regarding the proposed amendments and makes the following points:

1) the proposed amendments would present significant hardships to citizens accused of crimes and contribute to court congestion and interfere with the economic and expedient delivery of legal services

2) the new proposals put the attorney's interests in conflict with the client's, the courts, and the prosecuting agencies

3) under the proposed amendments, an attorney will have no incentive to resolve the case early and will have every incentive to let the case drag on and result in as many "billable" hours as possible

4) the difference between an attorney one year out of law school and a person with twenty years of successful experience in the particular field cannot be adequately reflected in a differential in an hourly fee

5) this is perceived as being a remedy for a problem that is non-existent

6) if there have been significant problems in this area, which is doubtful, can we not address those problems specifically rather than turning a well-established and non-problematic system into chaos

Beverly Hills Bar Association (comment signed by Louis B. Fox, Executive Director) opposes the proposed amendments and makes the following points:

1) clients are fed up with an endless stream of billings and want a fee "fixed" so they know how much legal representation will cost

2) a "fixed fee" protects the client as well as the attorney in that all parties know going into a legal relationship what the cost will be

3) proposed amended rule 4-100(A)(2) would decimate the practice of law with respect to the withdrawal of funds that are in dispute

4) attorneys cannot perform services and then hope that 1) the client is satisfied and 2) the client allows us to withdraw earned fees without a dispute

5) the proposed rule changes will have a severe negative impact on solo practitioners

6) there are already in place remedies available to disgruntled clients

7) the notion that the proposed rule changes are needed to protect "consumers" has absolutely no statistical, legal, or social merit

8) those attorneys who are dishonest, which are a tiny fraction of the bar, will be dishonest no matter what rules are in place

***California Attorneys for Criminal Justice** (comment signed by Philip H. Pennypacker, President Elect) opposes the proposed amendments and makes the following points:

1) the proposed amendments are retrogressive and discriminatory against criminal defense attorneys

2) the wording of the proposed amendments fails to designate a time when the fee is earned and this ambiguity may expose our membership to discipline

3) the proposed amendments will cause untold grief and create a climate of distrust between bar membership and the State Bar

Center for Human Rights and Constitutional Law (comment signed by Peter A. Schey, Executive Director) opposes the proposed amendments and makes the following points:

1) the proposed amendments would adversely affect the ability of defendants in criminal cases to retain counsel

2) the proposed amendments would prohibit a long-established practice of the vast majority of members of the California criminal defense bar of accepting non-refundable retainers and/or the payment of "fixed fees" in criminal cases

3) the proposed amendments are not in the public's interest and would significantly interfere with the ability of defendants in criminal cases to retain counsel of their choices

***Century City Bar Association** (comments signed by Jan Gabrielson, President) opposes the proposed changes to rules 3-700 and 4-100 and makes the following points.

1) proposed rule 4-100(A) in effect eliminates the traditional "fixed fee" arrangement that historically has been the basis in which an attorney-client relationship is established in many areas on the law i.e., criminal, bankruptcy, wills, real estate, contracts, divorce, immigration, etc and will touch every lawyer who practices in these areas

2) corporate attorneys and firms are entering into fixed fee arrangements with clients because that's what the client wants

3) attorneys cannot perform services and then hope that 1) the client is satisfied and 2) the client allows us to withdraw earned fees without a dispute

4) the notion that the proposed rule changes are needed to protect "consumers" has absolutely no statistical, legal, or social merit.

5) those attorneys who are dishonest, which are a tiny fraction of the bar, will be dishonest no matter what rules are in place

6) neither proposed rule 3-700 nor 4-100 give any guidance as to when a fee is "earned" allowing the client to claim that the fee is not earned until the work is complete to their satisfaction

7) it is quite clear that lawyers and clients are able, and should be able, to enter into fee agreements on their own without any interference from the State Bar

Joseph L. Costello (Attorney) objects to the proposal that all advance fees be placed in a member's trust account and makes the following points:

1) it would place an unreasonable burden upon small firms and sole practitioners who accept modest retainers

2) it is suggested that the rule only apply to retainers in excess of $1000.00, $2000.00 or $3000.00

***Criminal Courts Bar Association** (comment signed by John Yzurdiaga, President) adamantly opposes the proposed amendments to rules of 4-100 and 3-700 and makes the following points:

1) as criminal law defense practitioners, the vast majority of the fees charged by members of the organization are paid in advance on a flat or fixed fee basis

2) the proposed amendments would create an enormous problem of accounting for our members...we can see no valid justification for it

3) it is suggested that in the vast majority of cases, clients are better served with fixed fee retainers, as opposed to an hourly fee basis, which has a built in conflict of interest with the client

4) the effect of this amendment most likely would be to result in greater fees for smaller cases than are presently being charged under flat or fixed fee arrangements

5) it is suggested that no change be made in the handling of these types of cases, or, at least, that an exclusion be made for criminal representation

Demetrios Dimitriou (Attorney) opposes the proposed amendments to rules 3-700 and 4-100 and makes the following points:

1) leaving the rules as they now exist would be much better than any of the Commission's proposed changes

2) rule 3-700(D)(2) should be deleted in its entirety - it is in error because even if a "true retainer" were paid, if the attorney is not available to the client during the entire term of the retainer, a proportional refund would be due the client

3) the proposed amendments to rule 4-100 add to the complexity of the practice, especially in those cases where the fees of the attorney are not based simply upon the amount of time expended

4) the Commission should consider improving the existing rules in question by making them less, rather than more, confusing

5) if the Commission intends to impose a new obligation on lawyers for dealing with fees received for services to be performed int he future then the Commission should fashion a set of rules to do that, rather than trying to do so by forcing an existing rule governing "trust" issues to perform that function, which leads to confusion and is at the expense of the clearly understood historical sanctity the bar has for trust funds and other assets belonging to clients

2) it is doubtful that the average criminal law practitioner would be able to operate a practice successfully without reliance upon fixed fee retainer agreements

3) the average client wants to be assured that the fee that he pays will be of a specific amount of money and no more

4) for the criminal practitioner who handles higher profile cases, the new proposals will also be disastrous in that the deposit of a client's funds into a trust account will be subject to Federal or State forfeiture

5) the State Bar is doing a disservice to the criminal practitioners in the state and the public

6) the State Bar's proposals will raise the cost of legal services and decrease the availability of such services to those who need them most - individuals accused of wrongdoing

7) the proposed amendments are not in the interest of either justice or the public interest and should be totally rejected

Stanley I. Greenberg (Attorney) opposes the proposed amendments and makes the following points:

1) as a criminal law practitioner, under the proposed amendments, he could not take title to a fixed fee and avail himself of the status of a bona fide purchaser, which would necessarily require him to commit to trials with no assurance of payment for either services or expenses.

2) the proposed amendments would allow for the seizure/forfeiture of funds held in trust accounts since they still belong to the client at any point in the proceedings

3) the proposed amendments runs squarely into the relatively new 18 USC §982 which makes forfeiture mandatory regarding "any property traceable" to the offenses at issue

4) he cannot imagine what perceived problems triggered these proposed amendments - nor can he contemplate how the problems raised by the proposed amendments can be solved

W. Kent Hamlin (Attorney) strongly urges the State Bar to recommend adoption of the proposed amendments and makes the following points:

1) the proposed amendments represent a courageous and extremely important effort by the Bar to protect clients from attorneys who are financially insolvent

2) the proposed amendment to rule 3-700(D)(2) is important to provide clear guidance to attorneys regarding what fees are earned upon receipt, on the one hand, and what fees must be placed in trust account until earned by the attorney

3) it is hoped that the State Bar has sufficient resources to enforce these rules and insure that all attorneys faithfully comply with them

4) the only problem perceived with Rule 4-100 is that attorneys are not provided much guidance as to when the attorney must leave the "disputed portion" of any unearned fees in his trust account

5) the State Bar should make a special effort to publicize these amendments

Richard M. Kaplan (Attorney) objects to the proposed changes and makes the following points:

1) the proposed amendments assume that lawyers are crooks

2) If the State Bar Board and staff would actually get out among us, it would be clear that only a very few of us are crooks -- still too many, but only a few

3) the proposed amendments are another example of the State Bar fixing something that ain't broke and protecting "public rights" that do not need protection

4) the lawyer should be able to take the fee into his office account and, to the extent that he has not earned it, refund any unearned amount at the conclusion of the case

5) the proposed amendments would interfere with a sensible process without real benefit to the client, and, because they are so contrary to sense, they would probably make numerous lawyers into inadvertent rule-breakers

Diane L. Karpman (Attorney) opposes the proposed amendments and makes the following points:

1) these substantial changes in the practice of law in the State of California are unsupported by existing case law, legal custom, and community tradition

2) it is suggested that the profession in their personal fee agreements will change the term "non-refundable fee" to "true retainer," and therefore what has been accomplished is but a sham

3) there exists no perceived benefit and only additional confusion engendered by this proposed modification

4) attorneys will not comprehend the subtle distinctions created by the proposed amendments and will therefore become negligent rule breakers

5) these modifications fail to accomplish and genuine benefit for society or for the profession and in fact result in a profound change in the practice of law

6) true thieves are going to steal, these rules are not designed to address their conduct

Kornfield, Paul & Bupp (comment signed by Irving J. Kornfield, Partner) has concerns regarding the proposed amendments and makes the following points:

1) there is extreme concern regarding the impact of the proposed rule changes on bankruptcy practice, and, in particularly, upon the ability of debtors to retain and pay counsel for handling Chapter 11 reorganization proceedings

2) in bankruptcy matter, the court passes upon the reasonableness of the attorney's compensation, and, in appropriate cases, can and does require counsel to pay back to the estate any amounts received by it which the court feels to be unreasonable

3) bankruptcy courts have had difficulty in interpreting the status of pre-filing retainers, with questions as to whether such retainers really are "earned on receipt" or if they are truly trust funds

4) if money is place into a trust account in contemplation of filing a bankruptcy, it might be subject to levies of creditors

5) by requiring that fixed, flat, and non-refundable fees be placed in a trust account seriously changes the complexion of any fee dispute between the attorney and the client over these fee arrangements

6) in the absence of the proposed amendments, the fee dispute is simply a fee dispute that does not raise ethical questions placing the attorney's license at risk

7) an attorney will be placed at serious risk that his or her good faith judgment may be second guessed, and it ultimately determined that he or she improperly removed a portion of the fees from the trust account which now is an ethical violation, rather than simply a good faith, honest fee dispute

8) the strong undercurrent of the proposed amendments is to try to make all fee agreements based on an hourly rate, which is unacceptable to both attorneys and clients

9) other professionals, such as certified public accountants, architects, orthodontists, and others who customarily receive fixed, flat or non-refundable retainers have no similar requirement that their fees be placed in a trust account - to require this of lawyers suggests that lawyers as a group are less honest and require more policing

***Los Angeles County Bar Association** (LACBA) (comment signed by Andrea Sheridan Ordin, President) generally opposes the proposed amendments and also has suggested substitute amendments which would eliminate the bases of the Association's opposition to the current proposal. LACBA makes the following points:

1) it is admitted that there can be a serious problem with lawyers who misuse advance fee payments by clients

2) it is submitted that the recommended revisions do not cure that problem and instead adversely impact upon small firm, solo, criminal and bankruptcy practitioners who as a matter of custom and practice rely heavily upon flat fees or upon alternative arrangements that are subject to court review

3) it is the "rule of thumb" in a criminal practice that the "up front" retainer paid in a criminal case must be adequate to satisfy the lawyer in the event no further payments are received

4) requiring criminal practitioners to place flat fees in an untouchable trust account for the duration of the representation unduly handcuffs the lawyer who works in a small firm or solo practice

5) flat fee and alternative fee arrangements that are subject to court review are a customary and necessary part of the business of practicing law

6) further proposed amendments are suggested which would sustain the flat fee and alternative fee arrangements that are subject to court approval as viable forms of retainer, yet protect clients from being cheated because the onus would be upon lawyers to fully advise clients of the services for which they are retained and the non-refundable nature of the fee

Murphy, Weir & Butler (comment signed by Margaret Sheneman) requests amendment of the proposed rules and makes the following points:

1) rule 3-700(D)(2) should expressly exempt a fee which is paid by or for the benefit of a limited or general partnership or a corporation, or (2) a fee which is paid in contemplation

Amil Roth (Attorney) opposes the proposed amendments to rule 4-100.

San Diego County Bar Association Legal Ethics and Unlawful Practice Committee (comment signed by Timothy J. Kozel, Chairman) generally supports the proposed amendments and makes the following points:

1) it is appropriate to clarify into which accounts a lawyer should place advance payments received from clients

2) the interests of the client should be deemed paramount and should be protected whenever possible and, for this reason, all sums except "true retainers" should be placed in a trust account

3) the rules should be clarified to state with certainty that any funds received from a client, including "true retainers," are subject to the requirement that they are not unconscionable

Jerome Sapiro, Jr. (Attorney, Member, Commission for the Revision of the Rules of Professional Conduct) opposes the proposed amendments and makes the following points:

1) lawyers have never had a duty to deposit fixed, prepaid, non-refundable fees in trust accounts

2) sole practitioners and small firms will be discouraged from representing clients in domestic relations, estate planning, business formation, immigration, or criminal defense cases in which the clients want a fixed fee, as opposed to an hourly fee

3) sole practitioners and small firms will be discouraged from representing clients in business litigation and similar cases in which the fee agreements often call for a non-refundable retainer against a contingent fee

4) the real effect of the proposed new rules, namely enriching the rich, but suppressing non-rich, attorneys will occur

5) is the State Bar now taking the unconscionable position that attorneys are a disfavored class, so that all other creditors can be paid, but attorneys may not

6) the criminal defense attorney who is not paid up front likely will never be paid

7) suppression of competition by small or less wealthy law firms or sole practitioners in business litigation, domestic relations, estate planning, immigration, or criminal defense cases should not be a result of changes in the Rules of Professional Conduct

8) the proposed new rules create inherent ambiguities that make them unenforceable

9) the proposed new rules would adopt without cause the position characterized by the Supreme Court as "novel" (Baranowski v. State Bar (1979) 24 Cal.3d 153, 164, 154 Cal.Rptr. 752, 593 P.2d 613)

10) the State Bar should not recommend to the Supreme Court that the rules to be used to make it less possible for small firms or sole practitioners who are not wealthy to compete with the wealthy firms who can wait years before getting paid

2) The proposed regulation would be especially burdensome for attorneys handling a large number of criminal defense matters

State Bar of California, Antitrust and Trade Regulation Law Section (comment signed by Eliot G. Disner, Chair) has no comment on the proposed amendments.

***State Bar of California, Board of Legal Specialization, Criminal Law Advisory Commission** (comment signed by Robin Levine, Chair) has no comment on the proposed amendments.

State Bar of California, Business Law Section, Executive Committee raises several areas of concern as follows:

1) the proposed rules may create serious difficulty particularly in the areas of debtor-creditor relations and bankruptcy

2) the proposed amendments would create problems in connection with "earned upon receipt retainers" which are commonly given in bankruptcy cases such that it is very likely that fewer attorneys would be willing to undertake representation of a debtor in a bankruptcy.

3) if the proposed amendments are to be implemented, it is recommended that either (i) the attorney be given a senior statutory lien on or a right of offset against funds which the attorney is provided by his or her client, or (ii) the proposed amendments explicitly state that they do not apply to earned upon receipt retainers

4) if the proposed amendments are to be implemented, it is recommended that (i) the flat fee be excluded or (ii) the rules elaborate on the conditions under which the flat fee will be deemed fully or partially earned or (iii) the rules require that a flat fee agreement specify the conditions under which the flat fee will be deemed fully or partially earned

State Bar of California, Client Security Fund Commission (comment signed by Kiyoko Tatsui, Director, Client Security Fund) supports the proposed amendments and makes the following points:

1) the Commission is pleased that this effort has been made to define "true retainers"

2) the Commission has seen many cases where lawyers have characterized advance fees as "non-refundable retainers" in an effort to circumvent the requirements to refund unearned fees to clients

***State Bar of California, Committee on Professional Responsibility and Conduct** (comment signed by Barton C. Sheela, III, Chair) raises concerns and suggestions regarding the proposed amendments as follow:

1) while changes in the Rules may serve to clarify the different types of fees that attorneys use, the proposed amendments do not fully accomplish that goal

2) "fixed" or "flat" fee arrangements have a place in the practice of law in that many clients prefer to have their matters handled on such a basis

3) "fixed" or "flat" fee arrangements permits the client to know in advance what it will cost for the attorney's work on the matter and also permits the client to engage in "comparison shopping" in an effort to get the best price for the job

3) requiring fees paid in advance to be deposited in the attorney's trust account will expose the attorneys to the risk that they may never be paid

4) if the Rules of Professional Conduct are changed, lawyers who need access to those funds to pay rent, secretaries, investigators, court reporters, or other expenses related to staying in business will not have access to those funds, meaning that lawyers who have typically handled such cases in the past will not be willing or able to do so in the future

5) compensation on an hourly basis is not the optimum fee agreement in many cases

6) merely requiring advance fee payments to be deposited in a trust account will not protect the public against dishonest lawyers

7) it is recommended that, instead of requiring all fees other than true retainers to be deposited in client trust accounts, the rules make it clear that fixed, non-refundable fees paid in advance need not be so deposited

State Bar of California, Office of the Chief Trial Counsel supports the proposed amendments and makes the following points:

1) there is support for the proposed amendments which would require that all advance fee payments, except for "true retainers," be placed in a member's client trust account

2) there is support for the proposed amendments which clarify that a "fixed fee," "flat fee" and "non-refundable fee" agreement is not a "true retainer" for purposes of these rules

3) it is believed that the proposed amendments will significantly assist the membership more fully complying with Rules of Professional Conduct

Stutman, Treister & Glatt (comment signed by Jeffrey C. Krause) requests that the Board of Governors not modify the existing rules, or, in the alternative, modify those rules in such a way as to preserve the right of practicing lawyers to negotiate with their clients to receive "flat fees" and "minimum fees." The firm makes the following points:

1) permitting "flat fee" and "minimum fee" arrangements is particularly appropriate in circumstances in which they will be subject to review by a court of competent jurisdiction, such as a bankruptcy court

2) to prohibit a reasonable arm's-length business arrangement between a prospective client and an attorney in all cases is an over-inclusive remedy

3) attorneys should be entitled to freedom of contract with their clients, so long as their clients understand the compensation arrangement and that arrangement is not unconscionable

4) in all bankruptcy cases, the sequestration of retainers would create real or potential conflicts of interest and greater burdens on attorneys and bankruptcy courts, with little or not countervailing benefit

5) in the context of Chapter 11 cases, because there is a prompt and meaningful avenue for judicial review to make certain that the "flat fee" or "minimum fee" is not excessive, a debtor has greater protection than do clients in most other contexts

6) requiring the deposit of all "flat fee" and "minimum fee" retainers into client trust accounts would inevitably create conflicts between attorneys and their debtor in possession clients

Joseph M. Thornhill (Attorney) raises concerns regarding the proposed amendments as follow:

1) in business reorganization under Chapter 11, it is customary to obtain a substantial retainer

2) the Rules of Professional Conduct governing retainers and the disposition thereof should not be applicable to Chapter 11 business reorganizations

3) there is already a substantial amount of judicial and administrative supervision of Chapter 11 retainers

4) the proposed amendments pose a risk of imposing inconsistent obligations on counsel, since the Ninth Circuit may construe the Bankruptcy Code in a case arising in another state, so that the inconsistency is not apparent

5) a portion of the syllabus entitled "Recent Developments in Business Bankruptcy" which accompanied a panel presentation by the Commercial Law and Bankruptcy Section of the Bar Association of San Francisco is enclosed for consideration

James E. Wasson (Attorney) strenuously objects to the proposed amendments and makes the following points:

1) the proposed amendments would create a tremendous detriment to the small practitioner and those attorneys operating near the break-even line and may very well be the causation to cease the practice of law

2) as a sole practitioner specializing in family law and criminal law, minimum non-refundable retainers provide a source of funds to pay fixed overhead and allow him to continue his practice of law

3) minimum non-refundable retainers ensure that a client is serious about their case

4) the entire inception is not well thought out, nor do I think that the Commission really understands the nature of the practice of criminal law in the State of California, let alone the practice of family law in the State of California

5) the proposed amendments are not in the best interests of the consumer public in California

David S. White (Attorney) strongly urges the State Bar not to adopt the proposed amendments and makes the following points:

1) the proposed amendments would drastically discriminate against solo practitioners and small firms who have conducted their business in these regards quite satisfactorily for many years without regulation

2) the proposed amendments are an unwarranted intrusion in the finances of small and solo practices, particularly in these dire economic times

3) the proposed rules would be subject to constitutional challenge, unnecessary litigation, and ultimately to the devising of various vehicles to avoid the rule altogether

4) the less regulation in this area the better - leave this area well enough alone

5) the State Bar should be much more concerned with policing the truly incompetent practitioners and curbing the sometimes astounding sharp practices of litigators, particularly in the larger cities

EXHIBIT C

THE STATE BAR
OF CALIFORNIA

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

100 VAN NESS AVENUE, 28th FLOOR, SAN FRANCISCO, CALIFORNIA 94102-5218 TELEPHONE: (415) 241-2157

RECEIVED
MAY 22 1991
PROF. RESP. AND CONDUCT DEPT.
THE STATE BAR OF CALIFORNIA

DATE: May 20, 1991

TO: State Bar of California Commission for the Revision of the Rules of Professional Conduct

FROM: State Bar of California Committee on Professional Responsibility and Conduct

SUBJECT: Comment on Proposed Amendments to the California Rules of Professional Conduct

1. Rule 1-100(B)(3)

The Committee approves of the proposed amendment to rule 1-100(B)(3).

2. Rule 3-310

The Committee has considered the proposed changes to rule 3-310. While we find that many of the proposed changes will provide needed clarity to the rule, we are deeply troubled by the proposed change that would do away with the requirement of written consent in certain instances. In addition, we find that there are certain portions of the rule that are still unclear and could benefit by further clarification.

We approved of the changes to subsections B and C which delineate situations posing potential conflicts of interest. We believe that by identifying situations in which a potential conflict of interest exists, the practitioner will be educated by the rule itself. This is a change for the better. We believe that the addition of the word "relevant" to section A of the proposed rule is likewise a change for the better. We believe that the present rule requiring the disclosure of "the circumstances" to too broad and that the addition of the word "relevant" will focus the practitioner on exactly what it is the client need be told in these situations.

However, we disagree strongly with the Commission's decision to delete the requirement of written consent in situations delineated in subsection B of the proposed rule. It is our belief that written consent should be required in each of those situations. We further believe that requiring consent in writing will make this portion of the rule consistent with the other portions.

persons or entitles involved in litigation may cause clients or outsiders to question the personal interest of the member. We believe this is one of the most important rules contained in the Rules of Professional Conduct. From our own work with the Rules of Professional Conduct, we recognize that many times drafting a clear and concise rule is extremely difficult, and we applaud the Commission for its efforts in this regard. However, we wish to reiterate our strong belief in the need for written consent in each of the situations covered by rule 3-310.

3. Rules 3-700 and 4-100

Generally, the Committee believes that the proposed amendments are positive ones, in that they help clarify the existing language and protect the interests of the consumers of legal services.

The Committee believes, however, that non-refundable retainers, like "true retainers," are presumptively "earned" upon receipt, subject to the requirements of rule 4-200 concerning unconscionability of fees.

Specifically, the Committee is concerned that the language of the proposed discussion section of 4-100, when read together with the last sentence of 3-700(D)(2) and the new discussion paragraph on subsection (D)(2), may unduly restrict the lawyer's ability to charge a truly non-refundable retainer in appropriate circumstances.

Non-refundable retainers in many cases have virtually the same purpose as the "true retainers" defined in 3-700(D)(2). They may represent the reasonable value of the process of establishing a file, obtaining initial information, precluding the representation of other clients with conflicting interests, and the commitment and reservation of time in furtherance of the client's cause.

For example, a lawyer in a domestic case may be unwilling to open a file and make time for the case (and a troubled client) without a non-refundable retainer of, say, $1000. The lawyer may agree to credit the client at the lawyer's hourly rate, while still insisting on a minimum "start-up" fee.

It may be argued that the current proposed language allows lawyers the opportunity to show that a particular non-refundable retainer was indeed "earned." But the present language of 3-700(D)(2) and its discussion implies by the concept of inclusio unius est exclusio alterius, that excepting "true retainers" from the rule distinguishes them from non-refundable retainers. This implication is exacerbated by the discussion language of 4-100, which singles out such retainers for possible refund under 3-700.

Another concern of commission members goes beyond the particular experience of the Trust Fund Program. That is the possibility that a second result of decreasing the funds in trust accounts will be an increased risk that clients will lose money. The more lawyers are free to spend fees they have not yet earned, the more likely it is that some of the money will be unavailable for return to clients when the lawyer withdraws or is discharged.

Moreover, some commission members believe the rule as drafted will confuse clients and put attorneys at an unfair advantage. The rule gives lawyers an incentive to characterize advanced fees as "non-refundable," even when the lawyer knows the fee must be refunded if the work is not done. But while the lawyer knows that, the client does not. The client may not request a refund of the fee if the work is not completed, or may not complain if the fee is not refunded. During the course of the representation, the client is likely to avoid discharging the lawyer even for good cause, believing the advanced fee is gone forever.

For these reasons, the Legal Services Trust Fund Commission opposes the revision of Rule 4-100 as proposed.

As for how the rule should be revised, the Commission sees more than one possibility. A majority of Trust Fund Commission members believe that whenever a fee paid in advance would be partially or completely refunded if the work being paid for is not completed, the money should go in a trust account. They would favor Rule 4-100 saying as clearly and unequivocally as possible that all fees for legal work that is to be done in the future, whether the fees are characterized as "non-refundable" or not, must be placed in a trust account, to be withdrawn on a pro rata basis as the work is completed. This is the Commission's recommended solution to the problem.

The Trust Fund Commission recognizes this is a difficult issue, however, on which there are many views and competing interests. Consequently it may be necessary to consider other ways of approaching the problem. One possibility would be to add paragraph (B) to Rule 4-100 as follows:

> For purposes of this rule, unless a fee paid in advance is a true retainer (as set forth in rule 3-700(D)(2)), all advance fees received shall be deposited in one or more bank accounts defined in paragraph (A).

This might work as a definition of "advance fee." On the other hand, you may conclude that the difficulties of trying to define "advance fee" in a way that will eliminate confusion and uncertainty outweigh the possible benefits. Or it may be that such a definition is possible but that the unlikelihood of acceptance by the bar of a rule that is either so inclusive or not inclusive enough argues against it. In that event the Trust Fund Commission would favor a rule that would continue what is

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THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation

Commenting on behalf of an organization

- ○ Yes
- ◉ No

*** Name** Robert A. Kahn

*** City** San Francisco

*** State** California

*** Email address** (You will receive a copy of your comment submission.) rkahn@fenwick.com

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ◉ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

While I understand the need to protect consumers, the proposed rule, as stated, represents a possible difficulty for law firms trying to arrange fee agreements with business clients, such as monthly flat fee arrangements and other fee arrangements that are alternatives to the hourly billing model. More and more corporate clients are demanding fee alternatives to hourly billing, and it would be a huge disservice to this important segment of the legal market to create a rule that potentially jeopardizes and/or limits the ability of law firms and their business clients to create new billing models that are mutually beneficial.

I urge the state bar to consider revising the proposed rule to specifically protect individual consumers or otherwise limit to language to avoid impinging the ability of law firms to develop the type of alternative fee arrangements that are growing in popularity with corporate clients, such as monthly, flat-fee payments that would run afoul of the proposed rule.

Attachments

You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the ? next to **Attachment**.

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THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation

Commenting on behalf of an organization
- ○ Yes
- ◉ No

*** Name** Hugh Anthony Levine

*** City** San Francisco

*** State** California

*** Email address** (You will receive a copy of your comment submission.) halesq@ix.netcom.com

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ◉ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

This is my 37th year of practicing law, during which career, all of which has been devoted to criminal law, first as a prosecutor and later as a criminal defense lawyer, I have through my courtroom achievements attained a reputation and status which enable me to achieve outstanding results for my clients without engaging in unnecessary litigation.

Why shouldn't I be able to charge a non-refundable fee for obtaining an outstanding result for my client through perhaps a couple of hours of negotiation with the assigned prosecutor? Must I be relegated to receiving perhaps $1,000 for achieving this outstanding result based on an hourly fee when a less capable, less accomplished, less recognized attorney might not be able to achieve that same result despite dozens of hours of unnecessary litigation?

[CONTINUED...] [SEE ATTACHMENT FOR FULL TEXT]

Attachments

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6/5/2008	PC	C-2008-198 Hugh Anthony Levine [1.5]	Entire Rule	1.5	Online

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FULL TEXT OF COMMENTS SUBMITTED BY HUGH ANTHONY LEVINE

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This is my 37th year of practicing law, during which career, all of which has been devoted to criminal law, first as a prosecutor and later as a criminal defense lawyer, I have through my courtroom achievements attained a reputation and status which enable me to achieve outstanding results for my clients without engaging in unnecessary litigation.

Why shouldn't I be able to charge a non-refundable fee for obtaining an outstanding result for my client through perhaps a couple of hours of negotiation with the assigned prosecutor? Must I be relegated to receiving perhaps $1,000 for achieving this outstanding result based on an hourly fee when a less capable, less accomplished, less recognized attorney might not be able to achieve that same result despite dozens of hours of unnecessary litigation?

This proposed rule strikes me as nonsensical as well as completely stultifying of the exceptional talents of exceptional lawyers who can obtain exceptional results for their clients because of who they are, i.e., because of the stature they have attained in their legal milieu as the result of decades of superlative practice.

This proposed rule will do vastly more harm than good, and invites a situation where lawyers will engage even more phony time-billing than they do now, comparable to a financial advisor who "churns" a client's portfolio in order to generate transaction fees.

Where is the rationale for so dramatic a restructuring of the way attorneys have conducted their financial relationships with clients for decades? Certainly it is not found in ABA Model Rules. The only apparent rationale appears to be a cynical if not sinister desire to provide more funds for the State Bar through a stealth measure which would generate more revenue from IOLTA accounts.

I strongly urge the proponents of this misguided and misbegotten proposal to abandon it.

Submitted on 2008-06-05 11:25

THE STATE BAR OF CALIFORNIA

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PUBLIC COMMENT FORM

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DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation Attorney

Commenting on behalf of an organization
- ○ Yes
- ◉ No

*** Name** Knut Johnson

*** City** San Diego

*** State** California

*** Email address** (You will receive a copy of your comment submission.) knut@knutjohnson.com

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ◉ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

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file: Letter to State Bar re Fee Agreements.pdf (20k) Upload

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file: BIO.pdf (13k) Upload

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knut@knutjohnson.com

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6/5/2008	PC	C-2008-200 Knut Johnson [1.5]	Rule Section(s) Only

Specify:	Submitted via:
1.5(f)	Online

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www.knutjohnson.com
knut@knutjohnson.com

June 5, 2008

Via telefax: (415) 538-2171, email (Audrey.Hollins@calbar.ca.gov) & U.S. Mail
Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, California 94105

Re: Opposition to Proposed New State Bar Rule 1.5(f) (4-200) (Fees for Legal Services) Abolishing Non-refundable Retainers

Dear Ms. Hollins:

I am writing you to join in with my colleagues who have written to oppose Proposed New State Bar Rule 1.5(f) (4-200), which would abolish non-refundable retainers. I will not reiterate the well researched and eloquent arguments of Barry Tarlow in his letter to you dated May 20, 2008, but I agree with every point he makes. I have attached to this letter a short biography that I hope will give you some insight into my experience and background so that you may fairly evaluate my comments.

I would, however, like to make some additional points and to share with you my personal experience. Let me explain my experience with non-refundable flat fees. I am a criminal defense attorney in private practice in San Diego. I handle both appointed and retained cases in state and federal court. The federal court pays an hourly rate for my work, and the state court pays a non-refundable flat fee. I work just as hard in either case, accomplish similar results, and have done so for years. In addition, the county does not want to go to an hourly based fee system so as to avoid unexpected costs.

The rational to abolishing non-refundable fees is an insult to attorneys who have used them ethically and fairly for years. The rational seems to be that some attorneys may abuse such fee agreements. However, as I will set out below, all fee arrangements are subject to some sort of potential abuse and singling out one form of fee agreements that has the many benefits and salutary effects noted by Mr. Tarlow is not in the best interest of attorneys or clients.

The Proposal eliminates "non-refundable" flat fees, but by doing so effectively eliminates any flat fees for criminal practitioners. As a criminal defense attorney, I know that once I take on a case I cannot get off the case just because I have not been paid. Thus, whether it is a flat fee or an hourly rate, I must be paid before staring work or I risk bankrupting myself by representing a client for free. Therefore, if I enter into a flat-fee agreement, and then later a client "fires" me for no cause before the end of the case I may have to return fees that may have been earned. Thus, I am much more likely to charge an hourly rate and bill for every second that I spend on a client's case. The frame of mind of "how much time have I spent" instead of "what have I accomplished" does not promote effective lawyering or good attorney-client relations.

In my retained work I explain to all clients the nature of non-refundable flat fees and offer the client the choice of a flat fee or an hourly rate. Only about 5% chose an hourly rate when I explain that they will pay for any visits with me, all phone calls and e-mails, my discussions and brainstorming with colleagues, and all unexpected tasks related to their case. Because my case load is dominated by cases with a high emotional content, the 95% of clients who chose a flat fee know that they are free to call and visit with me at any time, at no additional cost, which is an enormous benefit for them emotionally and for me in promoting a good attorney-client relationship. I am better able to represent clients and to avoid any conflicts of interest when the monetary issues are all resolved before my representation begins.

I have worked in a large firm, a small firm, and a public interest office and I understand the finances of each. However, any firm billing for work is far better off, as is the client, with a fair non-refundable flat fee. For example, recently, a 94 year old member of my church had me review a bill from the law firm that is administering his trust. A quick review of that bill shows clearly that the firm is having their client pay to train their most junior lawyer. That despicable practice would not occur if they had charged a flat fee.

As Mr. Tarlow predicts in his letter, if the Proposal is enacted I would have to charge a much higher fee. I run a small office, with low overhead. However, to absorb the potential accounting costs, loss of use of fees for overhead early in the case, and the potential loss of fees if a client fires me without cause (something that has never happened to me before) I would need to charge higher fees.

I would also like to make several observations about what the result of the Proposal would be. First, the Proposal would force attorneys in virtually all cases to accept on hourly fees. The problem with that change is that hourly fee agreements have been criticized as being unfair to the clients and unethical. *See*, The Billable Hour Must Die, ABA Journal, August 2007. The hourly billing structure promotes attorney fraud, rewards inefficiency, and rewards overstaffing cases (most often by large firms). As was stated in the ABA Journal, every hourly fee agreement should be preceded with this disclosure: "I want you to understand that I'm going to bill you on a basis in which the frank economic incentives favor prolonging rather than shortening the litigation for which you've hired me." If that discussion did occur, every client would choose a non-refundable flat fee.

Numerous arguments exist, of course, to support hourly fees (which I have charged in appropriate cases). However, every argument in support of hourly billing (ethical lawyers will not overbill; smart lawyers will not be inefficient; honest firms will not overstaff) can be used to support non-refundable flat fees.

At this time in history, there has been a groundswell of support for billing alternatives to the hourly rate[1]. Abolishing non-refundable flat fees is a step backward

[1] In addition to the ABA Journal, see also: Winning Alternatives to the Billable Hour: Strategies That Work, Second Edition, by James A. Calloway and Mark A.

for the legal profession and hurts the public. I hope that the State Bar rejects the proposed change to Rule 1.5.

Sincerely,

/s/ Knut S. Johnson

Knut S. Johnson

Robertson, (ABA October 2002) or simply google "hourly legal fees alternatives." The main opposition to alternatives (such as non refundable flat fees) is from large firm lawyers and government employees who either have a large financial stake in promoting hourly fees or do not understand the realities of private practice.

KNUT S. JOHNSON, ESQ.

Education

J.D., c*um laude* University of San Diego School of Law, 1986 [*Outstanding Criminal Clinical Intern Award*]

B.S., with honors in Earth Science, Tulane University, 1980 [*W.A. Tarr Award for Outstanding Earth Science Graduate*]

Professional Affiliations

State Bar of California, *Certified Specialist Criminal Law*

New Mexico State Bar

American Bar Association (*Chairman*, Solo & Small Firm Committee, Criminal Justice Section [2000-2006])

San Diego Criminal Defense Bar Association (Board of Directors; *President [2001-2002]*)

San Diego Criminal Defense Lawyers Club

Criminal Justice Act Panel, Representative to Southern District of California [2006 -]

Attorney Representative, Ninth Circuit Court of Appeal [2001-2005]

Prior Work

Gulf Oil Exploration Co. (*Petroleum Geologist* 1980-1983)

Jenkins & Perry (*Associate* 1986-1988)

Federal Defenders of San Diego, Inc. (*Trial Attorney* 1988-1992; *Senior Trial Attorney* 1992-1994)

McKenna & Cuneo (*Associate* 1994-1996)

Knut S. Johnson is an attorney who defends people and organizations that government agencies are investigating and prosecuting. He was selected by his peers to be included in the Bar Register of Preeminent Lawyers, The Best Lawyers in America, and Southern California Super Lawyers. He is certified by the State Bar of California as a Criminal Law Specialist, and is the 2006 recipient of the E. Stanley Conant Award from the Defenders Organizations of San Diego for his dedication to indigent defense. Martindale Hubble has awarded him an AV rating, their highest rating for ethics and legal ability.

He has been an adjunct professor of law at the University of San Diego School of Law and California Western School of Law. Additionally, he has been on the faculty of the Institute for Criminal Defense Advocacy and the National Institute of Trial Advocacy. He has also taught trial advocacy in Azerbaijan and the Republic of Georgia as part of legal reforms conducted by the American Bar Association – Central European and Eurasian Law Initiative (CEELI).

Mr. Johnson has tried state and federal felony jury trials to verdict and represented clients throughout the United States. His clients have been charged with a wide range of crime, including murder, minor misdemeanor offenses, serious violent crimes, weapons offenses, narcotics crimes, environmental crimes, and complex white collar and regulatory offenses.

Mr. Johnson has also represented clients on appeal an in petitions for writs of *habeas corpus*. He has practiced before the U.S. Court of Appeals for the Ninth Circuit, as well as in petitions for certiorari to the United States Supreme Court. He has also practiced before the California Courts of Appeal and the California Supreme Court. Published opinions include United States v. Hebert, 201 F.3d 1103 (9th Cir. 2000); United States v. Garcia-Barron, 116 F.3d 1305 (9th Cir. 1997), S.E.C. v. Worthen, 98 F.3d 480 (9th Cir. 1996), and United States v. Soyland, 3 F.3d 1313 (9th Cir. 1993).

Mr. Johnson has lectured about criminal justice issues to bar associations and other groups of lawyers, including the American Bar Association and local bar associations. He has also authored articles on topics related to criminal justice. Those articles include the following: “Overview of Chapter 208, Speedy Trial,” Commentary, National Institute for Trial Advocacy Commentaries for USCS Materials Title 18, Crimes and Criminal Procedure Part II (National Institute of Trial Advocacy, 2004); "Guilt or Innocence in the Court of Public Opinion," San Diego Union Tribune Opinion Page April 18, 2002 (With Laura Berend); "On Your Own: Solo and Small Firm Practices," Criminal Justice, Winter 2001 (15:4) (Reprinted in GP Solo, "The Best Articles Published by the ABA, September 2001 (Vol. 18, No. 6)); “Responding to Subpoenas: Constitutional and Practical Issues,” The Champion, Vol. XXI, No. 1 (January/February 1997); “Juvenile Delinquents and Federal Law,” The Champion, Vol. XV, No. 4 (May 1991); Defending a Federal Criminal Case, Federal Juvenile Crimes Chapter, 1990, 1992, 1994, 1998, 2001 and co-author Federal Firearms Chapter, 1994.

THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation

Commenting on behalf of an organization

- ○ Yes
- ○ No

*** Name** Kurt David Hermansen

*** City** San Diego

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) kdh@kurtdavidhermansen.com

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.5 Fees for Legal Services [4-200]

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- ○ AGREE ONLY IF MODIFIED

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My state bar # is 166349

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6/5/2008	PC	C-2008-201 Kurt David Hermansen [1.5]	Entire Rule

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DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation private practitioner

Commenting on behalf of an organization
- ○ Yes
- ◉ No

*** Name**

*** City** san diego

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) frederickcarroll@hotmail.com

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
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- ○ AGREE ONLY IF MODIFIED

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I concur wholeheartedly with Mr.Tarlow's comments. As criminal practitioners we are often unable to collect fees as it is. Defendants have a variety of options should they be misrepresented. Nonrefundable fees ensure top quality representation.

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6/5/2008	PC	C-2008-202 Anonymous [1.5(f)]	Rule Section(s) Only	1.5(f)	Online

* Required

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Hollins, Audrey

From: Peter J. Hughes [pjhapc@sbcglobal.net]
Sent: Thursday, June 05, 2008 2:49 PM
To: Hollins, Audrey
Subject: Non Refundable Minimum Fee Agreements

I have been admitted to practice in California since July 1953 (State Bar Number: 24324), have been a certified criminal law specialist since the program was initiated and was a member of the Board of Governors representing San Diego and Imperial counties from 1976 to 1079, having chaired the Committee on Discipline for two years. I have been in private practice since September 1959 and since September 1978 been a sole practitioner limiting most of my practice to the defense of criminal cases in the state and federal courts. For more than seven years I have been a member of the Legal Ethics Committee of the San Diego County Bar and for more than five years on the board of directors of the San Diego Criminal Defense Bar Association.

I urge your office, any and all committees of the Board and the Board to reject all proposals to abolish non-refundable retainers.
I know that I speak for many and most probably all of my private retained criminal defense counsel in advocating this position. I have carefully reviewed the twenty-five page letter to you from attorney Barry Tarlow whom I have known for many years and the email from attorney John Phillips with whom I have shared office space for more than twenty-five years. I fully adopt and support the positions advocated by each of them and will not burden this message with repetition. My many years of private retained criminal practice mirrors what John and Barry articulate so well.

Peter J. Hughes

--
Peter J. Hughes
1010 Second Avenue, #1840
San Diego, CA 92101
619/234-6696 (direct)
619/234-6695 (7/24)

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Hollins, Audrey

From: John G. (Jack) Phillips [jgpapc@sbcglobal.net]
Sent: Thursday, June 05, 2008 11:24 AM
To: Hollins, Audrey
Subject: Non refundable minimum fee agreements

It is my understanding you are the person to whom comments regarding the issue of non refundable minimum fee agreements should be addressed, if not please advise to whom I should address my comments regarding this issue.

I am a sole practitioner and have practiced for 40 years. My practice is a majority criminal defense and I also represent plaintiffs in personal injury cases.

I have used the same minimum non refundable fee agreement for 38 years (I was in the District Attorneys office for 2 years) , updated as required by the Bus and Pro Code. I have never had a fee dispute with a client as it relates to my fee agreement.

It is my understanding this issue has come up 2 times before with some committee with the State Bar in the last 10 years and to my understanding it was soundly defeated.....Why has it come back now and why hasn't there been more publication of this issue until recently? It does seem to be a solution without a problem.

I know that Barry Tarlow has written an extensive (approx 25 pages) letter regarding this issue. If you don't have a copy of that letter, please let me know and I will forward a copy to you. Mr. Tarlow sets forth numerous reasons that these agreements are good for the clients and the attorneys.

If I charge an excessive fee, the State Bar should intervene, if I don't, let me make my fee arrangements with my clients.

There will always be cheaters and chislers in our business. The State Bar should deal with them appropriately. This proposed change throws out the baby with the bath water.....

However to take away our right to deal with our clients at arms lengths regarding our fees is our business, some lawyers charge more than others, some charge less. That is the free enterprise system and there are an abundance of lawyers in California and a prospective client has ample opportunity to shop around.

Attorney
John G. "Jack" Phillips
1010 Second Ave.
Suite 1840
San Diego, CA 92101

619-234-0163 Phone
619-696-0155 Fax

Hollins, Audrey

From: Michael L. Crowley [mlcrowley@usa.net]
Sent: Friday, June 06, 2008 9:33 AM
To: Hollins, Audrey
Cc: sddefense@googlegroups.com
Subject: Letter to Commission on Rule revisions

Attachments: CDBA non-refund ltr.pdf



CDBA non-refund ltr.pdf (53 KB...

Dear Ms. Hollins:

Attached is a letter of concern from the organizations I represent. Your website rejected the letter stating the period for comment had closed. This occurred, despite the fact that the deadline published for comment was today. Please confirm to me that this letter will make it to the Commissioners for their consideration. Thank you.

Michael L. Crowley
CDBA President
mlcrowley@usa.net

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CRIMINAL DEFENSE BAR ASSOCIATION OF SAN DIEGO
302 WASHINGTON ST., BOX 137
SAN DIEGO, CALIFORNIA 92103

CRIMINAL DEFENSE LAWYER'S CLUB OF SAN DIEGO
P.O. BOX 128193
SAN DIEGO, CALIFORNIA 92112-8193

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June 6, 2008

Ms. Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, California 94105

To the Commissioners of the State Bar Special Commission for the Revision of the Rules of Professional Conduct:

This is written to express our opposition to proposed rule 1.5(f) on behalf of the two criminal defense organizations of San Diego representing nearly 400 attorneys and thousands of years of legal experience. It is our belief that this provision would prohibit a time-honored and client-preferred method of charging for the representation of people accused of crimes under our legal system.

Most people charged with crimes appreciate the certitude of a fixed fee that is going to carry them through the ordeal of facing the charges brought by the government. It also provides a level of comfort for their counsel that the counsel is going to be compensated appropriately for the work performed. The public recognizes that counsel can be held in cases despite economic hardship to counsel because of the higher need from speedy justice. At the same time all counsel utilizing the payment method understand that any unreasonable fee must be refunded under state bar rules.

Since one of the charges of your Commission is to attempt to conform California rules, whenever possible, to the ABA Model Rules, the standard set forth by the ABA should be adopted. This was also recommended by the San Diego County Bar ethics committee in a letter to your staff. It makes no sense to cling to a hoary notion from the early part of the last century that the current unconscionability standard of the current Rule 4-200 which with its enumerated factors really represents a distinction from a reasonableness standard by naming it something other than reasonableness. A reasonableness standard should be utilized by arbitrators and civil courts for fee disputes and when a fee, coupled with the refusal to give a refund, shocks the conscious, then disciplinary action would be appropriate. This Commission should take the time and effort to set up this appropriate system as the ABA recommends.

There are a plethora of reasons why the non-refundable retainer works which we know have been made known to this Commission through other comments. One example is that this fee agreement prevents "check-book defense" such that a decision as to whether a meritorious motion or legal task should be undertaken is made based on the funding. Criminal defense, in contrast to many civil practices, requires that every meritorious action be taken to provide zealous representation even when it is known the chances of success may be very slim. In the civil context a cost-benefit analysis of a particular legal action is often appropriate while it should never be used in highly competent criminal defense.

It is ironic that this Commission would be forcing the criminal defense bar into an hourly system when our own state bar president has appropriately questioned and documented how the hourly system has caused the costs of legal services to rise and serve as a disservice to the consumers and counsel. (*See,* Bleich, Jeff. Escaping the billable hours trap; *California Bar Journal*, April 2008). Rather than taking a macro view of billing systems, this Commission with this proposal appears to just opt for a provision which throws the proverbial baby out with the bath water. The words of our president should be examined closely by this Commission before tossing an alternative system that has worked well for decades and not providing a substitute other than one which is deeply flawed.

It should not be forgotten that these contracts are often made by savvy legal consumers in arm-length transactions. The consumer, of course, has the opportunity to reject or negotiate a different contract. Some criminal defense does lend itself better to an hourly system and may be preferred by a particular consumer. Many of our members provide our clients with a choice of payment plans. Because of the nature of the criminal defense practice, however, counsel must find a way to be assured of payment when the financial circumstances of a client charged with a crime are often in flux. That is, fees are often impossible to collect after the case has proceed in an expeditious manner as required by the U.S. and California Constitutions.

If attorneys are abusing this system they should and are required to be held to a reasonable fee standard. If they are abusing it to a degree that shocks the conscious then they should be disciplined. This is the system you should strive to provide rather than short-changing the consumer and their counsel with this short-sighted proposal.

Our organizations work hard to rise the level of competency of our members. We are constantly endeavoring to provide the tools for our membership to act ethically and with the highest level of service to our clients. Our clients, in the best of circumstances, are likely undergoing the most traumatic event in their life. Because of the variety of circumstances a person may find themselves when entangled in the

criminal justice system, they should not be precluded from a particular form of contract which can give them some peace of mind, complete access to their counsel without concern of increased costs of such access and a reduction in the potential for a conflict arising as to what work needs to be done, such that everything possible is done for the defense of the client.

There are many other reasons why the current system does work. Most clients are satisfied by the representation of their counsel even when they may be being carted off to prison. This is because they feel everything that could be done, was done for a fair price. Figuring out our billing systems is a necessary evil of the practice of all law. Specifically excluding one system of billing unnecessarily, should not be undertaken, especially in the disciplinary context. We urge you to reject and re-think and re-tool this proposal in interests of the consumer and counsel alike. Thank you.

Michael L. Crowley,
President
Criminal Defense Bar Association of San Diego

Christopher J. Plourd,
President
Criminal Defense Lawyer's Club of San Diego

RAFAEL CHODOS, Attorney at Law

A Professional Corporation
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Email: Rafael@chodos.com

6/3/2008

Audrey Hollins
THE STATE BAR OF CALIFORNIA
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, CA 94105

re: Proposed New Rule 1.5, subsection (f) [Rule 4-200]

Dear Ms. Hollins:

I recently received a copy of Proposed New Rule 1.5(f), and I am writing you to express my STRONG OBJECTION to its language.

The language I have been given reads as follows:

(f) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except that a lawyer may make an agreement, for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter.

I am attaching a copy of an OpEd piece I submitted to the Daily Journal, in opposition to this language.

Cordially,

Rafael Chodos

PROPOSED RULE 1.5(f) GETS AN "F"
Opinion, by Rafael Chodos, Esq.

The State Bar has recently released a draft of Proposed New Rule 1.5(f), which reads as follows:

> (f) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except that a lawyer may make an agreement, for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter.

The Bar has not indicated why the proposed language is needed, but whatever the perceived need might be it is very clear that the language fails conspicuously to meet it, for the following "three good reasons:"

1. **The proposed Rule cannot possibly mean what it actually says.** [a] The prohibition against collecting a non-refundable fee, if interpreted literally, would mean that every fee a lawyer collects, except for "true retainer fees," would have to be refundable - even fees charged for work done and completed. [b] Under the proposed language, a lawyer could collect a retainer fee paid solely for the purpose of ensuring his availability for the matter, yet then be run over by a truck and not have to return the fee.

2. **The proposed Rule does not address the issues which must really be on the draftsmen's minds, and those issues are already addressed elsewhere.** The draftsmen's idea, surely, is that it should be improper to require a client to deposit money with an attorney that is intended to pay for identified work to be completed after the time of the deposit, and then to refuse to return the money when it turns out that the work never is actually completed. But already under present law, such money would be viewed as trust funds held by the attorney for the client's benefit to be applied to the designated purpose; and like all trust funds, the money would have to be returned to the client if the purpose for which it was entrusted evaporated. The real issue that the proposed Rule is trying to address is not the nature of the fee agreement, but the obligation of the attorney to refund any unearned portion of the fee. But this obligation is already addressed in Rule 3-700(d) which states clearly that upon termination of the attorney-client relationship, the attorney must return to the client all unearned fees. See also Clark v. Millsap (1926) 197 Cal. 765, for an early case applying this idea.

The "true retainer" issue arises also when a client, eager to remove his assets from the reach of his creditors, transfers them to his trusted attorney characterizing them as "a true retainer." It might be desirable to pass a Rule to prevent such schemes. But already, under existing law, the court may

(c) Rafael Chodos 2008

disbelieve the collusive characterization and require the attorney to treat the assets as trust funds. See e.g. Brothers v. Kern (2007) 154 Cal.App.4th 126, a recent case in which this very thing happened. What is really at stake in these sorts of cases is the honesty of the characterization rather than the propriety of the alleged fee arrangement; and the proposed Rule does not address that issue at all.

3. **Lurking behind the proposed language is an unspoken assumption which is both rigid and improvident.** The characterization of a given fixed payment as a "retainer" must be left to the agreement of the attorney and the client. To the extent that any payment is said to be "non-refundable" it is, by definition, part of the "true retainer." For if the lawyer says to the client, "I will not be available to work on your matter unless you give me $X in advance as a nonrefundable fee," then $X is a retainer -- period.

Even if the lawyer agrees to perform some specific work as part of the initial transaction, that does not render the fixed payment anything other than a "true retainer." After all, making oneself available to work on a matter necessarily involves a lot of work: reading the existing papers, studying the applicable law, taking long walks in the forest to decide what the overall strategy should be, and clearing one's calendar in order to have time and focus available for the matter - all these things have to be done as part of the initial work. Depending on the circumstances, the nonrefundability of the fee should not be affected even if some of this work ends up not having to be done. If for example, the other side sees the error of its ways shortly after reading the new lawyer's first filings and settles quickly; or if the client changes his mind after the attorney has gone through his "make myself available" routine; or if a new case comes down which makes the legal landscape less hostile -- none of these events should require the attorney to change the deal and refund the fee. As in all contracts, there is an allocation of risks and benefits imbedded in the arrangement between the lawyer and his client, and this allocation is part of the deal the courts must enforce.

The proposed language emanates from the rigid assumption that lawyers' charges must be capable of being broken down into identified units such as hours or specific tasks. But lawyers are not required to bill by hours, nor by specific tasks, nor is hourly or task billing always the best approach for the client. Nor is the contingent fee the only alternative: sometimes mixed fee arrangements, with components drawn from hourly billing, task billing, and contingencies, are best for both parties. When the parties discuss all the myriad elements of risk and work, and make an agreement, that becomes their deal and it must be respected and enforced. The Bar should not be poking its bureaucratic nose into these negotiations so long as they are open, free from fraud, agreed to by both sides, and provided the fee agreement is in compliance with Rule 4-200.

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Too bad that there is no general prohibition in our law against passing a superfluous or redundant rule or statute. If there were such a "meta-rule" our statute books would be a fraction of their present size and all our lives would be much easier -- and this proposed Rule 1.5(f) would not have made it as far as it apparently has.

****

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Author of THE LAW OF FIDUCIARY DUTIES
In solo practice for 30 years.

MEMORANDUM

Date: April 22, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subject: Proposed Rule 1.5 - Fees For Legal Services
[Existing CRPC Rule 4-200]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Disapprove Proposed Rule 1.5 and adopt ABA Model Rule 1.5a with the addition of those factors set forth in existing CRPC Rule 4-200 to determine reasonableness that are not in existing ABA Model Rule 1.5.

Rationale For Comment 1: In the interest of uniformity, guidance to attorneys, and fairness, reasonableness should be the standard and the client's informed consent should be a consideration in determining whether a fee is ethical. Mandatory fee arbitration has a history of successfully resolving these issues.

THE SALL LAW FIRM
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BRANDON N KRUEGER

June 6, 2008

Via Facsimile & U.S. Mail

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning
and Development
180 Howard Street
San Francisco, CA 94105

Re: Public Comment on Proposed Rules of Professional Conduct

Dear Ms. Hollins:

I am submitting public comment on the current set of Proposed Rules of Professional Conduct. I a member of the Orange County Bar Associations Professionalism and Ethics Committee, and the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee. However, these comments are mine alone and do not reflect the deliberations of those committees. I am also a former member of COPRAC and a former chair of the Standing Committee on Mandatory Fee Arbitration.

Rule 1.5 -- Fees for Legal Services

It is time that California get on board with the reasonable fee standard applicable in all other states. It is my perception that a lawyer should never charge an unreasonable fee. There is plenty of case law that mandates a fee agreement must be fair and reasonable to a client, so high could that requirement exist in an environment where the fee charged can be unreasonable?

I recognize that a reason for maintaining the "unconscionability" standard is out of a concern that lawyers should not be disciplined if they make a fee request in a court or arbitration, and the trier of fact decides to disallow some portion of the fee as unreasonable, or determines a different amount. This problem can be avoided by crafting the rule to set the policy that an attorney may only charge a reasonable fee, but that the State Bar shall not prosecute an attorney unless he or she has sought to charge a fee that is unconscionable.

Let's face it. The Rules establish standards of conduct, even if they don't create civil cause

of action. We look to the rules for guidance. As a matter of public policy, lawyers must be told that there fees cannot be unreasonable. Once that practice standard is established, it is permissible to have a slightly more elevated requirement (such as unconscionability) for discipline beyond a mere private reproval to be imposed. I can imagine that some on the Commission will say that they cannot impose this two-step process of setting one standard for policy reasons, and a different standard for discipline, yet that is exactly what exists in our current rule 2-400 which sets a policy against discrimination, yet subsection (C) prohibits any disciplinary investigation unless there has been an adjudication of wrongdoing in a different forum. You can impose the same dichotomy on reasonable versus unconscionable fees.

We need to bring California in line with the rest of the country on this one. Please adopt the reasonable fee standard.

With respect to the definition of "unconscionability" in subsection (b), the reference to determining unconscionability "at the time the agreement is entered into" is a problem because many of the key elements are determined on subsequent events. I realize this language is part of the current rule, but it creates problems in practical application. The sentence is unnecessary and is in fact contradicted by the concepts in factors 5, 6, and 10 in subsection (c). The time spent, the results obtained, the extent of hostility, the nature of the litigation and the effort involved are all determined at the end of the representation, not at the beginning. The parties don't necessarily contemplate that those factors will affect the fee at the outset, but the rule expressly makes such factors an important consideration. Thus, to determine whether unconscionability exists from the setting at the time of making the contract ignores major elements of the analysis, and the statement is simply wrong. Coercive behavior can lead to unconscionable results, especially in fees, yet that does not exist at the beginning -- it arises later -- and it is not something contemplated by the parties in advance.

Finally, with respect to subsection (f), I have seen a great deal of litigation and arbitrated many disputes over the problem of nonrefundable fees, especially in the family law context. I perceive that there will be great objection to the proposed rule prohibiting nonrefundable fees, especially from the organized bars and the criminal bar. I strongly support the Commission's decision to ban the nonrefundable fee. However, you need to provide better guidance as to the definition of a "true retainer" because there is widespread confusion. You also need to clarify the principal that the reason a lawyer cannot charge a nonrefundable fee is because the lawyer has an obligation to return fees that have not truly been earned. The comments fail to explain the rationale driven by the obligation to return an unearned fee.

Rule 1.8.1 -- Business Transactions with a Client

I believe that you have substantially weakened Rule 3-300 by providing in subsection (c)

of the proposed rule that there is no need to advise the client of the right to independent counsel if the client is already represented by counsel in the litigation. The way the rule is drafted, it assumes that merely because the client has representation, that is adequate. Yet, I have seen multiple instances when the attorney entering into the investment or loan or other business deal has merely sent the client down the hall to a tenant of the lawyer, or even an affiliated lawyer, so that the letter can say "you have already consulted with independent counsel" when in fact no such thing has taken place.

I understand that it may be seen as surplusage but it is a simple rule to follow as presently drafted in 3-300, and it is a no brainer to add that sentence: "You have the right to consult with independent counsel, and I will give you the appropriate time to do so." Why take it out?

The deletion of the requirement to make the independent counsel disclosure may in some instances emasculate the duty to make any written disclosure at all, other than the transaction documents themselves. For example, a promissory note may be fair and reasonable, it may fully disclose the terms. If the client has counsel representing him or her, even the "down the hall" kind of counsel, the rule as drafted would be satisfied without a disclosure letter and indeed no disclosure at all because the terms are set forth in the note, and the client signs it. This is, in my opinion, a serious weakening of the rule.

Finally, I address the question of fee modifications under 1.8.1. I have always felt that a fee modification with an existing client should be treated as being subject to 3-300. There is a fiduciary duty to the client! How hard is it to suggest that the client consult with independent counsel before there is a material modification to the fee arrangement? There is nothing arms length at all about midstream fee modifications, especially those that are imposed at critical stages of the relationship, when the client has no choice but to rely upon the lawyer. The Commission almost gets there with Comment 6. If the Commission won't come right out and say that fee modifications are governed by the rule, then at least Comment 6 should say that the prudent lawyer will advise the client to consult with independent counsel at the time of a fee modification.

Rule 1.7 -- Conflict of Interest: Current Clients

I am opposed to advance waivers as they are rarely sufficient to disclose either the circumstance or the foreseeable adverse consequences. Each advance waiver must be evaluated on a case by case basis, depending upon the actual conflict that later develops. What is most

troubling is that when the Commission expressly endorses advance waivers, as in Comment 33, it will have the effecting of encouraging their widespread use.

An advance waiver flies in the face of the notion that the attorney must make disclosure and obtain informed consent at two stages, once when the conflict is merely potential, and again when the conflict becomes actual. That is the whole point of the "shall not accept or continue" language. The advance waiver is only a one stage disclosure, when the conflict is merely potential. That is the defect. The Commission is bending to the will of large law firms that want to put business interests above client interests, and I think that is a mistake.

As a realist, I must concede that law firms will continue to use advance waivers, regardless of the content of the rule. They are here to stay, but that does not mean they are adequate. I strongly urge you to tone down the endorsement of advance waivers. At a minimum, the sentence in Comment 33 that suggests an open ended general waiver may be sufficient should be deleted. Also, the suggestion that it is okay to obtain an advance waiver where the future facts and circumstances cannot be know, it a misguided approach. That is a blanket authorization for open ended waivers that cannot possibly satisfy the requirement of informed consent. By openly embracing advance consents on general terms that do not set forth the foreseeable consequences the Commission waters down the whole concept, long a part of our rules, that informed consent be obtained at the time an actual conflict arises.

Finally, let me express the concern that the focus on sophisticated clients versus unsophisticated clients is not appropriate. There are not two classes of clients with different rules for each. All clients are entitled to the same protection of the rules, and all disclosures should be sufficiently thorough to explain the circumstances to every client. The assumption that corporate clients are well represented by their in house counsel, or by an experienced group of business persons who understand litigation and waivers is just that, an assumption. Many corporate clients are just as unsophisticated as the individuals who own and operate them. It is my opinion that disclosures should be required to be the same, thorough, complete and adequate to obtain an informed consent, regardless of the nature of the client.

I am also troubled by the Commission's new concepts of "direct" and indirect adversity, which are ill-defined. There needs to be much better guidance as to what types of transactional or situational conflicts would be direct or indirect. The average practitioner is not going to be able to figure out the distinctions absent better guidance. I think a focus on what is not a direct conflict would be helpful. The statement in Comment 5 that there is no single definition for what

constitutes a direct conflict is really not very helpful at all, and should be deleted.

In closing, I applaud your effort with these rules, and admire your dedication and commitment in this task. Thank you for your service to the public and to the profession.

Very truly yours,

THE SALL LAW FIRM

Dictated, but not read

Robert K. Sall

RKS/jvb

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

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DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation Criminal Defense Attorney

Commenting on behalf of an organization
- ○ Yes
- ◉ No

*** Name** Allen Bloom

*** City** San Diego

*** State** California

*** Email address** (You will receive a copy of your comment submission.) allenbloom@sbcglobal.net

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ◉ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

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The prohibition of a non-refundable fee option would have serious negative consequences on the rights and benefits of a client/defendant in a criminal case.

As an attorney who left school over three decades ago and applied to every single public defender and legal aid office in the country, and as someone who spent his first year in practice as a Peace Corp volunteer (VISTA Volunteer) working for $185 per month (plus food stamps) at the San Diego Legal Aid office, and as someone who has for over thirty three years maintained his commitment and dedicated a considerable portion of his practice to representing the indigent defendant, I am NOT someone who has ever placed money ahead of the rights of my clients.

It is with that background that I can unequivocably state that the benefits and rights of an defendant/client in a criminal case would be considerably benefitted by having the option of being able to accept an attorney fee agreement on a non-refundable fee basis. [SEE ATTACHMENT FOR FULL TEXT]

Attachments

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6/5/2008	PC	C-2008-215 Allen Bloom [1.5]	Entire Rule	1.5	Online

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FULL TEXT OF COMMENTS SUBMITTED BY ALLEN BLOOM

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The prohibition of a non-refundable fee option would have serious negative consequences on the rights and benefits of a client/defendant in a criminal case.

As an attorney who left school over three decades ago and applied to every single public defender and legal aid office in the country, and as someone who spent his first year in practice as a Peace Corp volunteer (VISTA Volunteer) working for $185 per month (plus food stamps) at the San Diego Legal Aid office, and as someone who has for over thirty three years maintained his commitment and dedicated a considerable portion of his practice to representing the indigent defendant, I am NOT someone who has ever placed money ahead of the rights of my clients.

It is with that background that I can unequivocably state that the benefits and rights of an defendant/client in a criminal case would be considerably benefitted by having the option of being able to accept an attorney fee agreement on a non-refundable fee basis.

The foundation for my beliefs are as follows:

1. A non-refundable and fixed fee agreement provides certainty to the client. They know what they are going to pay at the beginning of the case and they never have to worry that their fee will increase. In my cases, it usually means that I have greatly undercharged the client, because I end up spending more time on the case
than I originally estimated, yet never charge a client more.

2. It provides better and full service to the client. The client never has to practice "check-book defense", deciding whether a particular meritorious motion or legal task should be taken as compared to what it would cost. There never is a "short changing" of services, but rather is an expansion of services available.

3. It increases access to the attorney. A client doesn't ever have to worry that he is going to suffer financially by being billed by communicating with his attorney a multitude of times. Remind me to tell you the story of the client who met his lawyer at the Padre game, talked about Tony Gwynn and the Padre pitching and asked about the status of his case, only to receive a bill the following week for legal consultation.

4. It eliminates the chances of conflict between the client and his attorney. Because the attorney also gains certainty in the receipt of a non-refundable fee at the beginning of the case, there never is a situation where the attorney is not paid for his services, either intentionally or because of a change of financial circumstances of the client, meaning that the attorney does work for the client - maybe is forced to go to trial for the client cuz the judge will NOT relieve an attorney just for the client's failure to pay - all of which builds in a sometimes subtle and sometimes not so subtle conflict between client and attorney.

Submitted on 2008-06-05

When I get done telling you about the Padre story, ask me to tell you the story that I saw on 60 minutes, where the defense attorney told Morley Safer that he hadn't been paid by his client on the day before the trial despite his multiple efforts to have the client pay. The attorney told Safer, that he wasn't worried because he "had a way to convince the client". What was the way: The trial started; the judge asked if the defense had an opening statement: "We will waive your honor." The first DA witness finished direct; the court said, "defense counsel, you may cross examine". Defense atty responded: "We will waive, your honor."

The Defense atty smiled in the camera at the end of the day, when he showed Safer a bag full of money and said "See Morley, I told you I had a way to make him pay."

It was the most disgusting story I've ever heard. So completely in the worst tradition of this profession.

I wouldn't EVER do that, but the situation is ripe for such a behavior, if a non-refundable fee agreement is not allowed.

REMEMBER: having a non-refundable fee agreement does not mean that it is something which the client MUST accept. There is always the right of the client to say he won't accept such a fee arrangement and if an alternative agreement can't be reached, then the client always has the right to say, I will hire someone else.

5. FAIRNESS: It should also be noted, that a non-refundable fee agreement is really a much fairer system, if there is ever a dispute as to the fee. This works to the benefit of the client. Let's look at the two circumstances: non-refundable and refundable.

If there is a NON-refundable fee agreement, and at the end of the case or anywhere in the middle, the client disputes the fee, the client has the right to (a) attempt an informal resolution, but if such a resolution is not successful, has the right to (b) DEMAND arbitration and the atty MUST, as a matter of state law, accept the arbitration requirement. Of course, the client has the option of (c) filing a law suit. In all matters the attorney is obligated to try to resolve the matter.

On the other hand if there is a REFUNDABLE fee agreement, and the client disputes the fee, the client has the right to (a) seek an in informal resolution, but if such a resolution is not successful, but here the situation changes. The disputed funds now have to be placed in a special trust account and though the client has the right to demand arbitration, the attorney does NOT have the right to do so. In short, the client can refuse

to try to settle the issue, and ignore all the efforts of the attorney to resolve the situation. The money remains in the trust account and the client, if she wishes, can do absolutely nothing and if she acts in this way, the ONLY resolution that the atty has is to SUE HIS CLIENT. HOW TERRIBLE IS THAT. It destroys atty-client trust; it works greatly to the detriment of the client; it potentially opens the door to privileged communications, it's just bad.

WHY: Cuz the lawyer MUST accept an arbitration and the client does NOT have to accept it. This problem is eliminated if a non-refundable fee agreement is allowed.

DETRIMENT: Finally, it should be remembered that, of course, it is possible that there could be abuses by the unscrupulous atty taking advantage of a non-refundable fee agreement. There is a remedy is place to deal with such a circumstance. If a case is dismissed two days after filing, then, of course, the prohibition against unconscionable fees and my own ethics, demand that I return a large, if not all, the fee. If I, not my client, were to walk away from representation, then the full fee should be returned.

But problems with unscrupulous attorneys can occur with equal frequency with any other billing system: hourly (where the hours can be gouged and multiplied for unnecessary work); task (where poor work can be done for services). simply put, there is no billing system which is immune for an unscrupulous attorney, or for that matter, an unscrupulous client. The best way to have fair fees and good services for clients, is to have good attorneys and fair clients, and no system of billing guarantees that, however, we should look to create a system which enhances the chances of good representation, and I have found, after 33 years of practice, that the best method is through a non-refundable fee system.

Submitted on 2008-06-05

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

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DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation

Commenting on behalf of an organization

- ○ Yes
- ◉ No

*** Name** David Harris

*** City** Los Angeles

*** State** California

*** Email address** (You will receive a copy of your comment submission.) davidsolomonharris@gmail.com

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ◉ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

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I oppose the Proposed New State Bar Rule 1.5(f) (4-200). This proposal prohibiting non refundable retainers for legal services will drastically impact on the economics of practicing law in California as well as the ability of people in need of representation to obtain legal services. In essence, the proposal prevents an informed client from entering into a fee agreement that more often than not reduces and limits the cost of legal representation by abolishing and/or redefining a widely accepted historical fee arrangement and providing that almost every payment for future legal work will not be earned when received.

There are a number of policy reasons why this change should never be adopted, including unnecessary interference in attorney client relationships, the generation of increased client bar complaints, the substantial economic impact on small and large law firms, increased unnecessary accounting and record keeping, the resulting increase in legal fees and the need to preserve the availability of legal services to the people of California including consumers of low, fixed fee services, as well

Attachments

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davidsolomonharris@gmail.com

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6/6/2008	PC	C-2008-217 David Harris [1.5]	Rule Section(s) Only

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FULL TEXT OF COMMENTS SUBMITTED BY DAVID HARRIS

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I oppose the Proposed New State Bar Rule 1.5(f) (4-200). This proposal prohibiting non refundable retainers for legal services will drastically impact on the economics of practicing law in California as well as the ability of people in need of representation to obtain legal services. In essence, the proposal prevents an informed client from entering into a fee agreement that more often than not reduces and limits the cost of legal representation by abolishing and/or redefining a widely accepted historical fee arrangement and providing that almost every payment for future legal work will not be earned when received.

There are a number of policy reasons why this change should never be adopted, including unnecessary interference in attorney client relationships, the generation of increased client bar complaints, the substantial economic impact on small and large law firms, increased unnecessary accounting and record keeping, the resulting increase in legal fees and the need to preserve the availability of legal services to the people of California including consumers of low, fixed fee services, as well as to protect the constitutional rights of those accused of crimes to retain the lawyer of their choice.

Submitted on 2008-06-05 11:256

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
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DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation

Commenting on behalf of an organization

- ○ Yes
- ◉ No

*** Name** Michael Stepanian

*** City** San Francisco

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) mstepanian@sbcglobal.net

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ◉ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I have been a criminal lawyer for 41 years. I have through my experience a rapport with judges and prosecutors. I can negotiate and resolve cases on some occasions rather quickly based on my credibility. The naivete of this proposed rule is obvious. To justify my fee it will require me to invent the wheel each time I negotiate. Sometimes it's merely a meeting. You would prefer me to have busywork, hearings, paper, trials, arguments, like a neophyte? It will cost the state and government millions of dollars if you require the experienced criminal attorney to jump through hoops for their fees.

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* Date	Period	File :	Commented On:	Specify:	Submitted via:
6/6/2008	PC	C-2008-218 Michael Stepanian [1.5(f)]	Entire Rule	1.5	Online

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DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation

Commenting on behalf of an organization

- ○ Yes
- ◉ No

*** Name** Charles Sevilla

*** City** San Diego

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) chuck@charlessevilla.com

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ◉ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I oppose the proposed new rule. Current rules on excessive fees are sufficient and there is no rule that will avoid shysters from taking advantage of clients on fees. Current rules, arbitration and discipline procedures will handle the miscreants. A non-refundable fee option is of considerable benefit to the criminal defendant: it provides certainty to the client while insuring access to attorney services.

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6/6/2008	PC	C-2008-220 Charles Sevilla [1.5]	Entire Rule	1.5	Online

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DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation

Commenting on behalf of an organization

- ○ Yes
- ◉ No

*** Name** Jack J. Boltax

*** City** San Diego

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) jboltaxlaw@gmail.com

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ◉ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

As a practicing member for almost 25 years, 20 of which I have been in private practice, I think this rule is way overdue. I have repeatedly heard of situations where my colleagues abuse this type of situation, literally taking their client's money while doing little or no work. For example, one of my client's famly members hired an attorney to handle his case after I had negotiated a very favorable plea agreement. When the client found our that I had negotiated a favorable plea he immediately called his family and told them he did not need the lawyer. The family did so but the lawyer would not return the fee because the contract said it was non-refundable. He showed up in court to sub in but the client wouldn't agree to the substitution. The lawyer refused to return the non-refundable retainer or any portion of it, claiming that he had earned the money by talking to the family, looking up the charges and coming to court to sub in, even though the family told him that my client did not want his services. [SEE ATTACHMENT FOR FULL TEXT]

Attachments

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6/5/2008	PC	C-2008-221 Jack J. Boltax [1.5]	Entire Rule	1.5	Online

* Required

FULL TEXT OF COMMENTS SUBMITTED BY JACK J. BOLTAX

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

As a practicing member for almost 25 years, 20 of which I have been in private practice, I think this rule is way overdue. I have repeatedly heard of situations where my colleagues abuse this type of situation, literally taking their client's money while doing little or no work. For example, one of my client's famly members hired an attorney to handle his case after I had negotiated a very favorable plea agreement. When the client found our that I had negotiated a favorable plea he immediately called his family and told them he did not need the lawyer. The family did so but the lawyer would not return the fee because the contract said it was non-refundable. He showed up in court to sub in but the client wouldn't agree to the substitution. The lawyer refused to return the non-refundable retainer or any portion of it, claiming that he had earned the money by talking to the family, looking up the charges and coming to court to sub in, even though the family told him that my client did not want his services. The attorney kept the entire fee. I have received court appointed cases where attorney's have told the client's that court appointed attorney's don't do as good a job as retained attorneys. They get the client's families to spend their hard earned money for these attorneys and hire them through non-refundable fee agreements. The attorneys then sub-in after I have negotiated a plea bargain leaving them with little or no work to do. The attorneys then keep the entire retainer because it was "non-refundable". This type of predatory practice will cease if these types of cotracts are made impermissible by state bar rules. While I acknowledge most of the attorneys I know will refund portions of these type of fees when their work effort would make the fee "unconscionable", I have seen this type of agreement abused far to often. Thus, I think implementation of a rule barring a non-refundable retainer can only benefit the integrity of the bar.

Submitted on 2008-06-05

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

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DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation

Commenting on behalf of an organization

- ○ Yes
- ◉ No

*** Name** Stephen R. Brodsky, Attorney At Law, #137848

*** City** San Diego

*** State** California

*** Email address** (You will receive a copy of your comment submission.) attornman@aol.com

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ◉ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Non-refundable fee agreements have been the practice of the criminal defense bars across the nation for many years. It is no coincidence that criminal defense lawyers from all over the country use non-refundable flat fee agreements with their clients. The non-refundable fee agreement confers benefits on both the attorney and the client. The attorney is assured that his professional fees will be paid upon performance of agreed-upon professional legal services, and the client is assured that the attorney will perform his or her obligations under the fee agreement for a fixed fee. In this way, an attorney can not charge more while prosecuting a defense merely because the attorney is dissatisfied with having to spend more time on a case than was originally envisioned. There are many other compelling reasons for the continuation of non-refundable fee agreements. Attorney Barry Tarlow wrote a letter to the State Bar which comprehensively discusses the reasons in favor of non-refundable flat fee professional agreements. I support Mr. Tarlow's position and urge the State Bar not to interfere with right of criminal defense attorneys and their clients to enter into a contract for [SEE ATTACHMENT FOR FULL TEXT]

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6/5/2008	PC	C-2008-224 Stephen R. Brodsky [1.5]	Entire Rule	1.5	Online

FULL TEXT OF COMMENTS SUBMITTED BY STEPHEN R. BRODSKY

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Non-refundable fee agreements have been the practice of the criminal defense bars across the nation for many years. It is no coincidence that criminal defense lawyers from all over the country use non-refundable flat fee agreements with their clients. The non-refundable fee agreement confers benefits on both the attorney and the client. The attorney is assured that his professional fees will be paid upon performance of agreed-upon professional legal services, and the client is assured that the attorney will perform his or her obligations under the fee agreement for a fixed fee. In this way, an attorney can not charge more while prosecuting a defense merely because the attorney is dissatisfied with having to spend more time on a case than was originally envisioned. There are many other compelling reasons for the continuation of non-refundable fee agreements. Attorney Barry Tarlow wrote a letter to the State Bar which comprehensively discusses the reasons in favor of non-refundable flat fee professional agreements. I support Mr. Tarlow's position and urge the State Bar not to interfere with right of criminal defense attorneys and their clients to enter into a contract for professional legal services, unless a particular contract is unconscionable.

Sincerely,

Stephen R. Brodsky

Submitted on 2008-06-05

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
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DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation Sole Practitioner

Commenting on behalf of an organization
- ○ Yes
- ◉ No

*** Name** Kenneth J. Troiano

*** City** San Diego

*** State** California

*** Email address** (You will receive a copy of your comment submission.) kjtroiano@mac.com

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ◉ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Non-refundable fees should be judged by a set of criteria, not made per se unconscionable as this rule proposes. Such a fix does not lend itself to an easy solution. Many less wealthy individuals who choose sole practitioners over more expensive law firms or the use of the already overburdened taxpayer funder public defender and appointed counsel panels, greatly benefit from non-refundable fees. Such fees establish a set amount that a person or their family will pay for a given proceeding, thereby avoiding much higher fees associated with hourly billing. These fees provide certainty for a client's financial planning. Non-refundable fees are also frequently established in a competitive market that is known and understood by potential clients. A ban on non-refundable fees will be a boon to larger law firms who already dictate the high cost of and limited access to legal services in the State of California. No client wants to be in a position of not being able to pay attorney fees while their case remains unresolved. Being in that position will no doubt have an unsettling effect on their state of mind notwithstanding the attorney's ethical obligations and runs counter to the concept of promoting trust

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6/5/2008	PC	C-2008-226 Kenneth J. Troiano [1.5]	Entire Rule	1.5	Online

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FULL TEXT OF COMMENTS SUBMITTED BY KENNETH J. TROIANO

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Non-refundable fees should be judged by a set of criteria, not made per se unconscionable as this rule proposes. Such a fix does not lend itself to an easy solution. Many less wealthy individuals who choose sole practitioners over more expensive law firms or the use of the already overburdened taxpayer funder public defender and appointed counsel panels, greatly benefit from non-refundable fees. Such fees establish a set amount that a person or their family will pay for a given proceeding, thereby avoiding much higher fees associated with hourly billing. These fees provide certainty for a client's financial planning. Non-refundable fees are also frequently established in a competitive market that is known and understood by potential clients. A ban on non-refundable fees will be a boon to larger law firms who already dictate the high cost of and limited access to legal services in the State of California. No client wants to be in a position of not being able to pay attorney fees while their case remains unresolved. Being in that position will no doubt have an unsettling effect on their state of mind notwithstanding the attorney's ethical obligations and runs counter to the concept of promoting trust and confidence in your attorney.

Submitted on 2008-06-05

THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation

Commenting on behalf of an organization

- ○ Yes
- ◉ No

*** Name** Steven Feldman

*** City** San Diego

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) sfeldman77@san.rr.com

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ◉ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

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THE STATE BAR OF CALIFORNIA

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Your Information

Professional Affiliation

Commenting on behalf of an organization

- ○ Yes
- ◉ No

*** Name** Randy Sue Pollock

*** City** Oakland

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) pollockesq@aol.com

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ◉ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I am a criminal defense attorney and have been practicing as a sole practitioner since 1976. I believe this rule would unnecessarily interfere with the attorney-client relationshipmy ability to charge for the real value of my services.

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6/5/2008	PC	C-2008-228 Randy Sue Pollock [1.5]	Entire Rule	1.5	Online

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SCCBA COMMENTS TO RULE 1.5: FEE FOR SERVICES

The SCCBA supports adopting this rule as revised with the following changes:

Subsection (f): This subsection could be confusing to many practitioners as there is not a generally understood distinction between a non-refundable fee/retainer, a true retainer and flat fee. Many practitioners call a flat fee a non-refundable retainer or they call a non-refundable fee, a flat fee. Thus, the SCCBA suggests adding to this to the last sentence: "A lawyer shall not make an agreement for, charge, or collect a non-refundable fee or non-refundable retainer, except that a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter."

Comment [2]: This comment is wholly unhelpful as it simply restates subsection (f). The SCCBA suggests that this comment explain the differences between an advance fee, flat fee, a non-refundable fee or non-refundable retainer and a true retainer so that the practitioner understands more clearly what subsection (f) covers. Examples of the difference between charging a flat rate for a particular legal service and a non-refundable fee or retainer prohibited by this rule would additionally be helpful. This Comment should also reference or be combined with Comment [5] as it relates to the kind of fee taken at the inception of service: an advance fee. If the Comment is not changed, added to or combined with Comment [5], it should simply be deleted since it is superfluous.

Comment [6]: This comment needs to include a clarification that the rule does not apply to the attorney withdrawing from representation for non-payment of attorney fees by the client, assuming the attorney complies with the rules for termination of the attorney-client relationship.

Rule 1.5: Fees For Legal Services

(a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee.

(b) A fee is unconscionable for purposes of this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience, or the lawyer, in negotiating or setting the fee, has engaged in fraud or overreaching, so that the fee charged, under the circumstances, constitutes an improper appropriation of the client's funds. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.

(c) Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:

(1) the amount of the fee in proportion to the value of the services performed;

(2) the relative sophistication of the lawyer and the client;

(3) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(4) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(5) the amount at stake and the results obtained;

(6) the time limitations imposed by the client or by the circumstances;

(7) the nature and length of the professional relationship with the client;

(8) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(9) whether the fee is fixed or contingent;

(10) the time and labor required;

(11) the informed consent of the client to the fee.

(d) Expenses for which the client will be charged cannot be unconscionable.

(e) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(f) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, or non-refundable retainer, except that a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter.

Comment

Unconscionability of Fee

[1] Paragraph (a) requires that lawyers charge fees that are not unconscionable or illegal under the circumstances. An illegal fee can result from a variety of circumstances, including when a lawyer renders services under a fee agreement that is unenforceable as illegal or against public policy, (e.g., *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950-951 [203 Cal.Rptr. 879] [fee agreement with other lawyer entered under threat of withholding client file]), when a lawyer contracts for or collects a fee that exceeds statutory limits (e.g., *In re Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; *In re Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Bus. & Prof. Code, § 6146]), or when an unlicensed lawyer provides legal services. (e.g., *Birbrower, Montalbana, Condon and Frank v. Superior Court* (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304]; *In re Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896.) Paragraph (b) defines an unconscionable fee. (See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513].) The factors specified in paragraphs (c)(1) through (11) that are to be considered in determining whether a fee is conscionable are not exclusive. Nor will each factor necessarily be relevant in each instance. Contingent fees, like any other fees, are subject to the unconscionability standard of paragraph (a) of this Rule.

Non-refundable Fee

[2] This Rule prohibits a lawyer from making an agreement for, charging, or collecting a non-refundable fee. However, a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter.

Basis or Rate of Fee

[3] In many circumstances, Business and Professions Code, sections 6147 and 6148 govern what a lawyer is required to include in a fee agreement, and provide consequences for a lawyer's failure to comply with the requirements. (See, e.g., *In re Harney* (1995) 3 Cal. State Bar Ct. Rptr. 266.)

[4] With respect to modifications to the basis or rate of a fee after the commencement of the attorney-client relationship, see Rule 1.8.1, Comments [5], [6].

Terms of Payment

[5] A lawyer may require advance payment of a fee but is obliged to return any unearned portion. (See Rule 1.16(d) [3-700(D)(1)].) A fee paid in property instead of money may be subject to the requirements of Rule 1.8.1 [3-300].

[6] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. The Rule does not apply to the attorney withdrawing from representation for non-payment of attorney fees by the client, assuming the attorney complies with the rules for termination of the attorney-client relationship.

Prohibited Contingent Fees

[7] Paragraph (e)(1) prohibits a lawyer from charging a contingent fee in a family law matter when payment is contingent upon the securing of a dissolution or nullity of a marriage or upon the amount of spousal or child support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of balances due under child or spousal support, or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[8] Division of fees among lawyers is governed by Rule 1.5.1 [2-200].

RULES OF PROFESSIONAL CONDUCT OF STATE BAR OF CALIFORNIA

Please indicate which proposed rule you are commenting on:

Rule 1.5
Fees for Legal Services (4-200)]

Agree: Agree as Modified: Disagree : **X**

Comments: _____

Name: Cathrine Castaldi **Title: President**

Organization: Orange County Bar Association

☑ **Commenting on behalf of an organization**

Address: P.O. Box 6130

City, State, Zip: Newport Beach, CA 92658

Please **write** or **fax** or **respond using the Internet** to:

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, CA 94105

Internet: http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=90842

DEADLINE FOR COMMENT: 5:00 P.M. Friday, June 6, 2008

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation Law Office of Carol M. Langford

Commenting on behalf of an organization
- ○ Yes
- ◉ No

*** Name** Carol M. Langford

*** City** Walnut Creek

*** State** California

*** Email address** (You will receive a copy of your comment submission.) langford@usfca.edu

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ◉ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

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You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the next to **Attachment**.

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6/10/2008	Post-PC	C-2008-231 Carol M. Langford [1.5]	Entire Rule	1.5	Online

* Required

Comment on Proposed Rule 1.5: Fees for Legal Services

The following is a comment on proposed rule 1.5, specifically regarding the "unconscionable" standard that is applied to attorneys' fees. You should know that I have served as the Chair and Special Advisor to the State Bar Committee on Professional Responsibility and Conduct, in addition to being a member for several years. I have also Chaired the Law Practice Management & Technology Section of the Bar and the Council of Section Chairs. I am currently an adjunct professor at the University of San Francisco School of Law and Hastings College of the Law teaching courses in legal ethics, and I have a full-time practice specializing in legal ethics and attorney conduct.

My comment explains why the unconscionable standard of proposed rule 1.5 is undesirable and how it is inconsistent with the ABA Model Rules, the laws of other states, and current California legislation.

The ABA Rules and many other states hold that attorneys' fees must not be unreasonable. California is unique in applying an unconscionable standard to attorneys' fees. Cal. Practice Guide: Professional Responsibility (The Rutter Group 2007) ¶ 5:400. A fee is unconscionable when it is "so exorbitant and wholly disproportionate to the services performed as to shock the conscience." Goldstone v. State Bar, 214 Cal. 490, 498-499 (1931). The unconscionable standard has been interpreted by courts to be a higher standard than the unreasonable standard. While a fee may be unreasonable, it is not necessarily unconscionable. Herrscher v. State Bar, 4 Cal. 2d 399, 402 (1935). In California, a lawyer supposedly can only be disciplined for charging a fee that "shocks the conscience" as opposed to an unreasonable fee.

However, California has not applied that standard consistently. Many practicing attorneys are confused by the unconscionable standard, since courts often equate it with the unreasonable standard. For example, in Ojeda v. Sharp Cabrillo Hospital, 8 Cal App. 4th 1, 8 (4th Dist. 1992) the court referred to rule 4-200 as subjecting attorneys fees "only to the general requirement that the fee not be "unconscionable" or "unreasonable." Another California case treats the two as interchangeable as well: "The constraints against 'unreasonable' or 'unconscionable' fees are deeply ingrained features of bar rules governing professional responsibility." In re Oracle Securities Litigation, 852 F. Supp. 1437, 1452 (N.D.Cal. 1994). In yet another California case, the court refers to previous rule 2-107 (which also used the unconscionable language) in saying "California lawyers are entitled to charge clients no more than a reasonable fee for legal services." Cazares v. Saenz, 208 Cal. App. 3d 279, 287 (4th Dist. 1989). The confusion is furthered due to the fact that most courts consider the same factors under both the ABA and California Rules. Cal. Practice Guide: Professional Responsibility (The Rutter Group 2007) ¶ 5:407.

Another problem with the unconscionable standard is that it conflicts with current California statutory law. Sections 6147 and 6148 of the Business & Professional Code set a "reasonable" standard for attorneys' fees. Cal. Bus. & Prof. Code Ann. §§ 6147, 6148 (West 2000). Where a fee agreement is voided by the client for violations of the code, the attorney is entitled to reasonable fees. §§ 6147(b), 6148(c). By prescribing an unconscionable standard, rule 1.5 directly conflicts with statutory law.

There is no good reason why the Rule should use the word unconscionable. The only reason, and it is not a good one, is to promote a higher threshold for lawyers to violate the rule. In this case, the law of the Legislature should trump the Rules of

Professional conduct, and proposed rule 1.5 should be modified to apply an unreasonable standard to attorneys' fees.

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

Dennis Peter Maio, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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June 8, 2008

Ms. Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, California 94105

VIA FAX ONLY

Re: Opposition to Proposed New State Bar Rule 1.5(f) (4-200) [Fees for Legal Services] Seeking to Abolish Non-refundable fees

Dear Ms. Hollins:

Since you and I do not know each other, to give you, and other readers of this letter, some background to consider when assessing the basis of, and the value to be given to, the opinions I set forth below, I will tell you a little about myself.

I am, and have been since the inception of the certification category, a Certified Family Law Specialist. I have practiced law in Los Angeles County since January 1966. I have been the Chair of the Family Law Section of the Los Angeles County Bar, President of the Southern California Chapter of the American Academy of Matrimonial Lawyers, President of the USA Chapter of the International Academy of Matrimonial Lawyers, and I am presently am the Executive Vice-President of the American College of Family Trial Lawyers [its primary operating officer]. I have held numerous offices in all the aforementioned organizations. I am a member of the Liaison Committee between the Los Angeles Superior Court and the Los Angeles County Bar Association. I have dealt for many years with the resolution, or attempted resolution, of issues between the Family Law Section of the Los Angeles County Bar Association and the Los Angeles Superior Court's Family Law Bench. My Curriculum Vitae is attached hereto.

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I have had, and continue to have, a strong interest in the delivery of legal services to the public and the protection of the interests of the public and the lawyers who serve them. I also believe very strongly that the lawyers are entitled to reasonable protection from specious issues raised by clients as that is an area of particular concern in my field of law.

I was quite distressed to have only recently learned of the above proposed rule which would change the historically permitted method of charging fees under appropriate circumstances, particularly keeping in mind that lawyers have been, and presumably will continued to be, governed by the over-arching rule prohibiting the charge unconscionable fees.

Since this proposed Rule would have a very material effect on the ability of certain categories of lawyers to earn reasonable fees for the performance of their services, I would have thought that notice of this proposed Rule change would have been given in a way designed to clearly draw it to the attention of the Bar, something I believe did not occur.

In my particular field of law there is a unique devious method utilized by prospective clients, and sometimes their lawyers, for "conflicting out" many of the more experienced and well-respected lawyers - the practice of interviewing all the lawyers they wish to not have represent their spouse. Over the years, lawyers in the Family Law field have developed careful, self-protective screening measures to attempt to avoid being wrongfully conflicted out of a case. One of those methods is to not allow the disclosure of confidential information until someone has become a client and having non-refundable retainers which, in part, assure that you are not then quickly discharged and immediately conflicted out of the case, unable to represent the other spouse. Eliminating the right to collect and retain non-refundable retainers could have a very serious impact on our ability to not be unfairly conflicted out of cases.

In my field of practice, result fees and contingency fees are not permitted except under quite limited circumstances. The only way to insure that an experienced lawyer is reasonably compensated for their experience, hard work and perhaps their reputation as a formidable adversary who achieves an early resolution of a case, is the minimum or non-refundable fee. Not allowing such fees to be charged, and limiting lawyers like me and my peers, would have a serious impact on our ability to earn a reasonable fee in certain types of cases.

Because early resolution of cases in Family Law has always been the goal, not allowing lawyers to charge minimum or non-refundable fees might often discourage some

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lawyers from early resolution of cases because they are only going to be able to be compensated for hours worked, which is very often not the true measure of the value of their work. Perhaps, the Bar should also consider adopting a Rule which permits value billing, at least in Family Law cases.

What is discussed in the immediately preceding two paragraphs would also certainly apply to lawyers that practice Criminal Law - they would have no way to be reasonably compensated for using their skill and knowledge in achieving an early resolution through plea bargaining if they were not permitted to charge a minimum or non-refundable fee for their services.

The language of the proposed Rule would appear to prohibit the charging of a "flat" or "fixed" or "negotiated" fee for the performance of legal services, again a very drastic departure from the historical manner of providing compensation for legal services. Is a lawyer now required to only provide legal services based on an hourly rate? Has anyone considered the tremendous negative impact, and chilling effect, such a Rule would have on low income or modest income people who are concerned about not incurring fees far beyond their ability to pay and the lawyers who are willing to perform certain services for a fixed fee? The same concern would apply to business people of modest or reasonable means - they often will not want to embark on a legal process without having a fixed fee in mind. Are they to be disenfranchised from the receipt of reasonable and necessary legal services that some lawyer is willing to provide for a "flat" or "fixed" or "negotiated" fee?

While I do not know if the intent of the proposed Rule is to prohibit security deposits for future work to be done, I believe it could certainly be interpreted that way, again a completely unreasonable position for a criminal or trial lawyer, placing them at the mercy of the client's satisfaction with the result before paying for the services rendered. The Rules, and the Courts, do not permit us to withdraw close to trial even if we are not being paid for our services on a current basis pursuant to our retainer agreement - mutuality of obligation in this regard really does not exist for lawyers. The lawyer's protection is a security or trial deposit. Do we pay doctors, plumbers or house painters only after they render their services? No. Why would the State Bar want to place lawyers in a lesser position?

In closing, the use of fixed fees and non-refundable retainers has been common Audrey practice for generations of California lawyers and for other lawyers throughout the country for a number of important and appropriate reasons, some of which are set forth above. Fixed fees allow lawyers to provided lower cost, routine legal services at prices

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that could not be justified if the lawyer were forced to rely solely on an hourly billing system and payment only after services are rendered. A fixed fee, payable in advance, gives a client certainty and permit the client to retain a lawyer for an amount that is acceptable and affordable. Advance payment of fees allows lawyers to represent people who would otherwise present an unacceptable risk of non-payment, as well as to insure that unfair practices to conflict them out of representing another are not allowed to flourish.

I am unaware of their being a meaningful number of cases involving the feared abuse which would seem to be sought to be corrected by the proposed Rule. In the absence of true abuse, there should be no reason to change the historical way that lawyers charge clients in certain cases.

I am available for whatever additional discussion about this subject you, or anyone on the Committee, would like to have on this subject.

Very truly yours,

STEPHEN A. KOLODNY

08-08-08 LETTER TO STATE BAR RE PROPOSED RULE 1 5(f) (4-200_.wpd
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CURRICULUM VITAE
STEPHEN A. KOLODNY

Stephen A. Kolodny received a Bachelor of Arts Degree from Boston University, College of Business Administration and then graduated from the Boston University Law School in 1965. Having passed the California State Bar examination in 1965, he was admitted to practice law before the California and Federal Courts in January 1966. Mr. Kolodny was admitted to practice before the United States Supreme Court in March 2004. Mr. Kolodny continues as a Certified Family Law Specialist, certified since the inception of that program in 1980, practicing almost exclusively in the area of Family Law, handling complex property characterization, valuation, custody and support cases, often dealing with exceptionally high earner litigation issues.

On April 25, 2003, Mr. Kolodny was awarded the highest honor bestowed by Boston University School of Law, the prestigious *Silver Shingle Award for Distinguished Service to the Profession*. According to Boston University, which selects only one recipient each year for this recognition, "This award is presented to the alumnus whose contributions within his/her profession exemplify leadership, ethics, and integrity, and whose accomplishments reflect great credit upon their profession."

Professional Affiliations and Associations

American College of Family Trial Lawyers [The College]. Mr. Kolodny is a founding Diplomat and original member of its exclusive Executive Committee, and the current Executive Vice President. The College, created to promote professional education, creative thinking, innovative litigation tactics and strategy and overall skill enhancement opportunities for the most serious divorce litigators in America, is limited to 100 of the best family law trial lawyers in America, selected by their peers based upon trial advocacy skills.

American Academy of Matrimonial Lawyers [AAML]. Mr. Kolodny has been an active member of since 1981. Although he has been Counsel to the Academy, he has declined to accept officer positions because of his busy trial schedule. He does not wish to take away from

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his time at Kolodny & Anteau to handle the responsibilities required of an officer in a national organization.

- He was National Counsel for the **AAML** in 2001-2002 and 2002-2003.
- He completed a 6-year term on the **AAML** Board of Governors.
- He has served as Chair of the **AAML's** Continuing Legal Education Program in 1994 and 1995 and is a past member of its Membership, Admissions and Attorney's Fee Committees.

Southern California Chapter of AAML. Mr. Kolodny served as President from 1994 to 1995, and spent 1987 to 1993 and again from 1995 to 1997 as the Vice President of Membership. He is a current member of the Long Range Planning Committee.

International Academy of Matrimonial Lawyers [IAML]. Mr. Kolodny has been an active member since 1988.

- He is a former member of the Board of Governors of the **IAML.**
- He served as Publisher of the **IAML** Newsletter from 1993 - 1998.
- He was President of the **USA Chapter** from 1996 to 1998.
- He served as Continuing Legal Education Chair for the **USA Chapter** in 2000.

American Bar Association [ABA]. Mr. Kolodny has been a continuous member since 1972, and was the Parliamentarian of the Family Law Section in 1994 and 1995. He has recently declined to accept officer positions because of his busy trial schedule.

Each year from 1989 to 2007, Mr. Kolodny had been selected to be one of eighteen members of the core group of family lawyers from across the country who serve as adjunct professors at the University of Houston for the **ABA's** specially-created **Family Law Trial Advocacy Institute.** This eight-day intensive program is designed to teach trial skills and winning techniques not only to new lawyers but also experienced trial lawyers. Mr. Kolodny was co-chair of that program, since 1997. The Faculty has split from the ABA and will continue to present this program separately from the ABA.

Los Angeles County Bar. He has been a member, continuously since 1966, active in the Family Law Section where he was on its Executive Committee for many years, ultimately being elected as an officer in 1983. He continued in various officer positions until he became Chair of the section in 1987 and 1988.

He served for many years as Chair and Co-Chair of the annual **Los Angeles County Bar Child Custody Colloquium** program and continues to be an active panel participant in the **Family Law Section's Annual Symposium**, presenting on subjects relating to complex and

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sophisticated trial and motion practice, custody trials, property characterization, valuation and division issues, evidence and contempt enforcement.

Mr. Kolodny, in memory of a close friend and former judicial officer, continues to write and publish in the Annual Symposium Book, reputed to be the authoritative article on **Family Law Contempts in California**, an article that has earned statewide recognition and use and is distributed to all California Family Court Judicial Officers and used in Judicial training programs.

While on the Executive Committee, Mr. Kolodny also actively participated in various other professional activities including assisting as one of the designers and creators of the **Los Angeles Superior Court Family Law Mediation Panel**, a program he participated in for many years originally designed to be an exclusive panel of peer selected distinguished practitioners. For many years, he was an active participant in the Los Angeles Superior Court's Family Law Judge Pro Tem Program, providing judicial-type legal assistance to the Los Angeles Superior Court during the time that program was in existence in the Central District until its termination.

Beverly Hills Bar Association. He has been a member, continuously, since 1975 and has frequently presented Continuing Legal Education programs on subjects relating to complex and sophisticated trial and motion practice, custody trials, property characterization, valuation and division issues, evidence and contempt enforcement.

American Institute of Certified Public Accountants [AICPA]. Mr. Kolodny is one of several attorneys to participate in panel presentations at AICPA's national conferences on advanced litigation services. It is a national, professional organization for Certified Public Accountants. Mr. Kolodny has presented topics such as: (1) "Making the Most of the Experts: From Case Filing to Trial"; (2) "Making the Most of the Experts: Effective Deposition vs. Trial Testimony"; (3) "Making the Most of the Experts: Making Your Case and Surviving Cross- Examination"; and (4) "The Valuation Expert in Divorce: Advocate or Expert." In past years Mr. Kolodny has also presented on issues of goodwill and the current state of California family law, as it affects forensic accountants.

National Association of Certified Valuation Analysts [NACVA]. It is "a global, professional association that supports the business valuation and litigation consulting disciplines within the CPA, financial advisory, and investment banking communities." Mr. Kolodny participates as a guest speaker/panel presenter at their Annual Business Valuation Conferences. Among the topics recently presented are, "The Impact of State Laws on Valuations for Divorce" with Mr. Kolodny's portion covering state law differences for asset valuation and business-related income California and other western community property states.

California State Bar. He has been a member, continuously, since 1966 and has served as a Disciplinary Hearing Officer.

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Mr. Kolodny has been a continuous member of the **International Bar Association** since 1991.

Mr. Kolodny is a member of the Advisory Committee of **The Harriet Buhai Law Center**, a nonprofit organization that provides legal services to the less economically fortunate members of the Los Angeles community. He has also served as an active member of its Executive Committee.

Professional Recognition

In a November 2002 article by Worth Magazine, Mr. Kolodny was featured as one of *The Top 10 Divorce Lawyers* in the United States. Where the featured lawyers' philosophies were detailed, it was noted that Mr. Kolodny's was, "Other than in a custody case, my job is to get you what you want by whatever legal means I can."

In January 1998 Mr. Kolodny was recognized by Town and Country Magazine in their article entitled, *America's Top Divorce Lawyers.* Listed as one of the top ten in the nation, he was acknowledged for his "reputation for secrecy." It has always been Mr. Kolodny's, and therefore Kolodny & Anteau's, policy to vigorously protect the anonymity of his clients, shunning unnecessary publicity for himself, the firm and for his clients, even to the point of not mentioning the names of many of the prestigious clients he/they represent.

In an August 1998 California Lawyer article, *The Divorce Duelers*, featured Mr. Kolodny first (in a non-alphabetic list), as one of the top ten "most aggressive, toughest divorce practitioners in the state." The magazine polled attorneys and family court judges throughout the State of California who agreed the attorneys featured were "smart, self-assured -- and possess a willing enthusiasm for hard-nosed litigation." The article credited Mr. Kolodny with a reputation for using tough litigation tactics when necessary and tough settlement negotiations "to get my clients the rights they deserve under the law." His peers "acknowledged Kolodny's aggressive style," and described him as "ethical and very smart."

Mr. Kolodny is currently and has been listed in Best Lawyers In America since 1995.

Professional Presentations

Mr. Kolodny frequently presents continuing legal education seminars and programs to experienced family law practitioners at **ABA** and **AAML** annual meetings and at state-level CLE programs throughout the country, on various issues including complex litigation, complex evidence issues and strategies, child custody and psychological evaluation for child custody, tort remedies, complex and sophisticated trial and motion practice, custody trials, complex property trial techniques and tactics, valuation and division issues, contempt enforcement and other subjects of national interest.

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As a recognized expert in complex family law matters, Mr. Kolodny has been an annual presenter in the **AAML - Southern California Chapter's Annual Trial Advocacy Institute** since 1990, organizing and speaking on panels with Los Angeles County Superior Court Judges, regarding issues of complex and sophisticated motion and trial practice, including trial strategy.

Mr. Kolodny has frequently lectured to the **IAML** on issues of complex trials as well as presented programs or published articles on the subject of international collection of judgments and enforcement of matrimonial judgments.

Mr. Kolodny's professional presentations during recent years include, but are not limited to, the following:

- 2007-2008 Consultant and contributor to California Family Law Litigation Guide (Matthew Bender).
- 2006 Presentation and mock trial "Direct and Cross-examination" for the bi-annual AICPA/AAML Conference on Divorce
- 2004 presentation on Family Law Contempts for the Family Law Study Group of Los Angeles.
- 2004 A member of the AAML/American Law Institute (ALI) Committee.
- 2004 Member of the AAML Executive Committee.
- 2004 Presented a program for the Nevada State Bar at their Advance Family Law Seminar, on "Evidence and Trial Practice in Family Court" and "Trial Tactics and Strategy."
- 2004 CLE Chair for **The College** Annual Spring Meeting.
- 2004 Featured Speaker on "Family Law Contempts" at the Los Angeles County Bar, Los Angeles Superior Court Co-Sponsored Family Law Symposium, as well as updating the "Family Law Contempts" article published in the 2004 Symposium Book.
- 2004 Panel Speaker for a Teleconference Hosted by Shannon Pratt, entitled "Defending the Business Valuation in Court."
- Annual presentations for the AAML, Southern California Chapter, Annual Trial Advocacy Institute, on the subjects of "Advanced Motion Practice" and "Complex Trial Strategy and Presentation," with Los Angeles Superior Court Family Law Judge Kenneth A. Black and

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one other family law lawyer, in beginning in 1993, 1994, and continuing from 1996 through 2008.

- 2003 and 2001 Annual presentations at NACVA Annual Business Valuation Conference on topics such as "The Impact of State Laws on Valuations for Divorce."
- 2003 Presentation on "Child Support in High Wage Earner Cases," for The Family Law Society of Los Angeles.
- 2002 Family Law presentations twice annually including topics like, "Making the Most of the Experts" at their National Conferences on Divorce: Property and Complex Financial Issues, jointly sponsored by the AICPA and the AAML.
- 2002 Ohio State Chapter of the AAML, Family Law Section program presentation on "Rules of Evidence."
- 2001 Review of National Board of Trial Advocacy (NBTA) Family Law examination questions.
- 2001 and 2002 Beverly Hills Bar Association program, "Trial Strategies and Tactics."
- 2001 Florida Family Law Section Annual Symposium, Trial Strategies and Tactics in Complex Cases.
- 2000 ABA Millennium Trial Program, "The Marital Woes of King Henry VIII," one of eight designated trial counsel from the United States and United Kingdom for this fun program, tried before a London High Court Justice and a Florida Supreme Court Justice.
- 2000 San Fernando Valley Bar Association CLE program, "How to Properly Try a Contempt Case," presented with two Los Angeles Superior Court Judges.
- 2000 AAML program on "Comparative Cross-examination Techniques," presented in connection with and as a contrast to Roger Dodd - a two-day program dealing with cross-examination techniques of financial and valuation experts in a family law matter.
- 2000 ABA/NBTA program on how to conduct and object at depositions, including evidence issues.
- 2000 Los Angeles County Bar Association presentation on "How to Present and Defend Family Law Contempts."
- 2000 Los Angeles County Bar Association program on "How to Preserve and Attack Judgments."

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Other Items of Note

- 1998 ABA, Family Law Section's program on "Comparative Cross-Examination of Expert Witnesses."
- 1989 and 1990 - 1992 Presentation a program on "Marital Torts" to the AAML and other family law lawyer groups.
- Mr. Kolodny was one of the Los Angeles County lawyers involved in the creation of the Los Angeles County recognized conditions for bifurcating marital status from the other case-related issues, recognizing the importance of protecting the rights of the non-requesting party, while not binding the requesting party to a marriage that was irretrievably broken. As a result, he has done multiple presentations on technical and sophisticated issues involved in the bifurcation of marital status, the pitfalls resulting therefrom and tactics and judgment provisions to minimize problems for your client.
- Mr. Kolodny was a panelist in a program entitled, "How to Try a Complex Family Law Case," presented to the California Judges College, the Los Angeles County Bar Association and the Los Angeles Superior Court's Annual Family Law Symposium.
- Mr. Kolodny has also been a lecturer on Family Law matters for the California Society of Certified Public Accountants, Forensic Litigation Section.

Mr. Kolodny's various publications include:

- Co-Author of The Divorce Trial Manual, a nationally published book written and published in 2003;
- Co-Author of The Divorce Practice Handbook, a widely circulated, nationally sold hardcover book published in 1994;
- Regular Author of an article on Family Law Contempt, an annually updated publication in Los Angeles County Bar and Los Angeles Superior Court Symposium Book;
- Original creator of the *West's California Family Law Forms*;
- Contributing Author to the Judge Mills Family Law Bench Book, published in 1980;
- Co-Author of the *Family Law Judicial Council Forms* for several years;
- Author of *Family Law Practice Forms*; Family Advocate, ABA Family Law section;
- Author of article on "Tort Recovery Against Aiders and Abettors in Child Stealing Cases," published in 1981; and
- Author of article on "Evidence and Direct Examination," published in 1996.

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Mt. Vernon, KY
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Tampa, FL
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Los Angeles, CA
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Birmingham, AL
Wm. O. "Bill" James, Jr.
Little Rock, AR
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Santa Monica, CA
Rick Jones
New York, NY
Elizabeth Kelley
Cleveland, OH
Mark J. Mahoney
Buffalo, NY
William D. Massey
Memphis, TN
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Austin, TX
William H. Murphy, Jr.
Baltimore, MD
Timothy P. O'Toole
Washington, DC
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Gulfport, FL
Barry J. Pollack
Washington, DC
Mark P. Rankin
Tampa, FL
Martin A. Sabelli
San Francisco, CA
Maria H. Sandoval
San Juan, PR
Mark Satawa
Southfield, MI
Marvin E. Schechter
New York, NY
Gail Shifman
San Francisco, CA
Theodore Simon
Philadelphia, PA
David B. Smith
Alexandria, VA
Penelope S. Strong
Billings, MT
Jennifer L. Thompson
Nashville, TN
Deja Vishny
Milwaukee, WI
James H. Voyles, Jr.
Indianapolis, IN
William T. Whitaker
Akron, OH
Christie N. Williams
Dallas, TX
C. Rauch Wise
Greenwood, SC
Vicki Young
San Francisco, CA

EXECUTIVE DIRECTOR
Norman L. Reimer

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Reply to:
1311 Broadway
Little Rock, AR 72202

June 6, 2008

Ms. Audrey Hollins
Office of Professional Competence,
Planning & Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639
by fax (415) 538-2171

Jeffrey Bleich, Esq.
State Bar President
Munger, Tolles & Olson
560 Mission Street, 27th Fl.
San Francisco, CA 94105
Jeff.bleich@mto.com

Re: NACDL Objections to Proposed Revisions to the California Rules of Professional Conduct, Proposed Rules 1.5, 3.10, & 4.2

Dear Ms. Hollins:

I write on behalf of the National Association of Criminal Defense Lawyers ("NACDL"), with over 1,300 members in California. NACDL is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's 12,800-plus direct members in 28 countries – and 90 state, provincial, local, and international criminal tribunal affiliate organizations totaling more than 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a

"LIBERTY'S LAST CHAMPION"

1150 18th Street, NW ◆ Suite 950 ◆ Washington, DC 20036
202-872-8600 Fax 202-872-8690 assist@nacdl.org www.nacdl.org

rational and humane criminal justice system.

I am former Chair of NACDL's Ethics Advisory Committee (1990-2005), and the author of numerous written ethics opinions for NACDL and about 800 informal opinions. I am also the author of PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE (2d ed. 2005) and one of two lawyer members of the International Criminal Court Disciplinary Appeals Tribunal (2007-10).

NACDL urges the State Bar of California **to not adopt and to reject** the following proposed revisions to the California Rules of Professional Conduct:

1. a prohibition of nonrefundable retainers set forth in proposed Rule 1.5(f) and Comment ¶ 2, fees for legal services; we also suggest that the use of "unreasonable fee" in Model Rules 1.5(a & b) is a better definition and should resolve any questions.

2. authorization for government lawyers to negotiate the disposition of criminal and civil liability as set forth in the Comment ¶ 2 to proposed Rule 3.10, threatening criminal, administrative, or disciplinary charges.

3. commentary providing prosecutors and those acting at their direction with the ability to communicate with represented persons without the consent of their counsel, as set forth in proposed Rule 4.2 and Comment ¶s 19-20, communication with a person represented by counsel, communications authorized by law or court order.

These proposed changes to Rules 3.10 and 4.2 are also of doubtful constitutionality because they grant special status to prosecutors in California that exists nowhere else in the United States, either in federal or state law. There is no justification for a separate rule in California putting prosecutors above the law that every other lawyer in America must abide by. Moreover, as to Rule 4.2, Congress requires that all federal prosecutors follow their state ethics rules, and it has for quite some time. There is no sign anywhere that there is any problem with that, but California now proposes to exempt California prosecutors from this statutory mandate through the back door.

We submit that these three proposed revisions to California's rules of professional conduct would have a negative impact on criminal defense lawyers and their clients, the rights of those accused of crimes, and the criminal justice system in general. Our general position is also ably stated to you already by two NACDL members: Barry Tarlow of Los Angeles and Evan Jenness of Santa Monica who are separately commenting. I hope I will not repeat what they say.

Rule 1.5(f): The prohibition on flat fee ("nonrefundable") retainers" can be solved by using "unreasonable" instead of "unconscionable" in Rule 1.5(a & b), and Rule 1.5(f) then becomes unnecessary

Flat or "nonrefundable" retainers are a misnomer because no flat fee is truly "nonrefundable." Any fee is potentially refundable in part if the representation ends before the lawyer can do any substantive work or a conflict of interest develops at a point where the whole flat fee has not been earned or the lawyer must get out of the case because of some disagreement with the client. In those contingencies, a nonrefundable fee is clearly "unreasonable" under Model Rule 1.5(a & b). That is what the case law says "unreasonable" includes. "Unreasonable" is used in every other jurisdiction in the United States, but California desires to continue to use "unconscionable" as in California Rule of Professional Conduct 4-200.

NACDL submits that, although there is historical precedent in California, California unduly constrains its lawyers by the continued use of the word "unconscionable" fees instead of "unreasonable" fees. We submit that replacing "unconscionable" with "unreasonable" wherever it appears in proposed Rule 1.5 and adopting the entirely of Model Rule 1.5 without (f) is all that is required because of the wealth of case law on the meaning of an "unreasonable fee."

Flat fee agreements are the most commonly used form of retainer in criminal cases, and they are critical to enabling clients of medium and lesser means to retain criminal defense counsel. Lawyers can seldom determine the exact potential length of a criminal matter, and clients of limited means generally cannot afford to pay a refundable retainer large enough to assure counsel a fair hourly rate in every case. Cases may be tried, they may plead. We don't know when we get into it how it will end, but we need to be compensated for a trial if one occurs.

And, what if a case goes a way promptly because of something the lawyer did or was able to achieve in a short period of time? Would that be "unconscionable" under California law? It would not be in a personal injury case settled for a six figure fee with 40 hours of work. As stated in § 7:9 n. 35 of my ethics book,

> A non-refundable fee in a criminal case is not per se unethical or excessive–it depends on all the facts. "[A] lawyer of towering reputation, just by agreeing to represent a client, may cause a threatened lawsuit to vanish and thereby obtain a substantial benefit for the client and be entitled to keep the entire amount paid to him, particularly if he lost or declined other employment in order to represent that particular client." Bain v. Weiffenbach, 590 So. 2d 544 (Fla. Dist. Ct. App. 2d Dist. 1991).

The fee is earned. The client got what he or she bargained for: a quick favorable result.

More well-to-do clients may be able to deposit sufficient funds into a lawyer's client trust fund account to pay an hourly fee. Most clients, except those involved in seriously complicated white collar or homicide cases, expect to pay a flat rate fee, not an hourly rate that never ends and has no maximum. Indeed, most clients cannot pay anything except a flat rate fee in a serious

criminal case. Once they have paid the lawyer their liquid funds are often exhausted.

In addition, flat fees are often charged by low-cost, high volume criminal defense firms. They can assess the value of a case by its basic facts and charge accordingly, and, if one case takes too long, it balances out with the others. Prohibiting flat rate fees would undoubtedly increase fees to clients as the actual cost per case gets charged. A $1,000 fee may become $2,000 under this proposed rule. Clients may become unable to pay additional installments, and lawyers may then move to be relieved for nonpayment of a fee. In that situation, disposition of the case is delayed and court dockets back up.

Proposed Rule 1.5(f) is not included in the ABA Model Rules of Professional Conduct, Rule 1.5. The desirable goal of some national uniformity in states ethic rules is not advanced by this proposed rule. We all know that some states have somewhat but, not totally, prohibited flat fee retainers, but those cases do not account for possible alternatives. Others have found ways to have a flat rate and have it be "reasonable" under Model Rule 1.5(a). A good example is *In re Sather*, 3 P.3d 403 (Colo. 2000).

NACDL does not believe that prohibiting nonrefundable retainers will solve any real problems with client overbilling, and those issues should instead be addressed by disciplinary authorities on a case-by-case basis under the existing rules. There is no reason why a flat retainer cannot and should not be partially refundable when it would become "unreasonable."

In fact, a dishonest lawyer likely will attempt to overcharge a client regardless of the type of retainer utilized. Hourly rates have been falling into disfavor over the last few years because they are subject to abuse of churning of cases and overbilling by padding the hours.

We are aware of no studies or evidence suggesting that nonrefundable retainers in criminal cases are more vulnerable to abuse by lawyers than any other fee arrangements, yet, there are constant stories in the media these days about hourly billing falling by the way and coming under attack.

Thus, NACDL does not believe that proposed Rule 1.5(f) is necessary to protect California clients from being charged excessive fees, and it could result in many people actually paying more for private criminal defense lawyers.

MORTON & RUSSO, LLP
ATTORNEYS AT LAW

AMY F. MORTON
CERTIFIED CRIMINAL LAW SPECIALIST

DANIEL J. RUSSO **
CERTIFIED CRIMINAL LAW SPECIALIST

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** Also admitted to the District of Columbia Bar

June 4, 2008

Audrey Hollins
The State Bar of California
Office of Professional Competence,
Planning & Development
180 Howard Street
San Francisco, CA 94105

Re: Proposed New State Bar Rule 1.5(f)(4-200) (Fees for Legal Services) Abolishing Non-Refundable Retainers

Dear Ms. Hollins:

I am sending this letter to voice my strong objection to the proposed new rule 1.5, subsection (f) prohibiting non-refundable fees for performing legal services.

I am currently in a two attorney firm, and I am on the Criminal Law Specialist Committee for the State Bar. As an attorney who has practiced in Solano County for thirty years, I have utilized non-refundable retainers in the vast majority of my cases. As a former president and vice-president of the Solano County Bar Association, I am familiar with the practice of my fellow Solano County Bar members. Many, if not all criminal law practitioners, use a non-refundable retainer agreement in criminal cases. In addition, as a result of teaching Criminal Law, Criminal Procedure, Evidence and Criminal Trial Practice for over twenty-two years at John F. Kennedy School of Law, I have become familiar with many of the business practices of Bay Area criminal defense lawyers. Many of their clients, like mine, are not members of the criminal subculture. Often when they are charged with a crime, they find their lives devastated, not only emotionally, but, financially as well. In defending themselves, they must marshal their assets, often while they are in custody, and, may have lost their employment in defending themselves.

They cannot guarantee payment of hourly fees because their resources are limited. Thus, if they pay a flat non-refundable fee, they know what their cost are ahead of time and they can marshal their resources and obtain loans or assistance from family members and friends.

When they speak to relatives who are often the source of monies, they can tell their relatives exactly what they are in for in terms of money. Sometimes the lawyer who agrees to a flat fee finds himself working at the lowest end of the hourly scale, sometimes at the highest. The reality is that flat fee retainers benefit both the client and the attorney.

I have in the past and currently still work on court-appointed cases. These cases are paid on an hourly basis and can result in either very small or very large fees. Most private attorneys who do appointed work see this as a type of community service, and unfortunately many successful attorneys refuse to do hourly appointed work.

Having seen the destruction of idealistic young lawyers at the hands of minimum billable hours per week law firms, I heartily agree with Bar President Jeffery Bleich's analysis of the sometime destructive impact of hourly fees[1].

I urge you to reject this proposal.

Please contact me if you have any questions and please consider rejecting the proposal.

Very truly yours,

DANIEL J. RUSSO
Attorney at Law

DJR/vlw

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[1] Interestingly, the article by the State Bar President criticizing hourly fees generated almost universal agreement of their negative effort on the profession. (See opinion, letters California State Bar Journal, May 2008)

CERTIFIED SPECIALIST - CRIMINAL LAW
THE STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION

STANLEY I. GREENBERG
A LAW CORPORATION
6080 CENTER DRIVE, SUITE 800
LOS ANGELES, CALIFORNIA 90045-1574

(310) 215-7509
FAX (310) 215-7736

June 5, 2008

Audrey Hollins
THE STATE BAR OF CALIFORNIA
Office of Professional Competence,
Planning and Development
180 Howard Street
San Francisco, CA. 94105

Re: Opposition to Proposed New State Bar Rule 1.5(f) (4-200)
(Fees for Legal Services) Abolishing Non-refundable Retainers

Dear Ms. Hollins:

I am writing to document my vigorous opposition to the proposed new State Bar Rule 1.5(f) (4-200). I am a former member of the United States Army, Judge Advocate General's Corps, a former Assistant United States Attorney, a Certified Specialist in Criminal Law, and have been in private practice since 1974. I am enclosing a copy of my Resume so you might better evaluate my comments.

This proposed rule would have a very detrimental effect on defendants accused of crimes, their ability to retain counsel to assure representation throughout the matter, and the criminal defense practice generally. As I review my files, it seems this is an issue that has been raised before in approximately 1997 and probably earlier in the same decade. I was able to locate in my files a copy of a letter from highly respected defense lawyer Barry Tarlow dated April 28, 1997. At the time, it was an opposition to then proposed new Rule of Professional Conduct 4-110 regarding a virtually identical issue.

Also, I have previously lodged opposition to these proposed changes in the past as being very bad ideas. Rather than simply repeat the comments that I know have been made by myself and others, I am attaching herewith a copy of Mr. Tarlow's letter of April 28, 1997, and incorporate the contents by reference. They succinctly articulate the reasons this is such a bad idea. The arguments made therein are virtually the same that I would make, and I hereby adopt them.

Essentially, when a client agrees to pay a lawyer a flat fee, this represents a negotiated compromise in which both sides assume certain risks as to how the case will unfold. Given the recent opinion of our State Bar President that "hourly billing" is the bane of the legal profession, it is to the mutual benefit of both client and lawyer in a criminal case to commit to a non-refundable flat fee arrangement. The reasons are well-documented, and I will not further detail them here. However, should this rule pass, it will make defendants in criminal cases necessarily subject to all the disadvantages of hourly billing that were the subject of the recent criticism by our State Bar President. I strenuously urge against the passage of this new proposed State Bar rule.

Yours very truly,

STANLEY I. GREENBERG

SIG:jp
Encls.

c.c.: President Jeffrey L. Bleich
Vice President Holly J. Fujie
Vice President John P. McNicholas
Vice President Danni R. Murphy
Vice President James N. Penrod
Vice President M. Carmen Ramirez

EXPERIENCE:

4/74-Present **STANLEY I. GREENBERG, A LAW CORPORATION**
11845 West Olympic Boulevard, Suite 1000
Los Angeles, CA. 90064

White-Collar Criminal Defense Lawyer

Defend individuals and corporations accused or suspected of crimes, including RICO, all types of fraud (tax; mail & wire; securities; bank and savings and loan; insurance); CCE; money laundering; environmental matters; etc. This includes matters before investigating grand juries and regulatory agencies, as well as several dozen trials in federal court (and a fewer number in state court).

Represent four individuals in connection with 1997-1998 investigation into fraud in campaign financing against allegations of illegal contributions through "conduits" in violation of the Federal Election Campaign Act ["FECA"]. This includes representation in investigation by Department of Justice Public Integrity Section and Federal Bureau of Investigation, before Federal grand jury; and before U.S. House of Representatives, Committee on Government Reform and Oversight.

Successfully defended CEO of major corporation in a 3-month bank fraud trial in U.S. District Court in Las Vegas, NV. (trial included over 26,000 trial exhibits). Also successfully defended a lawyer in the "Alliance" case, a 2-1/2 month trial in U.S. District Court in San Diego, CA., in which several lawyers were accused of RICO/fraud offenses growing from their participation in civil litigation and billing of insurance companies. Represented lead defendant in the nine-month Jewelry Center money laundering trial in U.S. District Court in Los Angeles (Operation "Polarcap"). Represented CEO's and principles of two different telephone paging services against Federal charges of tax evasion, money-laundering and wire-fraud.

Teaching & Lectures

Taught advanced seminar in White Collar Crime at University of West Los Angeles School of Law (approximately 1983-84); guest lecturer at numerous law schools in the Los Angeles area (University of Southern California; Loyola; Pepperdine) on the criminal justice system, ethics, role of the defense lawyer. Have also lectured at CLE seminars and programs; lectured at University of Southern California Institute for Corporate Counsel, 1991. Lecture to Office of the Federal Public Defender on June 13, 1997: "More Than You Ever Wanted to Know About the Law of Contempt . . . But Were Afraid to Ask."

CONSULTANT

Expert Legal Consultant to CBS NEWS regarding People v. O.J. Simpson (1994-1995)

LISTINGS:

- Rated "a-v" in Martindale-Hubbell.
- Listed in everyM.O./Arraignment edition of **The Best Lawyers in America**, since its first publication in 1983. (Published by Woodward-White).
- Voted Southern California Super Lawyer 2004.

11/70-3/74 **ASSISTANT UNITED STATES ATTORNEY**
Los Angeles, CA.

Prosecuted violations of all federal criminal statutes at District Court and Circuit Court level. Advised all federal investigative agencies. Authorized issuance of search warrants, arrest warrants, complaints, etc. From January 1971, member of Fraud and Special Prosecutions Unit, assigned the more complex and lengthy grand jury investigations and trials; concentrated on frauds and white-collar crime.

9/69-9/70 **U.S. ARMY CRIMINAL INVESTIGATION DIVISION AGENCY**
Washington, D.C. (Temporary duty)

Legal counsel to criminal investigative task forces assigned to investigate irregularities in Non-Commissioned Officers' Clubs & Messes, and alleged war crimes committed in My Lai 4, Vietnam. Analyzed evidence from field and advised investigators on sufficiency of evidence, offenses committed, and conclusions that result from investigation. Recommended appropriate judicial action to commanders; and coordinated prosecutive efforts from Headquarters in Washington, D.C.

3/69-9/69 **EXAMINATION & NEW TRIAL DIVISION, U.S. ARMY JUDICIARY**

Examined appeals from convictions by inferior courts-martial and requests for new trials. Prepared memoranda and gave oral briefings recommending appropriate action to the Judge Advocate General. Examined general courts-martial in which the sentence was less than 12 months for legal sufficiency.

2/68-3/69 **STAFF JUDGE ADVOCATE & ASSISTANT STAFF JUDGE ADVOCATE**
Cam Ranh Bay and Cu Chi, Vietnam

Represented and prosecuted soldiers accused of serious crimes in general courts-martial (approximately 20-30 felonies, including offenses of murder, rape and mutiny). Advised soldiers and commanders on legal matters of civil, military and criminal nature. Reviewed inferior courts-martial for legal sufficiency. Legal counsel to boards of officers convened for various military purposes. As claims officer had adjudicatory authority on small claims against the United States. Awarded Bronze Star for meritorious service during this assignment.

3/67-2/68 **ASSISTANT STAFF JUDGE ADVOCATE**
Fort Campbell, KY.

Advised soldiers and dependents on civilian and military legal matters. Represented soldiers accused of serious crimes in general courts-martial (approximately 15-20 felonies, including offenses of rape, robbery and assault).

Represented soldiers before various types of administrative boards. Reviewed inferior courts-martial for legal sufficiency. Prosecuted civilians before U.S. Commissioner for minor offenses committed on the Federal Reservation (similar to traffic court).

Summer 1965 **CUPPLES, COOPER & HALLER**
St. Louis, MO.

Law Clerk

ADMISSIONS:

California State Bar, December 14, 1972
Missouri State Bar, September 1966
Colorado State Bar, January 25, 1989
U.S. Supreme Court, November 1969
U.S. Court of Military Appeals, October 1969
Numerous Federal District Courts and Courts of Appeal

ASSOCIATIONS:

Member, Board of Directors, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) (Six year member)
(Chairman and Co-Chairman of numerous committees).

Member, AMERICAN BAR ASSOCIATION, Criminal Justice Council of the Criminal Justice Section.

Member, AMERICAN BAR ASSOCIATION, Defense Function Committee, Criminal Justice Section; White Collar Crime Committee.

Member, AMERICAN BAR ASSOCIATION, Criminal Justice Standards Committee, Task Force on the Prosecutorial Role in Investigations, Criminal Justice Section.

Member, LOS ANGELES COUNTY BAR ASSOCIATION, White Collar Crime Committee.

Member, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE (CACJ).

Co-Sponsor of ADVANCED CRIMINAL LAW SEMINAR (annual seminars conducted in Aspen, Colorado).

Organizer and Moderator for Spring CLE Seminar and Conference of the National Association of Criminal Defense Lawyers, April 23-24, 1998, Santa Monica, CA: **Post-Daubert Strategies for Winning Cases with Experts & Forensics.** (Attended by approximately 220 lawyers from all over the U.S.)

EDUCATION:

UNIVERSITY OF MISSOURI
J.D. 1966
Class Standing: 8 of 92

Managing Editor, Missouri Law Review
Curators' Scholarship
Omar E. Robinson Scholarship
Judge Shepard Barclay Prize (awarded to member of senior class based on scholarship and leadership)

Dean's List
Student Assistantship (Moot Court Committee)

Moot Court Finalist, First Year Competition
Moot Court Finalist, Second Year Competition
Criminal Investigator, Boone County Public Defender.

UNIVERSITY OF MISSOURI, COLUMBIA
A.B. 1963
(Political Science, History and English)

Honors Program
Dean's List
Member, Student Senate
Member, Executive Committee, Inter-Fraternity Council
President, Sigma Alpha Mu Fraternity
Member, Pi Omicron Sigma, National Leadership, Honorary for Fraternity Men

LAW OFFICES
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April 28, 1997

Katherine McMahon
Office of Professional Competence, Planning and Development
State Bar of California
100 Van Ness Avenue, 28th Floor
San Francisco, CA 94102-5238

Re: Opposition to Proposed New Rule of Professional Conduct of the State Bar of California, Rule 4-110 (Advance Payment of Fees for Legal Services) And Proposed Conforming Amendments to Existing Rules 3-700 (Termination of Employment) And 4-100 (Preserving Identity of Funds And Property of a Client

Dear Ms. McMahon:

I am a lawyer who has represented individuals and businesses accused of crimes in state and federal courts throughout the country for over thirty years. Enclosed is a copy of my biography so that you can evaluate my background and experience in determining what weight you should give to my views. I am seriously concerned as are many other California lawyers about the problems raised by the State Bar's proposed new Rule 4-110 and conforming amendments to Rule 4-100 and Rule 3-700 of the Rules of Professional Conduct of the State Bar of California (hereinafter "Proposals"). Proposed new Rule 4-110 would require lawyers to deposit all fees for legal work not yet performed in a client trust fund account unless the lawyer has obtained "the informed written authorization of the client"[1].

Careful analysis of the "Proposals" reveals that they are unnecessary and that the asserted need for change has simply not been demonstrated. A review of the history of the "Proposals"

[1] Proposed new Rule 4-110(c)(1) defines "fee paid in advance" as "any monetary compensation received by a member or law firm as consideration for legal services to be rendered in the future." The Discussion section to proposed Rule 4-100 limits the definition of "true retainer" to "a fee paid to the lawyer solely for the purpose of ensuring availability of the lawyer for the client's matter or for a specific period of time and is not tied to the performance of any specific legal service." Omitted entirely from the proposed "Discussion" section definition of "[a]ll fee arrangements" is the concept of an "earned when paid" fee or a "non-refundable retainer." The "Informed Written Authorization" proposed in Rule 4-110(A) and defined within subsection (C)(3)(a)-(e) would also mandate that any written authorization signed by the client include notification to the client that "(e) The fee paid in advance that is not placed in a trust account may not be available upon demand to refund to the client in the event legal services are not completed."

EXHIBIT A

demonstrates that the Committee on Professional Responsibility and Conduct ("COPRAC") has (1) in large part, merely reintroduced a previously rejected 1991 State Bar Commission proposal[2]; (2) presented it in new clothing which creates even more serious implications; while (3) ignoring the far more rational proposal offered in response by the Commission in December, 1991 and in fact adopted by the State Bar Board of Governors in 1992[3]. Based upon the single query by the Supreme Court relating to an easily remedied "possible ambiguity" in a portion of the refund requirements in the amendments adopted by the State Bar in 1992[4], the State Bar staff inexplicably tossed out the previously adopted changes and directed COPRAC to reinvent the proverbial wheel. Yet, nothing has happened in the intervening period which makes the last proposal [see footnote 3 *supra*] adopted by the State Bar in 1992 - , simply requiring that a fee agreement set out that an advance fee is earned when paid - , an inappropriate solution. Instead, COPRAC proposes for no valid reason to fundamentally change the way law is practiced in California.

The effect of these "Proposals" will be to foreclose a lawyer from acquiring an ownership interest in any payment for work that has not yet been completed. Such a rule has profound and disturbing consequences not only for those accused of crimes, criminal defense lawyers and consumers of low cost, fixed fee legal services, but also for lawyers who practice in many areas of the law, including entertainment law, divorce, S.E.C., bankruptcy, real estate and tax law. As detailed below, these sweeping policy changes will impact adversely on most lawyers, because they appear to make all fee payments the property of the client until the work is performed, regardless of (1) the provisions of a fee agreement setting out the intent of the lawyer and the client, or (2)whether the funds are placed in a general or trust account. In many cases, this will prevent an attorney from representing clients who desperately need representation.

The proposed changes will result in a prohibition on the use of any type of advance fees for operating expenses which threatens the economic viability of high volume, low fee practices

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[2] The State Bar Commission for the Revision of the Rules of Professional Conduct ("Commission") presented similar rule change proposals in 1991 which were also submitted for public comment; as COPRAC concedes in its present report, the vast majority of public comment (forty-three of the fifty-four comments) was in opposition to the proposed 1991 amendments which were ultimately withdrawn.

[3] The December 1991 proposal, identified in COPRAC's March 10, 1997 Memorandum as the "Third Proposal" and actually adopted by the State Bar in 1992, would have instituted minor, reasonable changes to the current rules permitting the continued use of "fixed fees", "flat fees" and "non-refundable retainers" to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statements that such fees paid in advance of legal services are earned when paid.

[4] Any ambiguity in the proposal adopted in 1992 which possibly confused the exemption of "earned when paid" fees placed in a general account from the requirement that "unearned" advance fees must be refunded could have been resolved with the inclusion of additional language in a discussion section that while lawyers and clients can contract to have fees which are "earned when paid," the "earned when paid" fee can become "unconscionable" and thus subject to refund if the attorney fails to perform the agreed-upon service.

and will increase the cost for many types of legal services. The "Proposals" will also inexorably expose lawyers performing all types of legal services to significant financial peril by facilitating the restraint and/or seizure of fees if any client has a potential criminal or bankruptcy problem or has a dispute with the IRS, the S.E.C. or even a vulnerability to potential creditors' claims. Moreover, the inability of criminal and civil lawyers to accept title to advance fee payments will substantially increase the risk of attorney fee forfeiture by state and federal prosecutors. This will deprive many citizens who can afford counsel of the practical ability to retain a lawyer.

The proposal suggested by COPRAC is truly a solution in search of a problem. Whatever the stated reason for this change, there simply has not been a pattern of abuse by lawyers resulting from the current rules[5] which mandates these changes or which would be remedied by these changes. In the absence of demonstrable abuses, the primary concern of the State Bar ought to be the protection of the interests of clients and lawyers and not the generation of substantial increases in income for State Bar projects that depend on income from interest earned on lawyers' trust accounts.[6] Instead, COPRAC proposes changes which will create unnecessary complexity and confusion and fundamentally undermine the attorney-client relationship. The changes are contrary to the interests of the two groups who are most affected, the lawyers and their clients.

1. The Proposed Changes Will Fundamentally Alter The Way Law Is Practiced And Ignore Sound Public Policy Considerations

The California Supreme Court has characterized the State Bar's position as "novel", that any advance fee payment must be deposited in the client's trust account. *Baronowski v. State Bar*, 24 Cal. 3d 153, 164 (1979). The "Proposals" fundamentally change the way law will be

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[5] A full reading and analysis of the reports cited in the COPRAC March 10, 1997 Memorandum at note 2 (State Bar of California Client Security Fund 1993 Progress Report and State Bar Client Security Fund 1994/1995 Progress Report) reveals that there has been no demonstration that the handling of advance fees by California lawyers is a genuine problem or is in any manner logically connected to the fact that "unearned fees" account for the largest total dollar amount paid from the client's security fund. Moreover, the anecdotal discussion about informal surveys of the "ethics hotline" ignores the fact that improper handling of fees in the majority of complaints filed involves outright theft from a trust account or gross misapplications of client monies and not what is in issue here. It is naive to believe that thieves or troubled and morally deficient people who happen to be lawyers will not steal or misappropriate money from their clients because the Bar passes these new rules.

[6] Not one word regarding State Bar utilizations of Trust Fund interest was mentioned regarding this purpose in COPRAC's March 10, 1997 Memorandum, and yet it is difficult to believe that this is not a major reason for the current "Proposals." Based on the history and demonstrated support by the State Bar Client Security Fund Commission and the Legal Services Trust Fund Commission for similar but wisely rejected rule changes proposed in 1991, there is a strong inference that an agenda for these proposed rule changes is the desire for increased funding of State Bar programs from interest-bearing trust accounts. While funding of these programs is a vital and worthwhile function of the Bar, it cannot be an appropriate basis for this radical reworking of the practice of law.

practiced in California without regard to the dire impact it will have on the profession. A major problem with the "Proposals" is the effect they will have on the economic viability of low cost, high volume, fixed fee practices that depend on advance payment from relatively routine legal matters. Typically such offices have scores of matters in various stages of completion and rely on the fixed fees generated by these cases to cover overhead expenses. If fixed fees are required to be deposited into a trust account until a portion of the service is completed, fees for basic legal services will increase because of the time value of money; that is money available today is worth more than money that is potentially available tomorrow.[7] The complex administrative allocation problems presented for both low cost, fixed fee practices and all criminal practitioners are formidable and will add costs that will be passed on to consumers of legal services. *See Missouri v. Jenkins, supra*, 109 S.Ct at 2469 ("[t]he fact that...the attorneys' [overhead] expenses are not deferred pending completion of the litigation can cause considerable hardship.")

In addition, one important purpose of a "flat fee" or "fixed fee" is to assure the client in advance that the fee will be no more than a particular amount. Many clients who have become relatively sophisticated consumers of legal services do not want fees calculated or related to how many hours the lawyer may work on a case. This type of fee is not determined based on fixed values for individual steps in the litigation. Cases develop differently and the "fixed fee" is at best an educated but fair estimate, since there is no way to determine when or how, for example, a criminal case will be resolved. The work will generally differ in cases that at first appear to be similar[8]. Therefore, particularly in high volume practices, there is no way to accurately make partial withdrawals from the trust fund account as soon as the corresponding portion of the fee is earned, as required by proposed Rule 4-110.

A lawyer, once in a criminal case, will at times find it difficult or impossible to withdraw even after being fired. When a lawyer is ordered to do so by the court, the lawyer must continue the representation even if grounds exist for terminating representation. It is likely that courts will order lawyers to continue representation when a change of lawyers would result in trial delay, even if the client does not want the lawyer and the lawyer does not want the client[9]. Even when a client has agreed to sign a waiver so that an advance fee can be placed in an operating account, the proposed rule changes potentially force a lawyer to remove a fee from the operating account

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[7] *See Missouri v. Jenkins*, 109 S.Ct. 2463, 2469 (1989)(observing in the context of an award, as non-refundable retainer or fixed fee, of attorneys' fees in a civil rights case that "clearly, compensation received several years after the services were rendered...is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings.").

[8] For example, an attorney may expend substantial resources on a presentation to a prosecutor to dissuade the government from filing an indictment, or investigating the case, on plea negotiations, at the trial or on sentencing.

[9] *See, e.g., In re Antonio Gonzales*, 726 F.2d 16 (1st Cir. 1984)(finding failure to pay legal fees does not justify withdrawal; *Rophaiel v. Alken Murray Corp.*, 1996 U.S. Dist. Lexis 7796 (S.D.N.Y. 1996)(non-payment of legal fees alone does not justify withdrawal); *In re Meyers*, 120 Bankr. 751, 752 (Bankr. S.D.N.Y. 1990)(non-payment of legal fees alone is insufficient basis for withdrawal).

that under current rules would belong to the lawyer, and place those funds out of reach in a trust account. If a dispute arises between lawyer and client during trial, it appears the lawyer must return an advance fee payment to a trust account "until the dispute is finally resolved" under the unfair obligations imposed in the "Proposals"[10]. There then may be no funds available to pay operating expenses, including rents and salaries, while the lawyer is compelled to continue with the trial.

Absent the client signing the waiver set out in the "Proposals", a fixed or flat fee cannot be charged and placed in a general account. *See* Proposed Rule 4-110(A). This would wreak havoc on the practice of criminal lawyers who participate in long cases. In the era of the mega-trial, many serious criminal cases in state and federal courts last for months and frequently the time from arrest to trial can be up to two years. The "Proposals" would bring about the absurd result that during a long trial, the lawyer cannot remove any advance fee payments from the trust account if the client objects "until the dispute is finally resolved"[11]. This is another example of how the authors of the "Proposals" appear to have very little appreciation for or sensitivity to the implications of the changes. It appears they would expect the criminal defense bar to rely on all those accused of crimes to act honorably and ethically in approving the release of funds from a trust account. The incidence of disruptions in lawyers' lives by involvement in large cases are already legion and the financial pressures extreme[12]. The "Proposals" would put in jeopardy the

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[10] According to the March 10, 1997 Memorandum issued by COPRAC:

> "...case law interpret[s] the current rules to require that disputed fees must be placed in a client trust account..."

Id., at p.6. Under the present "Proposals" the attorney could be required to remove any and all fees paid in advance for as yet unperformed legal services deposited originally in a general account because of a waiver and place them in a trust account when certain disputes arise.

[11] *See* March 10, 1997 COPRAC Memorandum at p.5:

> "If a client disputes the member's right to all or a portion of such funds, the member cannot withdraw the disputed portion of the funds until the dispute is finally resolved

[12] Judge Marvin Aspen in *United States v. Andrews*, 754 F.Supp. 1161, 1174 (N.D.Ill. 1990) accurately describes how attorneys are "deleteriously affected" by lengthy trials even when their fee is secure:

> "It is quite another matter... to expect these attorneys to survive economically...in a case anticipated to last as long as a year or two. Not only would their present earnings be diminished, but there would be long-range adverse effects on their practices due to such a lengthy full-time commitment. These severe repercussions to their professional careers would be particularly damaging in [a] case where most of the attorneys are solo practitioners."

The inherent economic hardships imposed on attorneys involved in increasingly more common mega-

economics and the very existence of the private criminal defense bar and the typical small law firm.

In many cases lawyers may be forced to place increased reliance on loans for operating expenses with a concomitant increase in cost to clients. In addition, the "Proposals" would require unnecessary and costly increased record-keeping. For example, in the typical fixed fee drunk driving case, which is never billed hourly, it would be relatively impossible to produce the required accounting. *See* Proposed Rule 4-110(B) and related Discussion. Increased accounting costs and overhead would result from the "Proposals" as well as the imminent elimination of the client's ability to contract for a flat/fixed fee which is earned on receipt. This fee arrangement is typically based on the client's sound judgment and preference for knowing in advance the extent of the financial obligation to the lawyer, which in many instances will be far less than an hourly billable which accounts for all the work to be done in the case. Moreover, fees in a trust account will be vulnerable to attachment by other potential creditors increasing the risk of nonpayment, and increasing fees to account for that risk. Finally if, before the sentencing and/or an eventual appeal in a criminal case, any funds remain the property of the client (as they appear to be under the "Proposals" regardless of whether they are in a general or trust account), the court can require that they be used for restitution or as payment of a fine rather than as payment of unearned future legal fees. *See United States v. Vincent*, unpublished, Case No. 90-10769 (9th Cir. 1995)(advance fee for post-conviction appeal ordered disgorged to pay criminal restitution). All of these factors will diminish lawyers' willingness to represent clients who present a risk of non-payment.

2. Unexplained Omission of Traditional Non-refundable Retainer

In redefining the types of fees lawyers may charge (*see* Discussion to proposed rule 4-110), COPRAC has completely omitted the concept of the "non-refundable retainer" from its newly coined definitions of the types of legal fees. As a central justification raised for this proposed rule change (*see* COPRAC Memorandum, Introduction and Background at p. 2) - COPRAC claims terms for various types of advance fees such as "non-refundable retainer" or "minimum fee" need to be redefined because they " lack common understanding and can often create confusion in the mind of the client." *See* COPRAC Memorandum, *supra*, at p.6. Unless a lawyer represents a client who is incompetent to stand trial, it strains credulity to imagine how the terms "minimum fee" or "non-refundable retainer" are ambiguous, particularly if they are spelled out in a fee agreement as "earned when received." In my 30 years of practice, I have never interviewed a client who ever had any difficulty understanding these fee concepts.

There are many factors traditionally recognized as justifying non-refundable retainers, including but not limited to: (1) Where there is a strong likelihood that taking on this client will (or did) preclude the attorney from taking on another present or future client; and (2) the

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trials would become insurmountable should the proposed changes be adopted, which allow the client and/or those parties attempting attachment restraint or forfeiture to control the fee being taken away altogether in the midst of such a trial.

experience, reputation, and ability of the attorney which might warrant the use of such a fee[13]. John Wesley Hall, Jr., *Professional Responsibility of the Criminal Lawyer*, 2d ed. (1996) §7:6 at p.165; Wisconsin Op E-94-4; see also Utah Opinion 136 (July 1993). The vast majority of state ethics committees permit the use of non-refundable retainers as long as the client is treated fairly.[14]

Unfortunately, the "Proposals" ignore the realities of practice for thousands of Californian lawyers. The "Discussion" section of proposed Rule 4-110 includes an unduly restrictive and inappropriate definition of fees, completely omitting the well-recognized and often utilized concept of the "non-refundable retainer." The proposed definition of a "true retainer" as a fee only paid for ensuring availability and not tied to the performance of any legal service would completely alter the way law has been practiced forever.

As the traditional justifications for the non-refundable retainer demonstrate, the proposed restrictive definitions do not account for the civil or criminal lawyer who accepts one case which requires a substantial amount of work by other attorneys in the office, causing other cases

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[13] There are a myriad of examples of legal transactions that have traditionally involved non-refundable retainers or fixed fees that are earned when received and are not calculated based on the time devoted to the assignment. These include: (1) fees charged by real estate lawyers for documenting and structuring complex financial transactions; (2) fees paid to securities lawyers for a public securities offering; (3) tax advice involved in the planning of sophisticated financial transactions, and (4) fees paid to entertainment lawyers for negotiating the terms of recording contracts or agreements regarding motion picture deals.

[14] John Wesley Hall, Jr., *Professional Responsibility of the Criminal Lawyer* (2d. ed. 1996) at p.163. *See*, e.g., Michigan Informal Op RI-69 (1991)(if the money is classified as a "non-refundable retainer," a lawyer may deposit the funds into the lawyer's own operating account immediately since such a fee is earned at the time of payment); Georgia Op. 91-2 (1991)(retainer fees which the lawyer earns by agreeing to represent the client, as well as flat and fixed fees to be earned upon completion of a specific legal task, may be placed in a general operating account; Oregon Op 509 (1986)(if the non-refundable fee clearly belongs solely to the firm, it must be deposited in the firm's general office account rather than the client's trust account); the Louisiana Supreme Court in 1996 amended the Louisiana Rules of Professional Competence to explicitly approve the use of a non-refundable retainer to permit immediate crediting of those moneys to an attorney's general account. Rule 1.5(f)(2) states, in part:

> "(2) When the client pays the lawyer all or part of a fixed or of a minimum fee for a particular representation with services to be rendered in the future, the funds become the property of the lawyer when paid...such funds need not be placed in the lawyer's trust account...";

Alaska OP-87-1 (1987)(a lawyer may charge a non-refundable retainer fee as long as the nature of the fee is fully explained to the client, orally and in the written fee agreement, and provided that the fee is not excessive); Pennsylvania OP-120(1985)(non-refundable retainers are ethical and should be fully explained to clients and reduced to writing). *But see, Wright v. Arnold*, 877 F.2d 616 (Okla. Ct.App. 1994) (finding non-refundable retainer concept held to be unenforceable).

necessarily to be turned down because the time is not available. It does not account for the conflict situation in many civil and criminal litigation matters where accepting a particular client in a complex case precludes the lawyer from representing dozens of other potential parties or defendants. Moreover, in the field of commercial transactional law, the lawyer or law firm accepting a client not only often forecloses representation of any other parties involved in the pending transactions but may be precluded in the future from representing other major clients in transactions that come to fruition years later. Nor does it account for the special knowledge, experience and ability an attorney may have already acquired on an issue or area of the law in a case, which might otherwise have to be gathered at the expense of a client with a less experienced or knowledgeable lawyer. These are clearly legitimate bases for compensation and are a substantial part of the traditional factors justifying non-refundable retainers.

Ironically, it was COPRAC that first suggested (see State Bar Memorandum (Oct. 1992) Enclosure F) in 1991 that any change to the rules should explicitly add "non-refundable retainers" as part of the definition of "true" retainers earned upon receipt. COPRAC is also on record as stating it is "concerned" that any proposed rule change not "unduly restrict" a lawyer's ability to charge a truly non-refundable retainer in appropriate circumstances. *Id.* Without explanation, COPRAC has now abandoned these important principles, heading in the exact opposite direction by improperly eliminating the concept of a legal fee for services that is fully earned when paid.

3. The Waiver Suggested under Proposed Rule 4-110(c)(3) Is Unnecessary, Offensive and Coercive

COPRAC has never persuasively articulated why the proposed waiver is any improvement over the "earned when received" language that the State Bar Board of Governors in 1992 believed resolved the issue of depositing advance fees in a general account. The waiver proposed by COPRAC under Rule 4-110(E)(3) is offense and coercive to the practitioner and will undermine the trust vital to the attorney-client relationship. The notice to the client contained in the proposed "informed written authorization" that fees not placed in the trust account "may be spent...prior to completion of the legal services" and therefore "may not be available upon demand to the client in the event legal services are not completed" sends a message to the client that the lawyer fits the all too familiar public image of a shady character, operating just on the edge of bankruptcy, waiting to "rip the client off." *See* Proposed Rule 4-110(C)(3)(c)(e). The proposed waiver by its own language discourages the legitimate placement of a fee in a general account by connecting refund obligations to the waiver itself. In addition, the language of the waiver will have the effect of encouraging more disputes between the attorney and client, along with increased bar complaints, by mandating the return of all advance fees under an apparently subjective standard of what "the client is entitled to receive" without any indication of what would constitute such entitlement. *See* Proposed Rule 4-110(C)(3)(d).

The waiver, even if substantially toned down, fails to properly inform the client of the reason for placing a particular fee in a general account while implicitly suggesting doing so is somehow suspect. Given the economics of practice, the cost of overhead, and the threat of seizure or restraint of a fee in a trust account, most criminal lawyers and many other practitioners only want to take those cases where the fee will not have to be placed in the trust account and

where the fee is "earned when received." Clients including highly sophisticated professionals and businesspeople do not object to these types of fee agreements. It simply runs contrary to the interests of lawyers and clients to explicitly require fees to be placed in a trust account unless special and onerous waivers are signed.

The proposed waiver also reflects a complete lack of appreciation for what it means to function in real world practice where lawyers must quote fees, be retained by clients, maintain good relationships with those clients, deal with a client's often difficult legal problems, pay operating expenses and at the same time steadfastly comply with ethical and professional responsibilities. Such a written statement must have been the brainchild of someone who has never functioned within the realities of the ordinary private practice of law.

4. Analysis of the Enhanced Risk of Seizure, Restraint, Attachment And/or Forfeiture of Legal Fees

Forcing a lawyer to put funds provided for legal fees into a trust account changes the fundamental nature of who is the owner of these funds. If a fee paid to a lawyer is earned when received and is placed in an attorney's general account, it is the property of the lawyer. The client's right to have representation in litigation is protected. If the funds are forced to be placed in a trust account, the funds are then the client's funds and subject to seizure under criminal or civil process. The waiver required in the "Proposals" for depositing the fee in the general account does not change the reality that the unearned portion belongs to the client even when deposited in the general account[15]. Therefore, in many situations the attorney will lose a fee, the client loses the ability to pay for the attorney, and in federal criminal prosecutions where non-payment of fee is often not grounds for withdrawal, the lawyer may be forced to complete all legal services without pay.

Under the concept of the "Proposals", the fee continues to belong to the client until earned, unless it fits in the very narrow definition of "true retainer." *See* Discussion to Proposed Rule 4-110. Under many theories of seizure or asset restraint, this would allow a third party to levy or restrain the use of any unused portion of a fee because it belongs to the client. If the fee

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[15] Putting the funds in a general account with the permission of the client does not eliminate the problem. Under the "Proposals," the unexpended portion belongs to the client, not the lawyer. Therefore, it would be subject to seizure or restraint under applicable criminal law principles and also probably by the S.E.C. under *S.E.C. v. Interlink Data Network of Los Angeles*, 77 F.3d 1201, 1205 (9th Cir. 1996)(portion of advance fee payment not for services already rendered remains property of client for purposes of determination of whether deposit subject to freeze on client's assets). In *Interlink*, the Ninth Circuit held that advance fees paid to the law firm of Lewis, D'Amato for the performance of future legal services which were directed by a fee agreement to be maintained in the law firm's trust account were therefore subject to seizure. *Id.* In addition, the Second and Ninth Circuit Courts of Appeal have also affirmed a judgement creditors' qualified rights to set aside and recover attorneys' fees paid by insolvent or potentially insolvent debtors. *See HBE Leasing Corp. V. Frank*, 61 F.3d 1054(2d Cir. 1995)(creditors allowed to disgorge over $750,000 in legal fees from seven attorneys as fraudulent conveyances); *United States v. Vincent*, unpublished, No. 93-10769 (9th Cir. 1995)(advance fee for post-conviction appeal ordered disgorged to pay criminal restitution as asset of client and not property of attorney).

belonged to the attorney, as it would in a traditional non-refundable retainer or a fixed fee situation, the client is not the owner of the funds and would have no say over whether the fee is deposited in a trust account. We have consistently advised lawyers in this situation that funds are generally not seized or restrained if they are in the lawyer's general account and are fees paid in full and earned on receipt, so that the client has no right to the funds. Under the "Proposals" any portion of the fee that is for future legal services would be the property of the client, and therefore subject to restraint or forfeiture.

The only way the client is guaranteed to obtain legal services and the lawyer is guaranteed to receive a fee when a client is potentially involved in a bankruptcy, SEC, criminal or jeopardy tax situation or has potential creditors, is if there is a non-refundable assignment or absolute transfer of the funds. This is the key principle of defense historically utilized to protect legal fees from seizure or restraint[16].

When the client maintains the right to the funds before they are used, the state and IRS, or the bankruptcy lawyers or state and federal prosecuting agencies could make a persuasive argument that the fee is the client's property and therefore it can be seized. Even if the bar disagrees with my interpretation of the impact of these "Proposals", they still subject the lawyer to an enormous risk. In *Interlink, supra*, 77 F.3d at 1205, the lawyers completed all the work and lost the fee because the money belonged to the client under the financial arrangement drafted in the fee agreement. Because the funds were characterized as an advance fee payment that was to be placed in trust, they were the assets of the client and thus subject to restraint or seizure. *Interlink* , along with the other cases cited above, foreshadows the serious problems for California lawyers and their clients if these rules are adopted.

A client's funds that are deposited in a trust or general account under these "Proposals" will be subject to federal or state restraint and/or forfeiture or attachment by potential creditors. The "Proposals" will substantially increase the risk of attorney fee forfeiture because it will be impossible for an attorney who holds a fixed fee payment in trust or who has deposited it in a general account in accordance with the bar mandated waiver provisions to assert that he or she is a bona fide purchased for value. As long as the client has the right to determine whether the funds remain in the trust account, they belong to the client not the lawyer. Therefore, compliance with the proposed rule and amendments will make it impossible for a client to be represented by counsel in many criminal cases.[17]

Forfeiture of attorneys' fees is an increasingly common occurrence in state and federal

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[16] *See People v. Vermouth*, 42 Cal. App. 3d 353, 359(1974); *Buker v. Superior Court*, 25 Cal.App. 3d 1085, 1089 (1972); Tarlow, *Criminal Defendants and Abuse of Jeopardy Tax Procedures*, 22 UCLA L.Rev. 1191 (1976). The principles developed in *Vermouth* and *Buker* involved an "irrevocable assignment" enabling the client to receive representation and the lawyer to maintain the fee. *See People v. Vermouth, supra*, 42 Cal. App. 3d at 359.

[17] *See Caplin & Drysdale Chartered v. United States*, 109 S.Ct. 2646 (1989); *United States v. Monsanto*, 109 S.Ct. 2657 (1989)(upholding the constitutionality of government forfeiture of attorneys' fees); *People v. Superior Court, (Clements)*, 200 Cal.App. 3d 491 (1988)(refusing to recognize an exemption for attorneys' fees under California's forfeiture statute).

court. Numerous articles have appeared in the legal press on the effect of fee forfeiture on the ability of clients to retain criminal defense lawyers to represent them in serious criminal cases.[18]

For almost two decades, Bar Associations throughout the country have vigorously opposed the concept of forfeiture or restraint of legal fees because it destroys an individual's Sixth Amendment right to counsel of choice[19]. In light of the extraordinary effort by these concerned representatives of the organized Bar to safeguard the right to counsel in fee forfeiture situations, it is particularly disturbing that my own Bar would pass rules that will greatly facilitate fee forfeiture and deprive the citizen accused off private counsel of his or her choice.

Under federal law, attorneys' fees may be subject to restraint or forfeiture under a number of statutes, including 21 U.S.C. §853, 18 U.S.C. §§981 and 982 or 18 U.S.C. §1963 (RICO). RICO applies to a laundry list of federal offenses covering almost all major violations of federal law.[20] It is important to emphasize that RICO forfeiture is not limited to unlawfully acquired funds but also applies to the proceeds of legitimate business purchased with lawfully acquired funds if the owner is charged with a RICO violation involving one of the many predicate crimes. *See* 18 U.S.C. §1963(2)(D). 21 U.S.C. §853 provides for forfeiture of any property constituting, derived from, used or intended to be used in a federal drug offense. Additionally, if the property to be forfeited has been dissipated or cannot be found, any other property of the defendant, including funds used to pay an attorney may be substituted and forfeited. 21 U.S.C. §853(p). Therefore, even funds that were lawfully acquired and are unrelated to criminal activity are subject to forfeiture under this "substitute assets" provision.

The civil forfeiture statute, 18 U.S.C. §981, similarly provides for civil forfeiture of any

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[18] Taylor, Stuart. *Trench Warfare over Fee Forfeiture*, The American Lawyer (July/August 1995); Pike, David. *Winter of Discontent for Defense Lawyers*, Los Angeles Daily Journal (February 9, 1994); Mintz, Howard. *Paying a Fee or Playing a Game*, The Recorder (November 16, 1992). *See* Tarlow, *Fee Forfeiture, Apocalypse Now or Business as Usual*, Trial (April 1990), Strassner, *The Defense Bar Hedges its Bets 2 Months after Fee Rulings*, The National Law Journal (August 28, 1989). Indeed, it is the policy of the United States Department of Justice to pursue such forfeiture whenever the Department deems it appropriate to do so. *See Justice Department Guidelines on Forfeiture of Attorneys' Fees*, 38 Crim. L. Rep 3001 (BNA)(October 2, 1985).

[19] *See, e.g., ABA Criminal Justice Section Report to House of Delegates* (Resolution 108A opposing use of fee forfeiture under Comprehensive Crime Control Act of 1984)(that was overwhelmingly adopted by the House of Delegates in July, 1985, and in August of 1986, the ABA House of Delegates passed related Resolution 125A, which opposed the use of pre-trial restraining orders that interfered with a client's ability to hire counsel and pay the other costs related to the defense of a criminal case); Oregon Bar Op. 509 (1986); Utah Bar Op. 136 (1993). Bar Associations throughout the country passed similar resolutions.

[20] The predicate offenses under RICO include, among others, mail fraud, bank fraud, murder, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, dealing drugs, counterfeiting, theft, obstruction of justice, witness tampering, welfare fraud, money laundering, transportation of stolen vehicles, trafficking contraband cigarettes, and securities fraud. 18 U.S.C. 1961(1).

property involved in or derived from a host of federal offenses.[21] The criminal forfeiture statute, 18 U.S.C. §982, provides for forfeiture for the same litany of offenses upon a criminal conviction.

If the government seeks forfeiture of funds a defendant has used to pay his lawyer under 21 U.S.C. §853, the lawyer's sole defense is that he or she is "a bona fide purchaser for value of the right, title or interest in the property and was at the time of the purchase reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. §853(n)(6)(B). The federal RICO statute provides the same language with regard to forfeiture under RICO. 18 U.S.C. §1963(c). An attorney or other third party can defend a forfeiture proceeding under 18 U.S.C. §§ 981 and 982 to the extent that the lawyer can show an interest as an owner or a lienholder. 18 U.S.C. § 981(2). If these funds were deposited in a trust account, the funds would remain the property of the client and the attorney would not be able to assert the defenses that are specifically provided by these statutes. Even if they were deposited in a general account, they would be subject to forfeiture if the client had not irrevocable transferred the funds to the lawyer.

California law provides for various forms of asset restraint and/or forfeiture in insurance and health care cases[22]. California law also provides for forfeiture for drug and so-called racketeering offenses.[23] So-called racketeering offenses include a vast cross section of crimes that do not resemble the traditional image of racketeering.[24] As in the federal system, the

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[21] These include violation of the federal currency reporting requirements (18 U.S.C. §§5313(a) and 5324), or federal money laundering statutes (18 U.S.C. §§1956 and 1957). Additionally, property or funds may be forfeited under 18 U.S.C. §981 if they constitute, are derived from or are traceable to any proceeds obtained directly or indirectly from an offense against a foreign nation involving trafficking in a controlled substance, or if they constitute or are derived from proceeds traceable to a violation of federal statutes prohibiting bribery of a bank officer, embezzlement by a bank officer, misapplication of bank funds, making false entries in bank records, bank fraud, federal program fraud, false statement, fraud against the United States, mail fraud and wire fraud.

[22] For example, California Penal Code § 186.11(e)(2)(1996) provides that any person who is charged with two or more fraud or embezzlement-related felonies involving a "pattern of related felony conduct" implicating more than $500,000 is subject to asset seizure and other asset restraint until after a trial is conducted in order to preserve those assets for criminal restitution and fines should there be a conviction.

[23] Under Health and Safety Code §11470(f), "all moneys, negotiable instruments, securities, or other things of value furnished by any person in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, or securities which were used or intended to be used to facilitate" any a number of violations of the Health and Safety Code are subject to forfeiture. A third party may challenge such a forfeiture by filing a claim of interest in the property. *Cal. Health and Safety Code* §11488.5.

[24] The forfeiture section of California's "Control of Profits of Organized Crime Act," provides for forfeiture of "all proceeds of a pattern of criminal profiteering activity," which includes "all things of value that may have been received in exchange for the proceeds immediately derived

legislature has provided that lawyers may challenge a fee forfeiture under this section by proving that the fee is "solely owned by a bona fide purchaser for value." *Cal. Penal Code* §186.7(a).

In order not to chill the right of every person to have the opportunity to retain a lawyer in criminal matters, the United States Congress and the California legislature have even specifically determined to exempt legal fees paid with funds derived from criminal activities from ordinarily applicable criminal laws.[25]

Whether the fee once it is accepted is subject to forfeiture, however, is a different question. An attorney cannot be a "bona fide purchaser for value" or claim that he or she has an interest in the fee, if the attorney is prohibited by the "Proposals" from taking title to the fee. *See United States v. Veon*, 549 F.Supp. 274, 283, n.18 (E.D.Cal. 1982). In *Veon*, former Chief Judge Lawrence Karlton of the Eastern District of California observed that "an absolute assignment of property to serve as "true" non-refundable retainer extinguishes the clients interest in the property. It follows *a fortiori*, that to the extent such a transaction has occurred, the Government cannot obtain forfeiture of the assigned property..." since the "Proposals" would prohibit an absolute assignment or transfer of the fee, as described in *Veon*, and would leave clients and their lawyers vulnerable to fee forfeiture, under the provisions of federal and California law.

The use of non-refundable retainers and/or the payment of "fixed fees" or "flat fees" which are earned when paid historically has been an accepted practice among criminal defense attorneys throughout the country for a variety of reasons unique to the practice of criminal law.[26]

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from the pattern of criminal profiteering activity" *Cal. Penal Code* §186.3. The crimes that make up a pattern of "criminal profiteering" under California Law include but are not limited to bribery, felonious assault, embezzlement, forgery, gambling, kidnaping, mayhem, murder, receiving stolen property, robbery, solicitation of crime, grand theft, motor vehicle theft, trafficking in controlled substances, securities law violations, obscenity, insurance fraud, money laundering and computer crimes. *Cal. Penal Code* §186.2(a).

[25] 18 U.S.C. §1957(f)(1) excludes fee payments to lawyers from the coverage of the money laundering statute (the term monetary transaction...does not include transactions necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the constitution."); California statutes permit a lawyer to receive, as fees, funds that may be derived from consideration of the constitutional right to counsel afforded by the Sixth Amendment to the United States constitution and Section 15 of Article I of the California Constitution, when a case charged under [§11379.4(a)] involves an attorney who accepts a fee for representing a client in a criminal investigation or proceeding, the prosecution shall additionally be required to prove that the monies or negotiable instruments were accepted by the attorney with the intent to participate in the unlawful conduct...or to disguise or aid in disguising the source of the funds or the nature of the criminal activity").

[26] These include the enhanced risk of non-payment and the great reluctance of courts to recognize non-payment as a ground for withdrawal. Federal district court judges will generally not permit a limited appearance. It is practically impossible for a lawyer to withdraw as counsel of record in Federal court because of non-payment of a fee. *See discussion, supra*, at p.4 at n.9. This same principle would apply at many stages of a state case, particularly when a firm trial date is approaching in a complex case.

However, non-refundable retainers have taken on an increased importance in the face of aggressive attempts by prosecutors to seize or restrain legal fees. Several ABA panels have examined the issue of attorney fee forfeiture and the use of non-refundable retainers. One of the ABA panel members, the Honorable Marvin Garbis of the United States District Court for the District of Maryland, observed that the purpose of federal forfeiture action is "to prevent [the attorney] from taking the money in the first place," and observed that the acceptance of a non-refundable retainer is consistent with professional ethics." *ABA Meeting Features Programs on Fee Forfeiture, Government Investigative Tactics*, 49 Crim.L. Rep. 1499 (BNA)(November 11, 1991).

Judge Garbis' view is consistent with the position of both the ABA Code of Professional Responsibility and the ABA Model Rules, neither of which require advance fee payments or non-refundable retainers to be held in trust. *See* ABA Code DR-9-102, ABA Model Rule 1.15. As one commentator has noted, the prevailing view is that "prepaid legal fees should...be considered to be attorney's funds not clients' funds, and need not be placed in a client trust account." J.M. Burkoff, *Criminal Defense Ethics: Law and Liability*, §11.7, p. 11-27 (Rev.Ed. 1991).

Conclusion

The use of fixed fees and retainers which are earned when received has been common practice for generations of California lawyers and lawyers throughout the country for a number of important and appropriate reasons. Fixed fees allow lawyers to provide lower cost, routine legal services at prices that could not be justified if the lawyer was forced to rely on an interim or payment billing system. Advance payment of fees allows lawyers to represent people who would otherwise present an unacceptable risk of non-payment, including people accused of serious crimes whose property may be subject to forfeiture or restraint. A fixed fee paid in advance gives a client certainty and permits the client to retain a lawyer for an amount that is acceptable and affordable. The "Proposals" will profoundly change the way many attorneys practice in California and will raise the cost of legal services and decrease the availability of such services to those who desperately need representation, including people accused of crimes.

Since there has not been a meaningful number of cases in which traditional fee policies that have worked well for generations have been abused, and since it cannot be demonstrated that any changes will prevent rogue lawyers from misappropriating client funds, there is no need for change. For all the reasons discussed in this letter, the "Proposals" are not in the public interest and should be rejected.

Very Truly Yours,

Barry Tarlow

Barry Tarlow

LAW OFFICES OF
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June 10, 2008

Audrey Hollins
Office of Professional Competence
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: State Bar Rule 1.5(f)(4-200)
Fees for Legal Services - Abolishing non-refundable retainers

Dear Ms. Hollins:

I am a criminal defense attorney and have practiced in Northern California for over 50 years. I am enclosing a copy of my resume to give you some indication of my experience with the State Bar and the criminal practice.

I am disturbed by the proposal required that all retainers which are non-refundable would be prohibited by this new regulation.

In my own experience as a criminal defense attorney I have frequently received retainers from clients at the outset of a case where I have been unable to calculate how much time I would be spending on a case and/or whether I would be successful in obtaining favorable results for the client without going through extensive court hearings or trials.

While in some cases the fee paid may exceed the hourly rate an attorney would charge billing by the hour, the work performed and success of the attorney based on his experience and professional ability justifies the substantial fee.

By this proposal if I were prevented from asking for a substantial fee at the outset of the case I would be unwilling to represent individuals in the criminal field.

Frequently, there are individuals who can only afford to pay a one time retainer, which in many occasions would be substantial.

If that is listed as a refundable retainer the fee is subject to being attached by bankruptcy courts and/or the money would be subject to attachment for separate litigation involving the defendant.

June 10, 2008

I see no need for the change in this regulation and strongly urge you to not ask the State Bar to support it.

Very truly yours,

LOUIS S. KATZ

LSK/kk

Encl.

cc: Jeffrey Bleich, Esq.
560 Mission Street 27th Fl.
San Francisco, CA 94105

bcc: Barry Tarlow, Esq.
9119 Sunset Blvd.
Los Angeles, CA 90069

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FAX: (415) 863-3282

1954	Admitted to STATE BAR OF CALIFORNIA Admitted to NINTH CIRCUIT AND FEDERAL DISTRICT COURTS.
1972	Admitted to the UNITED STATES SUPREME COURT.
Education	J.D., Hastings College of Law, San Francisco, 1953. B.A., Economics/Psychology, San Francisco State College, 1950.
1973	Certified Specialist in Criminal Law.
Legal Experience	1991-Present. Solo practice, San Francisco Bay Area. Assumed law practice of Charles R. Garry (deceased). Criminal defense, forfeiture, civil rights. Offices in San Francisco and Redwood City. Conflict criminal panel, Federal District Court, Northern California 1997-2000 accepting Criminal Justice Act appointments San Francisco Superior Court Conflict panel 1991-to present. Accepting Criminal court defense appointments including death penalty trial appointments San Mateo County Superior Court Private Defender Conflicts panel, 1991-2000 accepting criminal defense appointments including homicide, and other Serious felony cases 1981-1991. Private practice in San Diego, Criminal Defense. 1978-1981. Director of the San Diego County Office of Defender Services (Public Defender of San Diego

County). Opened first Public Defender office in history of San Diego. Annual budget of $7 million. Organized and administered contracts with private attorneys for all appointed criminal defense in state court.

1957-1977. Gostin & Katz, San Diego, California. (Partner) General practice. Emphasis on plaintiff's personal injury and criminal defense with substantial litigation.

1954-1957. Solo private general practice in San Francisco.

1954-1955. Law partnership with Jonathan Rowell, Esq. Redwood City.

Teaching Experience

1975-1990. Adjunct Professor, University of San Diego School of Law. Taught Professional Responsibility, Constitutional Law, Advanced Trial Practice and Lawyering Skills.

Second Start teacher teaching reading to learning disabled and semi literate students of all ages 1998 to present

1982 Spring Semester. California Western School of Law, Appellate Advocacy. Adjunct Professor.

Continuing Education of the Bar (CEB), Criminal Tactics and Procedure. Three day program taught in several cities in California and Alaska.1980-81

1975-1982. National College of Criminal Defense Lawyers, Houston Texas. Visiting Summer Faculty.

1970-1980. California Trial Lawyers, Lecturer and seminar chairperson, State and National seminars.

1980-1986. Hastings Center for Trial and Appellate Advocacy, San Francisco. Visiting Professor, Summer Criminal Law Program.

Awards & Honors

1977. Outstanding Legal Contribution, San Diego NAACP Annual Award.

1978. Outstanding Trial Lawyer of the Year, San Diego Trial Lawyers Association (SDTLA).

1978. SDTLA Trial Lawyer of the Month.

1984. Criminal Defense Lawyers Club of San Diego County Award "for 30 Wonderful Years and Still the Dedicated Professional, Defender of the Disadvantaged, Conscience of the Community, Consummate Advocate, Teacher & Friend."

1986. San Diego County ACLU Annual Award for Long & Distinguished Service to Cause of Civil Liberties.

Publications

Contempt Defense Manual (How to Defend Contempt Charges Against Attorneys) Co-Author and Co-Editor, 1987,1993, and 1999 revision (CACJ Publication)

"Defense of Child Sexual Abuse Cases," Syllabus Editor (CACJ) (1985).

"Representing Witnesses Before Grand Juries," Forum, CACJ, 1979.

"Everything You Wanted to Know About Defending a Sex Case," California Public Defenders Association Journal, 1978.

"Time and Cause of Death in Homicide Cases," Criminal Defense Law Journal, 1978.

"Mentally Disordered Sex Offender, Law Update," Forum, CACJ, 1978.

"Eyewitness Identification," Western State Law Journal, 1977. Law Review article.

"Representing the Mentally Disordered Sex Offender," Forum, CACJ, Jan. 1977.

"Eyewitness Identification," CEB Monograph, 1976.

"Defense of Airport Searches," The Defense Magazine NACDL, March 1973.

Organizations

Executive Committee, Criminal Law Section, State Bar of California 1998 to present

La Raza Centro Legal, Board of Directors and treasurer 1998- to present

Board of Directors :San Diego County Bar Association.1979-1982, 1974-1977.

Vice President of San Diego County Bar Association. 1976-1977, 1984-1985.

National Association of Criminal Defense Lawyers, . Board of Directors 1973-1982.

California Attorneys for Criminal Justice, Board of Directors. 1973-present. President 1977-1978. Co-Founder. Chairman of Contempt Defense Committee 1987 to present.

California Trial Lawyers Association. Board of Directors, 1961-1971; Secretary, 1970-1971.

Criminal Defense Lawyers Club of San Diego; founding member and Past President. 1977-1991.

State Bar Jury Instruction Committee. 1977-1978.

San Diego ACLU Legal Panel Member since inception. 1958-1991.

1992-Present. Board of Directors, San Francisco Lawyers Club.

1993-Present. American Inns of Court, Senior Barrister. Co-Founder San Francisco Lawyers Club Chapter.

1994-1997. State Bar Conference. Board of Governors. Resolutions Committee.

THE STATE BAR
OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL

Scott J. Drexel, *Chief Trial Counsel*

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639 TELEPHONE: (415) 538-2063

August 26, 2008

Randall Difuntorum, Director
Office of Professional Competence & Planning
State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Comments of the Office of the Chief Trial Counsel to Proposed Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

Thank you for the opportunity to submit the comments of the Office of the Chief Trial Counsel to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in March 2008. I apologize that these comments have been submitted after the comment deadline but hope that they will nevertheless be considered by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

Proposed Rule 1.5 [Fees for Legal Services]

1. Unconscionable Fees

The Office of the Chief Trial Counsel is opposed to any attempt to specifically define the term "unconscionable" in subsection (b) of proposed rule 1.5. The phrase "unconscionable fee" is sufficiently defined by case law and has been found not to be unconstitutionally vague. (*In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 732.) In our view, any attempt to specifically define what constitutes an unconscionable fee is likely to be either overbroad or under inclusive. Sufficient guidance regarding the determination of whether a fee is unconscionable is provided by the list of facts set forth in subsection (c) of proposed rule 1.5. However, we urge the Commission to consider adding two additional factors to the list set forth in subsection (c). Those additional factors are: (1) whether the fee involves an element of fraud or overreaching on the attorney's part (see *Herrscher* v. *State Bar* (1935) 4 Cal.2d 399, 403; *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989); and (2) whether there was any failure on the attorney's part to disclose the true facts to the client (see *Herrscher* v. *State Bar*, *supra*, 4 Cal.2d at p. 403). In addition, the Commission may wish to more clearly state in the rule itself whether the factors set forth in subsection (c) are intended to be the exclusive factors to be considered in determining whether a fee is unconscionable. At least one

appellate court has expressed some uncertainty on this issue. (See *Shaffer* v. *Superior Court* (1995) 33 Cal.App.4th 993, 1003.)[1]

If the Commission nevertheless determines that the adoption of a definition of the term "unconscionable" as applied to fees for legal services is appropriate, the Commission should carefully consider the case law interpreting the term "unconscionable" as used in Civil Code section 1670.5 regarding unconscionable contracts or clauses of contracts and the effect that defining the term in relation to proposed rule 1.5 might have upon the interpretation of the same term in section 1670.5. (See *Shaffer* v. *Superior Court*, *supra*, 33 Cal.App.4th at p. 1000; *Carboni* v. *Appospide* (1991) 2 Cal.App.4th 76, 81-83.)

Additionally, we believe that the proposed definition of an "unconscionable fee" as currently drafted is inconsistent with case law. The proposed definition set forth in subsection (b) of proposed rule 1.5 states, in pertinent part, that a fee is unconscionable if the lawyer "has engaged in fraud or overreaching." This language suggests that all of the elements of civil fraud must be present to constitute unconscionability. However, under the case law, it is sufficient that the negotiation, setting or charging of the fee "involves an element of fraud or overreaching," which may not require proof of all of the elements required for civil fraud. (See *Herrscher* v. *State Bar*, *supra*, at p. 403; *In the Matter of Van Sickle*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 989.)

2. Unconscionable Expenses

Subsection (d) of proposed rule 1.5, regarding legal expenses, is ambiguous. This subsection can be read to mean that expenses charged to the client cannot be unconscionable within the meaning of the rule or it can be read to prohibit attorneys from charging their clients for expenses that are unconscionable. Subsection (d) should be modified so that it is clear that the latter meaning was intended.

In addition, the rule is uncertain with regard to the determination of the unconscionability of expenses. The proposed definition set forth in subsection (b) and the factors listed in subsection (c) of proposed rule 1.5, by their terms, apply only to the determination of whether a fee is unconscionable. What factors or considerations does the Commission intend for lawyers, State Bar prosecutors, the State Bar Court and the Supreme Court to apply in determining whether an expense is unconscionable?

3. Fees in Family Law and Criminal Law Matters

We are concerned about the Commission's proposal in subsection (e) of proposed rule 1.5 to single out two types of contingent fees (in family law and criminal law) as being improper. The implication of singling out these two types of contingent fees is that all other types of contingent fees are appropriate, a result that the Commission may not have intended. No explanation of the rationale for

[1] We recognize that the Commission has stated in Comment 1 to proposed rule 1.5 that the factors specified in paragraph (c) are not exclusive.

the fire and commented upon the fact that there was a large amount of paper and cardboard in the basement of the building to use as tinder for the fire.

The State Bar Court Review Department did not find respondent Dale culpable of a violation of current rule 2-100 of the Rules of Professional Conduct because the incarcerated arsonist was represented in his criminal proceeding, but not in the civil action in which respondent Dale solicited the information.

It is the Office of the Chief Trial Counsel's position that respondent Dale should have been found culpable of violating rule 2-100. As such, we recommend that subsection (a) of the proposed rule should read as follows:

> In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation, **or a related subject**, with a person the lawyer knows to be represented by another lawyer in the matter, **or a related matter**, unless the lawyer has the consent of the other lawyer.

The Office of the Chief Trial Counsel does not have any comments to offer at this time with respect to proposed rules 1.16, 3.5, 3.10, 4.3 or 5.4.

Thank you again for the opportunity to comment upon these proposed amendments to the Rules of Professional Conduct.

Very truly yours,

Scott J. Drexel
Chief Trial Counsel

SJD:dim
Attachment

PUBLIC COMMENTS [1.7] ~ FILE LIST

C-2008-191 Carol M. Langford [1.7]

C-2008-199 David McGowan [1.7]

C-2008-213b SDCBA [1.7]

C-2008-214c Robert Sall [1.7]

C-2008-216 David McGowan [1.7]

C-2008-230b OCBA [1.7]

C-2008-232b COPRAC [1.7]

C-2008-239 Douglas Hendricks [1.7]

C-2008-242a Richard Zitrin [1.7]

C-2008-245 Carol M. Langford [1.7]

C-2008-246 Margaret Lodise [1.7]

C-2008-253b Chief Trial Counsel [1.7].pdf

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation Law Office of Carol M. Langford

Commenting on behalf of an organization
- ○ Yes
- ◉ No

*** Name** Carol M. Langford

*** City** Walnut Creek

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) langford@usfca.edu

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.7 Conflict of Interest: Current Clients [3-310]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ◉ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

SEE ATTACHMENTS

Attachments

You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the next to **Attachment**.

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Receive Mass Email?

To receive e-mail notifications regarding the rules revision project, check the box indicating that you would like to be added to the Commission's e-mail list and enter your email address below. Email addresses will be used only to deliver the requested information. We will not use it for any other purpose or share it with others.

Carol M. Langford Comment on Proposed Rule 1.7: Consent to Future Conflict

The following is a comment on proposed rule 1.7 regarding conflicts of interest. Of particular concern is comment 33, which authorizes advance waivers of future conflicts of interest. The comment states that there must be informed consent for a waiver to be valid, which may be satisfied even in the absence of specific facts and circumstances surrounding the potential conflict. In addition, where the party giving consent is an experienced user of the type of legal services involved, even a "general and open-ended" advance consent may satisfy the "informed" requirement.

This commentator believes that the proposed rule is overly broad as written and that more specific guidelines should be included to determine whether there was informed consent. Additionally, this commentator recommends that blanket waivers should be treated with caution and only permitted where there is some type of limitation on scope. One suggested limitation which courts have approved is the identification of the potentially adverse parties in the waiver. To support my arguments relevant California case law will be set forth, as well as the accounts of several experienced practicing lawyers.

A brief overview of California case law on the issue helps establish the appropriate scenarios in which advance waivers of conflicts of interest should be permitted. In Zador Corp. v. Kwan, 31 Cal. App. 4th 1285 (6th Dist. 1995), plaintiffs brought suit against Zador and its agent Kwan. The owners of Zador had been represented by Heller for ten years and hired the firm to defend in the action. Kwan then asked Heller to represent him in the action as well, and Heller agreed on condition that Kwan sign a waiver and consent form. The form stated that in the event that a conflict

arose between Zador and Kwan, Kwan should seek new counsel and that Heller could continue to represent Zador "notwithstanding any adverse that may develop." Id. at 1300. Kwan studied the form for 20 minutes and signed it. After a conflict arose between the two parties, Kwan retained new counsel and reaffirmed his consent to Heller's continued representation of Zador. Heller followed up by sending a written confirmation of this agreement. The court held that the detailed consent form along with Kwan's multiple expressions of consent showed that he had executed a valid waiver. Zador Corp. v. Kwan, 31 Cal. App. 4th at 1301. In that case, the scope of the waiver was limited by identifying the adverse party and referring to conflicts arising out of present litigation, and the client was sophisticated in business matters.

In Visa U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100 (N.D. Cal. 2003), Visa, represented by Heller, sued First Data for trademark infringement. Prior to this action, First Data had asked Heller to represent it in an unrelated suit. Heller agreed to represent First Data on the condition that it signed a waiver, consenting to Heller's representation of Visa in future disputes against First Data. Heller explained that it had an ongoing relationship with Visa and represented it in large-scale commercial litigation. Since both Visa and First Data are major competitors in the credit card business, Heller explained the possibility of future conflicts between the two companies. First Data agreed and signed the waiver. In holding that First Data made a valid waiver, the court noted that Heller had explained the potential conflict in detail, that Visa was identified as the potentially adverse client, and that First Data was a sophisticated user of legal services. Id. at 1107-1109. The court also stressed that First Data actually knew of potential antitrust claims between it and Visa before signing the waiver. Id. at 1108.

In both Zador Corp. and Visa, the waiving party had some present knowledge about the kinds of conflicts it was waiving. In Zador Corp., the party knew that the future conflicts would relate to the present litigation he was involved in. In Visa, the party knew of potential antitrust claims that the adverse party might have against it. This knowledge also amounted to a durational limit on the waiver, referring to conflicts that arose out of a particular litigation rather than all conflicts occurring at any time in the future. In Zador Corp. and Visa, the waivers were also limited by referring to conflicts between the waiving party and an identified adverse party. An identified adverse party seems to play an important role in the courts' decisions to uphold the waivers. In fact, in another California case, the court refused to uphold the validity of an advance waiver where there was no identified adverse party. Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796 (N.D. Cal. 2004) involved a dispute over the intellectual property rights of chemicals. Before suit was filed, the owners of Concat, the Winchell family, hired the Morgan, Lewis law furn to plan their estate. Unilever was an existing client of Morgan, Lewis at the time.

Unaware of the connection between Concat and Unilever, Morgan, Lewis agreed to provide services to the Winchell family if they signed an advance waiver. The waiver referred to all future conflicts involving existing or new clients. The court found that this type of "generalized boilerplate waiver" was insufficient to obtain informed consent and in "stark contrast" to both Visa and Zador Corp., where named adverse parties were given. Id. at 821.

In addition to the courts, practicing lawyers have struggled with advance waivers and when they should be enforced. Advance waivers can be beneficial to the client by preserving his right to select the counsel of his choice. If advance waivers were

prohibited, counsel would be required to decline the party's request for representation, even if the client was willing to take the risk of the same counsel opposing him in a future suit.

In situations where a party is knowingly executing a waiver, he is bargaining for something – the special talent or expertise of the lawyer, or in co-defendant situations, economic or tactical advantages. In his experience, an attorney notes, "I have been involved in many instances . . . where a GC is willing to accept advance waivers in order to have access to a particular expertise." E-mail from William Schuman, to APRL listserv, Advance Waivers (Feb. 26, 2008).

On the other hand, broad and sweeping advance waivers pose the danger of a client unknowingly waiving all future conflicts, without a meaningful choice on his part. This would clearly violate the fiduciary duty owed to clients by lawyers. Many attorneys are concerned with "blank check" waivers because "the client is being asked to waive the unknown and unknowable." E-mail from Kurt Melchior, to APRL listserv, Advance Waivers (Feb. 28, 2008). As one attorney puts it, "So long as they are blank, no one, not even sophisticated GCs, can tell for sure what they are waiving. And they are, at least in my close experience, not so sophisticated that they are not shocked at what can happen . . . when the conflict comes down the pike." E-mail from Richard Zitrin, to APRL listserv, Advance Waivers (Feb. 26 2008).

I was an expert recently in a matter involving the Paul, Hastings law firm. They had asked the client, a GC from a financing company in New York, to waive any conflicts involved from the firm continuing to represent them even after the firm had clearly committed malpractice in the matter they were handling for the GC. The GC had

no real idea what he was waiving; the firm told him they would "handle the matter and take care of it" and he thought that meant they would both handle the case and pay any damages resulting from their failure to file proper UCC papers. When the time came to pay, the firm balked, stating that as a GC he must have clearly understood what he was waiving even if it was not in a written waiver. I testified about my low opinion of the firm's conduct and the next day the firm rapidly settled, likely fearful that the jury would agree with me.

That is not the first time I have dealt with GCs who may not be as sophisticated as lawyers think they are. GCs are busy and often can't pay attention to vague documents put in front of them. In my experience they rely heavily on the friendships they develop with their lawyers over the years and count on the lawyers not to do anything that would hurt their interests. An advance waiver of the type contemplated by the comment opens the door for law firms to abuse their clients.

The concern is magnified when the client is a relatively unsophisticated user of legal services: "These folks not only cannot understand the advance waiver explanation sufficiently for it to ever be 'informed,' they haven't remotely got the knowledge, background, or experience to evaluate such a waiver." E-mail from Seth Rosner, to APRL listserv, Advance Waivers (Feb. 26, 2008).

Proponents of the proposed comment on advance waivers argue that informed consent can be obtained by educating clients about the business practices of the firm. For example, informing the client of how the firm checks for conflicts and what types of clients the firm represents. However, busy attorneys constrained by billable hours seldom have the time to fully explain the complex business practices of the firm to all of their

potential clients. I was a partner in a mid-sized San Francisco law firm – it had around 90 lawyers. Never once did we fully explain our business practices. Also, cases often come in suddenly, needing urgent attention, and cannot be delayed by a lengthy explanation of the firm's practices. Yet even when lawyers take the time to explain how conflicts of interest may arise, they are likely to leave out important unfavorable information, such as how often conflicts of interest have arisen in their firm or the number of times the firm has been disqualified or sued for conflicts violations.

Advance waivers are also problematic because many potential conflicts may remain undetected and undisclosed to clients. At large firms with several branches and thousands of clients, it is impossible for attorneys to keep track of every single client on a daily basis. Large firms maintain a database through which they run conflicts of interest checks. However, these systems are not sophisticated enough to catch all conflicts, and some may fall through the cracks. For example, if an attorney runs an individual's name through the database, subsidiaries of a company he owns might not show up. Or take for example a recent case in New York, in which Milbank, Tweed, Hadley, and McCloy represented Bucyrus Erie Company in a bankruptcy proceeding. During the proceeding, it was discovered that the law firm had also represented the principal of Bucyrus' largest creditor. The firm asserted that it was unable to detect a connection between the two businesses during its search for conflicts of interest.

Recognizing the problems set forth above, California courts and many attorneys support advance waivers, but only those that are very limited in scope. In Zador Corp. and Visa, the waivers were limited in scope by identifying the adverse party and establishing durational boundaries. In Zador Corp., the conflicts involved were those

arising from a present litigation. In Visa, the conflicts were those relating to antitrust claims that the waiving party was aware of.

In addition to limitations on scope, it is important to consider the particular facts of each case to ensure that the consent was informed and a waiver knowingly made. The sophistication of the client and whether he was bargaining for something specific in signing the waiver is important. It is not enough that the GC merely be a GC. Specific guidelines should be incorporated into rule 1.7 to act as safeguards against uninformed and unintended waivers.

Absent some real guidelines, this comment should be taken out and advance waivers only addressed by the courts. This comment goes way beyond current case law and almost ensures powerful GCs will one day lobby Sacramento to regulate advance waivers when they get burned by one.

If you have any questions about my comment, or want further explanation, please do not hesitate to call me.

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
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DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation Professor of Law, University of San Diego

Commenting on behalf of an organization
- ○ Yes
- ◉ No

*** Name** David McGowan

*** City** San Diego

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) dmcgowan@sandiego.edu

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.7 Conflict of Interest: Current Clients [3-310]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ◉ AGREE ONLY IF MODIFIED

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Proposed Rule 1.7(a) is confusing and, read literally, would change both current California law and depart from the Model Rules. I propose deleting the references in proposed 1.7(a) to the "matter." The rule then would read:

(a) Representation directly adverse to current client. A lawyer shall not accept or continue representation of a client in a matter in which if the lawyer's representation of that client in that matter will be directly adverse to another client the lawyer currently represents, in another matter, without informed written consent from each client.

If 1.7(a) is amended, then 1.7(c) is unnecessary, and should be deleted to make the rule simpler and clearer. Subsection (c) simply prohibits a particular type of direct adversity, in which client B has an interest in the matter in which the

[CONTINUED...] [SEE ATTACHMENT FOR FULL TEXT]

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6/5/2008	PC	C-2008-199 David McGowan [1.7]	Rule Section(s) Only	(a)	Online

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FULL TEXT OF COMMENTS SUBMITTED BY DAVID MCGOWAN

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Proposed Rule 1.7(a) is confusing and, read literally, would change both current California law and depart from the Model Rules. I propose deleting the references in proposed 1.7(a) to the "matter." The rule then would read:

(a) Representation directly adverse to current client. A lawyer shall not accept or continue representation of a client in a matter in which if the lawyer's representation of that client in that matter will be directly adverse to another client the lawyer currently represents, in another matter, without informed written consent from each client.

If 1.7(a) is amended, then 1.7(c) is unnecessary, and should be deleted to make the rule simpler and clearer. Subsection (c) simply prohibits a particular type of direct adversity, in which client B has an interest in the matter in which the lawyer represents client A, and B's interest in that matter is directly adverse to A's interest. But if we strike out the language I have suggested, (a) becomes a flat prohibition on all concurrent representation of directly adverse interests, including the type specified in proposed subsection (c).

Another way of looking at it is simply to compare the titles of the sections: (a) is "Representation directly adverse to current client" and (c) is "Representing a client's adversary." When you represent a client's adversary your representation is adverse to your client.

I hope the commission finds this suggestion useful.

DM

Submitted on 2008-06-05 11:25

MEMORANDUM

Date: April 22, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subject: Proposed Rule 1.7 – Conflicts of Interest
[Existing CRPC Rule 3-310]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 1.7 but modify to delete entirely Comment 34 regarding class representation.

Rationale For Comment 1: Proposed Rule Comment 34 is too complicated a subject to be addressed in any manner other than a separate rule on class representation, which is why the ABA did not include class representation in its Model Rule 1.7.

Comment 2: Approve Proposed Rule 1.7 but modify to delete entirely the 4th sentence from the end of Proposed Rule Comment 33 regarding advance consent.

Rationale For Comment 2: Proposed Rule Comment 33 does not accurately state the status of current law.

THE SALL LAW FIRM
A PROFESSIONAL CORPORATION
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22351 COAST HIGHWAY
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JAMES T BIGGS
LARA A S GALLAS
BRANDON N KRUEGER

June 6, 2008

Via Facsimile & U.S. Mail

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning
and Development
180 Howard Street
San Francisco, CA 94105

Re: Public Comment on Proposed Rules of Professional Conduct

Dear Ms. Hollins:

I am submitting public comment on the current set of Proposed Rules of Professional Conduct. I a member of the Orange County Bar Associations Professionalism and Ethics Committee, and the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee. However, these comments are mine alone and do not reflect the deliberations of those committees. I am also a former member of COPRAC and a former chair of the Standing Committee on Mandatory Fee Arbitration.

Rule 1.5 -- Fees for Legal Services

It is time that California get on board with the reasonable fee standard applicable in all other states. It is my perception that a lawyer should never charge an unreasonable fee. There is plenty of case law that mandates a fee agreement must be fair and reasonable to a client, so high could that requirement exist in an environment where the fee charged can be unreasonable?

I recognize that a reason for maintaining the "unconscionability" standard is out of a concern that lawyers should not be disciplined if they make a fee request in a court or arbitration, and the trier of fact decides to disallow some portion of the fee as unreasonable, or determines a different amount. This problem can be avoided by crafting the rule to set the policy that an attorney may only charge a reasonable fee, but that the State Bar shall not prosecute an attorney unless he or she has sought to charge a fee that is unconscionable.

Let's face it. The Rules establish standards of conduct, even if they don't create civil cause

of action. We look to the rules for guidance. As a matter of public policy, lawyers must be told that there fees cannot be unreasonable. Once that practice standard is established, it is permissible to have a slightly more elevated requirement (such as unconscionability) for discipline beyond a mere private reproval to be imposed. I can imagine that some on the Commission will say that they cannot impose this two-step process of setting one standard for policy reasons, and a different standard for discipline, yet that is exactly what exists in our current rule 2-400 which sets a policy against discrimination, yet subsection (C) prohibits any disciplinary investigation unless there has been an adjudication of wrongdoing in a different forum. You can impose the same dichotomy on reasonable versus unconscionable fees.

We need to bring California in line with the rest of the country on this one. Please adopt the reasonable fee standard.

With respect to the definition of "unconscionability" in subsection (b), the reference to determining unconscionability "at the time the agreement is entered into" is a problem because many of the key elements are determined on subsequent events. I realize this language is part of the current rule, but it creates problems in practical application. The sentence is unnecessary and is in fact contradicted by the concepts in factors 5, 6, and 10 in subsection (c). The time spent, the results obtained, the extent of hostility, the nature of the litigation and the effort involved are all determined at the end of the representation, not at the beginning. The parties don't necessarily contemplate that those factors will affect the fee at the outset, but the rule expressly makes such factors an important consideration. Thus, to determine whether unconscionability exists from the setting at the time of making the contract ignores major elements of the analysis, and the statement is simply wrong. Coercive behavior can lead to unconscionable results, especially in fees, yet that does not exist at the beginning -- it arises later -- and it is not something contemplated by the parties in advance.

Finally, with respect to subsection (f), I have seen a great deal of litigation and arbitrated many disputes over the problem of nonrefundable fees, especially in the family law context. I perceive that there will be great objection to the proposed rule prohibiting nonrefundable fees, especially from the organized bars and the criminal bar. I strongly support the Commission's decision to ban the nonrefundable fee. However, you need to provide better guidance as to the definition of a "true retainer" because there is widespread confusion. You also need to clarify the principal that the reason a lawyer cannot charge a nonrefundable fee is because the lawyer has an obligation to return fees that have not truly been earned. The comments fail to explain the rationale driven by the obligation to return an unearned fee.

Rule 1.8.1 -- Business Transactions with a Client

I believe that you have substantially weakened Rule 3-300 by providing in subsection (c)

of the proposed rule that there is no need to advise the client of the right to independent counsel if the client is already represented by counsel in the litigation. The way the rule is drafted, it assumes that merely because the client has representation, that is adequate. Yet, I have seen multiple instances when the attorney entering into the investment or loan or other business deal has merely sent the client down the hall to a tenant of the lawyer, or even an affiliated lawyer, so that the letter can say "you have already consulted with independent counsel" when in fact no such thing has taken place.

I understand that it may be seen as surplusage but it is a simple rule to follow as presently drafted in 3-300, and it is a no brainer to add that sentence: "You have the right to consult with independent counsel, and I will give you the appropriate time to do so." Why take it out?

The deletion of the requirement to make the independent counsel disclosure may in some instances emasculate the duty to make any written disclosure at all, other than the transaction documents themselves. For example, a promissory note may be fair and reasonable, it may fully disclose the terms. If the client has counsel representing him or her, even the "down the hall" kind of counsel, the rule as drafted would be satisfied without a disclosure letter and indeed no disclosure at all because the terms are set forth in the note, and the client signs it. This is, in my opinion, a serious weakening of the rule.

Finally, I address the question of fee modifications under 1.8.1. I have always felt that a fee modification with an existing client should be treated as being subject to 3-300. There is a fiduciary duty to the client! How hard is it to suggest that the client consult with independent counsel before there is a material modification to the fee arrangement? There is nothing arms length at all about midstream fee modifications, especially those that are imposed at critical stages of the relationship, when the client has no choice but to rely upon the lawyer. The Commission almost gets there with Comment 6. If the Commission won't come right out and say that fee modifications are governed by the rule, then at least Comment 6 should say that the prudent lawyer will advise the client to consult with independent counsel at the time of a fee modification.

Rule 1.7 -- Conflict of Interest: Current Clients

I am opposed to advance waivers as they are rarely sufficient to disclose either the circumstance or the foreseeable adverse consequences. Each advance waiver must be evaluated on a case by case basis, depending upon the actual conflict that later develops. What is most

troubling is that when the Commission expressly endorses advance waivers, as in Comment 33, it will have the effecting of encouraging their widespread use.

An advance waiver flies in the face of the notion that the attorney must make disclosure and obtain informed consent at two stages, once when the conflict is merely potential, and again when the conflict becomes actual. That is the whole point of the "shall not accept or continue" language. The advance waiver is only a one stage disclosure, when the conflict is merely potential. That is the defect. The Commission is bending to the will of large law firms that want to put business interests above client interests, and I think that is a mistake.

As a realist, I must concede that law firms will continue to use advance waivers, regardless of the content of the rule. They are here to stay, but that does not mean they are adequate. I strongly urge you to tone down the endorsement of advance waivers. At a minimum, the sentence in Comment 33 that suggests an open ended general waiver may be sufficient should be deleted. Also, the suggestion that it is okay to obtain an advance waiver where the future facts and circumstances cannot be know, it a misguided approach. That is a blanket authorization for open ended waivers that cannot possibly satisfy the requirement of informed consent. By openly embracing advance consents on general terms that do not set forth the foreseeable consequences the Commission waters down the whole concept, long a part of our rules, that informed consent be obtained at the time an actual conflict arises.

Finally, let me express the concern that the focus on sophisticated clients versus unsophisticated clients is not appropriate. There are not two classes of clients with different rules for each. All clients are entitled to the same protection of the rules, and all disclosures should be sufficiently thorough to explain the circumstances to every client. The assumption that corporate clients are well represented by their in house counsel, or by an experienced group of business persons who understand litigation and waivers is just that, an assumption. Many corporate clients are just as unsophisticated as the individuals who own and operate them. It is my opinion that disclosures should be required to be the same, thorough, complete and adequate to obtain an informed consent, regardless of the nature of the client.

I am also troubled by the Commission's new concepts of "direct" and indirect adversity, which are ill-defined. There needs to be much better guidance as to what types of transactional or situational conflicts would be direct or indirect. The average practitioner is not going to be able to figure out the distinctions absent better guidance. I think a focus on what is not a direct conflict would be helpful. The statement in Comment 5 that there is no single definition for what

constitutes a direct conflict is really not very helpful at all, and should be deleted.

In closing, I applaud your effort with these rules, and admire your dedication and commitment in this task. Thank you for your service to the public and to the profession.

Very truly yours,

THE SALL LAW FIRM

Dictated, but not read

Robert K. Sall

RKS/jvb

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
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DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation University of San Diego School of Law

Commenting on behalf of an organization
- ○ Yes
- ◉ No

*** Name** David McGowan

*** City** San Diego

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) dmcgowan@sandiego.edu

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.7 Conflict of Interest: Current Clients [3-310]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
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ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I would like to suggest that the commission consider promulgating a relatively detailed safe harbor for advance conflict waivers. It could either be done in the text of the rule, as suggested below, or in comments. I believe sophisticate firms are already doing substantially what is described in this proposal, and that practitioners who are relatively unfamiliar with advance waivers could use detailed, concrete guidance.

Here is the suggestion:

1. Add Proposed Revised Rule 1.7(e), as follows:

(e) A lawyer may ask a client to consent to the lawyer's representation of interests that conflict with the client's interests, or the lawyer's future representation of interests that would conflict... [SEE ATTACHMENT FOR FULL TEXT]

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FULL TEXT OF COMMENTS SUBMITTED BY DAVID MCGOWAN

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Here is the suggestion:

1. Add Proposed Revised Rule 1.7(e), as follows:

(e) A lawyer may ask a client to consent to the lawyer's representation of interests that conflict with the client's interests, or the lawyer's future representation of interests that would conflict with the client's interests. Such consent is effective only if the lawyer obtaining it demonstrates that he or she disclosed to the client information sufficient for the client to make an informed decision regarding the request. A lawyer may make such a showing by satisfying either of the following sections.

(1) Consent is presumptively effective if the lawyer provides in writing to the client: (i) a concrete description of the scope of the requested waiver, including but not limited to whether it would allow the lawyer to oppose the client in litigation or negotiations; (ii) explanations of (a) why the lawyer is asking for the waiver; (b) what benefits the lawyer expects to receive from it; (c) what risks it presents for the potential client; (d) the lawyer's best estimate of the probability that those risks will occur; and (iii) a statement that because the request benefits the lawyer the client should consider asking other, disinterested counsel for advice on whether to agree to the request. With respect to waivers of future conflicts, such disclosure also must include a statement that such conflicts might arise in a context, and raise issues, the client could not presently anticipate.

(2) Failure to provide any element of disclosure specified in section (1) renders consent to a conflict or future conflict presumptively invalid. A lawyer may overcome this presumption only by showing by clear and convincing evidence that (i) the lawyer was unable to provide the disclosure required by that section; and (ii) the client nevertheless had sufficient information to make an informed decision regarding the waiver request.

2. Delete current comment 29, and replace with Proposed New Comment 29, as follows:

Under either section (e)(1) or (e)(2), to obtain valid consent to a present or future conflict a lawyer must provide the client an adequate basis for deciding whether to agree to the waiver. The lawyer must disclose such information in the way most likely to assist the particular client in understanding his or her stake in the request. To the extent possible, the lawyer must relate each category of information to the circumstances that led the client to employ the lawyer.

Whether a client's decision was informed depends heavily on the client's general sophistication and sophistication regarding legal services. Information sufficient for a

sophisticated client might be meaningless jargon to an unsophisticated client, and it may be unnecessary to provide a sophisticated client the full extent of explanation needed to inform an unsophisticated client.

When representing multiple clients in a single matter, the lawyer must disclose the risk that circumstances might create incentives for the lawyer to favor one client over another, and the implications of joint representation for the confidentiality and lawyer-client privilege issues described in Comment [13]

If a lawyer shows by a preponderance of evidence that he or she provided the information required in section (1), a client's corresponding consent will be presumed to have been informed, and therefore to be effective. If, in particular circumstances, a client needs additional information to make a decision, then the client's consent is effective only if the lawyer provided such information. The client, however, would bear the burden of demonstrating that disclosure specified in Section (1) did not provide an adequate basis for his or her decision.

If a lawyer fails to provide the disclosure specified in Section (1) to a client in requesting a conflict waiver, the client's consent is presumptively invalid. In some unusual cases, lawyers who fail to provide such disclosure may be able to demonstrate by clear and convincing evidence that a client's consent was adequately informed. In such a case, the client's consent would be valid. Any such showing must include an explanation of why the lawyer was unable to provide such to a client. A lawyer may not make the necessary showing if the lawyer was able to provide the disclosure required by Section One but chose not to do so. This rule is intended to void all consents in cases where a lawyer withheld information for strategic reasons.

"Open-ended" waivers, which by definition do not specify in advance the scope of the requested waiver, by definition, cannot be supported by the disclosure required by Section (1). They therefore are presumptively invalid. Such waivers are therefore valid, if at all, only if the requirements of section (e)(2) are met.

3. Delete current comment 33

The presumption structure differs from the current and proposed rules, but would provide greater assurance that clients were properly informed before agreeing to waive future conflicts.

My thanks for considering these comments, and best wishes for your deliberations.

MEMORANDUM

Date: June 6, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct The State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.7 – Conflicts of Interest: Current Clients**

Founded over 100 years ago, the Orange County Bar Association has over 9,800 members, making it the second largest voluntary bar association in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following concerning the subject proposed Rule:

*****

COMMENT:

I. DIRECT AND INDIRECT ADVERSITY

We have concerns about the distinction between "direct adversity" as that term is used in the rule, and the concept of indirect adversity which appears only in the comments. We are also concerned about the use of "Client's adversary," a term that appears in the subtitle of subsection (c), but not in the body of the rule. There can be many permutations of what constitutes a client's adversary, yet the proposed rule attempts to limit that context to only one situation.

These concepts, including "direct adversity," "client's adversary," and especially "indirect adversity," are not adequately defined. We believe the average lawyer will have difficulty applying them. Further, the use of the term "Client's Adversary" in the subtitle adds confusion because that term is not used within the text of that rule.

Even an indirect adversity can be severe enough to cause a client to lose confidence in the lawyer. Assume that Client A consults lawyer for assistance in a land use planning matter in which a proposed road will take a particular path that would be injurious to the Client A. The lawyer assists Client A to attempt to persuade the government agency to relocate the road. At the same time, the lawyer's partner represents Client B in seeking entitlements for B's development project nearby. B favors the road taking that path that Client A does not like, because it will bring more traffic to Client B's commercial location. They are different matters. They are different clients. They are not suing each other, yet their goals are in conflict. Each lawyer is negotiating

with the agency for a different route for the same road. Does that make A and B Client Adversaries for purposes of the heading in subsection (c)? Does it make them "directly adverse" for purposes of either subsection (a) or (c), or is it merely indirect?

Comment 6 suggests that because they are not parties in the "same matter" (which is itself indefinite) their adversity would merely be "indirect." If so, it is not governed by either subsection (a) or (c) which require direct adversity. Would they be considered clients with actually or potentially conflicting interests in a single matter, under subsection (b) because, while they are different projects, the matters both pertain to the same road? They are certainly not joint clients. They are both interested in the same road from different goal orientations. They have a common interest in the road with conflicting goals and they are not working together.

One could posit several conflicting fact patterns within the same scenario, each with differing degrees of adversity. Without going through all possible examples, one must ask: Is this kind of conflicting representation permitted by the rule? The above may be a fact pattern that the members of the Commission could easily discern and apply the rule, thus you may have a quick answer. Our concern is that the average lawyer won't. The rule needs to be drafted for the average lawyer.

As written, there are uncertainties as to what constitutes a single matter or a different matter, what is directly adverse versus merely indirectly adverse, and when the clients are adversaries. It is not always as simple as one being a plaintiff and the other being a defendant, and competitors may certainly be adverse. Comments 5, 6 and 7 suggest that the poorly defined indirect adversity in many instances is not going to be a conflict at all. However, it is still possible for a client to be harmed even if the adversity is merely indirect. Even the examples you have provided in Comment 7 recognize this risk.

Perhaps the Commission is attempting to draft a rule that will accommodate some types of conflicting representations to minimize the use of disqualification motions as an offensive tool in litigation. While this may be a useful goal, it should not be to the sacrifice of basic notions of loyalty to clients, or create confusion by artificial attempts to define the difference between direct and indirect conflicts.

We believe the proposed rule lacks the certainty necessary to guide the lawyer to ethical decision making, especially with respect to the determination as to whether the adversity is direct or merely indirect. Comment 5 is unhelpful in its warning that there is no single definition for indirect adversity.

Further, because the draft rule deviates significantly from the Model Rule, lawyers seeking to resolve a conflict are denied the guidance they may find in authorities from other states in which the rules have been interpreted. Since discipline is the price paid for violating the rule, these terms should be better defined. If you are going to maintain these distinctions from the Model Rule, we also believe that interpretation of the

proposed rule would be better aided by a series of specific examples of direct and indirect adversity.

We also believe it would be helpful for the Rule to better explain or define the distinctions between the same matter and different matter contexts that are fundamental to Subsections (a), (b) and (c). As may be seen in our example above, the distinction is not always easy to discern.

It is noted that the Commission has stayed away from adopting certain concepts of adversity defined in the Model Rules, such as the standard based upon the lawyer being "materially limited" by a duty owed to other persons. While this too is a vague standard, it has the benefit of being one that is consistent among many other states, which will have a body of authority to assist in its interpretation. We believe the members of the bar may be better served by adoption of the language of the ABA Model Rule.

II. ADVANCE WAIVERS

We speak next to the issue of advance waivers addressed in Comments 14 and 33. We have a general concern regarding the adequacy of any disclosure to a client where the relevant factual circumstances have not yet developed. There will undoubtedly be circumstances where the nature and extent of adversity cannot be fully explained in advance, calling into question the adequacy of the consent and whether it is informed.

The quality of disclosure will of course vary with the nature of the matter and the degree of effort given by the lawyer, as well as the ability to foresee and predict the circumstances that might develop. Some disclosures, as you point out in Comment 33, will involve future facts and circumstances that cannot be known at the time the consent is requested. In this regard, we are troubled that Comment 33 seems to encourage advance waivers when the facts are not known at the time the consent is requested. This is dangerous territory for both attorney and client.

The suggestion in Comment 33 that screening might be appropriate has yet to be endorsed by California courts. We understand that you may get to a rule that permits screening, but we are reluctant to see the Commission legislate new ways of planning around loyalty conflicts that have not been endorsed by the California courts.

Likewise, the suggestion in Comment 33 that the relative sophistication of the client may be a factor raises some troubling issues. Rules or comments that suggest the rule may be interpreted or applied based upon a particular client's ability to perceive risk creates the possibility of having first class and second class clients – those with lots of litigation experience and others of the unsophisticated "mom and pop" variety. This would require the lawyer (and the disciplinary investigator) to assess the client's intellect and experience before knowing whether or not a particular disclosure will violate an ethical rule. This could open the door to rules being interpreted and applied differently, rather than providing a uniform standard.

A flexible rule that allows for consideration of client sophistication will make compliance simpler for those who represent major corporations, but far more difficult for those who represent inexperienced individuals. Will this have the potential effect of skewing discipline toward small firms or lawyers who represent the mom and pop type clients, whose waivers will be more difficult to craft? By suggesting such distinctions, you are placing the focus not on the quality of the disclosure, but on the quality of the client. If the Rules tend to distinguish between clients it adds yet another layer of complexity to their interpretation and enforcement. It is potentially an unwieldy standard.

Advance waivers are fraught with risk. The disclosures are difficult to write and even more difficult for clients to understand. While there are certainly circumstances in which an advance waiver might yield an informed consent, we do not think they should be generally encouraged, and words of caution more explicit than those you have stated in the comments should be included.

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*

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

Dennis Peter Maio, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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June 6, 2008

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The State Bar of California
Commission for the Revision
of the Rules of Professional Conduct
180 Howard Street
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RE: Draft California Rule of Professional Conduct 1.7, Comment 33
(Advance Waivers of Conflicts of Interest)

Dear Rules Revision Commission:

We support draft California Rule of Professional Conduct 1.7, Comment 33, regarding advance waivers of conflicts of interest. We support the draft Comment for the following reasons:

(1) The Comment recognizes and permits as ethical advance waivers of conflicts of interest.

(2) The Comment provides certainty and guidance to tens of thousands of California State Bar members who use, or work in law firms that use, advance waivers of conflicts of interest with their clients.

(3) Advance waivers of conflicts of interest are used regularly in modern law practice, especially by medium and large law firms. A 2007 survey of AmLaw 200 law firms reports that 64% of such firms include advance waivers of conflicts as part of their standard engagement letter. (*See* "2007 Law Firm Risk Management Survey," IntApp, Inc.)

(4) Advance waivers of conflicts of interest permit access to counsel of choice for clients.

(5) The draft Comment applies to advance waivers all the client protections found in Draft Rule 1.7 (Conflict of Interest: Current Clients) concerning waivers of current conflicts. The draft Comment thus provides client protection to the same extent, regarding advance waivers of future conflicts, as it does concerning waivers of current conflicts.

Thank you for this opportunity to provide comment on draft Comment 33. Additionally, we appreciate and thank the Commission for permitting us to appear at Commission meetings to offer our comments on this draft Comment as it was developed by the Commission.

Respectfully,

Douglas L. Hendricks

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June 6, 2008

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State Bar Board Liaison to Commission

BY E-MAIL & U.S. MAIL

Re: Comment on Rules 1.7 and 1.8.1

Dear Commission, Chair Sondheim, and President Bleich:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics at a law school in California. Future undersigneds will be forwarded to you when they are available. We are providing you with identification for each professor of Legal Ethics, including their law schools and other significant identifying information. The information is for identification purposes only.

INTRODUCTION:

First, ethical precepts concerning loyalty and conflicts of interest are, along with those addressing confidentiality, perhaps the most significant of all rules being reviewed by the Commission. It is essential to adhere to the basic principle that the rules of professional conduct are designed to *protect clients and the public*. Any variation from this course, any effort by our profession at putting self-interest or self-protection first, must fail. Not only would such a course be a disservice to the consumers of legal services, but it will likely result in demeaning the very profession we all desire to improve.

Second, the black-letter rules serve not only as rules of discipline but as *guidance* to the tens of thousands of responsible lawyers who look to these rules for benchmarks that govern their behavior. The Commission must clearly recognize that not most of California's lawyers do not have the level of sophistication that members of the Commission, or the State Bar Board of Governors, bring to the table. The State Bar would be abrogating an important portion of its

responsibility unless it makes it clear that these rules shall serve as guideposts to the average practitioner.

Third and finally, just as the rules must speak to the average lawyer, they must serve to protect the *average client*. So long as the Rules of Professional Conduct apply to all lawyers in all circumstances of legal representation, it would be inappropriate, perhaps even extremely so, to focus analysis on big, sophisticated institutional clients. California, our nation's most populous state, is filled with 35,000,000 ordinary people, the majority of whom will need legal services in their lifetime. One rule must work for our entire constituency.

With this perspective, we are concerned that the modifications to the ethics rules relating to conflicts of interest too often benefit lawyers more than clients, institutions – including large law firms – more than individuals. While it is true that our global village is expanding rapidly, this is no reason to abandon basic tenets of loyalty and fiduciary duty that are part of the foundations of our legal system.

We articulate below four specific areas of concern:

1. Rule 1.7 would allow a lawyer to be adverse to that lawyer's own client, and must be modified.

(A) Rule 1.7(a) – the crux of the problem:

Perhaps the most shocking change in the conflicts rules is current 1.7(a), which, closely read, would allow lawyers or law firms to be adverse to, and even sue, their own clients.[1] This would substantially and significantly abrogate the basic notion of loyalty, one of the most essential duties of a lawyer.

Not a single jurisdiction in the United States now allows a lawyer or law firm to be directly adverse to that individual or firm's own client. There is no excuse, in our view, for California to move in this direction. The effort to move closer to the ABA numbering system would best be paralleled by an effort to move the conflicts rule closer to the ABA model.

Rule 1.7(a) is, fortunately, easily fixed. The three phrases concerning "matters," italicized in the footnote, must be removed. What then remains is a simple, straightforward statement of the duty of loyalty.

(B) Rule 1.7(c):

Once Rule 1.7(a) has been amended, Rule 1.7(c) becomes superfluous. Rule 1.7(c) is an amended restatement of current rule 3-310(C)(3). It is superfluous if Rule 1.7 is changed as

[1] To make this clear, consider that the current draft of Rule 1.7(a) says "A lawyer shall not accept or continue representation of a client *in a matter* in which the lawyer's representation of that client *in that matter* will be directly adverse to another client the lawyer currently represents *in another matter* without informed written consent from each client. That means that if a lawyer represents A in A v. B, the lawyer may undertake representation of B in B v. X *without consent*, even though B is directly adverse to the lawyer's client A.

suggested to avoid eliminating the concept of loyalty. Two points should be noted, however. First, this restatement of current Rule 3-310(C)(3) is considerably narrower than the current rule. It removes language that now reads "*whose interest in the ... matter* is adverse," adds the word "direct" to the word adverse, and puts the "matters" in chronological order, thus narrowing the rule's application.[2]

(C) Rule 1.7(b):

Unlike Rule 1.7(c), this section is neither superfluous nor changed from the current rule, now embodied in Rule 3-310(C)(1) and (2). However, the rule section, which retains the concepts of actual and potential conflicts of interest, could easily be combined in one statement rather than two, by saying "potentially or actually conflict."

2. The Commission's position on "advance waivers" is untenable and must be removed.

A. Inadequate disclosure:

Comment 33 to Rule 1.7 inappropriately allows clients to consent to blanket advance waivers of conflicts of interest even where adequate disclosure, as required by the Commission's own definition, cannot possibly be met. These waivers are far broader than what should be permitted.

The Commission has adopted the strong current State Bar standards on disclosure and informed consent: "Disclosure means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences of those circumstances...." "Informed written consent" is consent after this disclosure.

Comment 33, however, allows a broad exception to informed written consent "where the lawyer cannot provide all the information and explanation Comment 30 [on informed consent] ordinarily requires." The Commission would make it permissible to substitute the following for disclosure: "an explanation that the lawyer is requesting the client to consent to a possible future conflict that would involve *future facts and circumstances that to a degree cannot be known* when the consent is requested." The waiver may also "permit the lawyers to be *adverse to the client on any matter in the future*...."[3]

B. Case law and "factors":

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[2] The rule originally was to have a parallel rule, 3-310(C)(4), an omission that was inadvertent and recognized by the first constitution of this Commission in its report to the State Bar and ultimately the Supreme Court. Not only is this (C)(4) provision not set forth, though the Supreme Court's holding in *Flatt v. Superior Court* (1998) 9 Cal.4th 275 captures much of that non-existent rule's essence, but the existing (C)(3) has been unnecessarily narrowed. Although the suggested change to 1.7(a) would moot this issue, the direction espoused by the Commission in this regard is troubling.

[3] The sentence in Comment 33 stating that "[a]n advance consent normally will comnply with this Rule if it is limited to a particular type of conflict with which the client already is familiar" is puzzling in light of the Comment's previous language acknowledging that disclosure will be inadequate – unless the Commission intends that the client is already "familiar" with conflicts that "cannot be known" at the time of consent.

Advance waivers under narrow circumstances have been permitted in California. Thus, where a law firm agrees to represent two parties, one of which is a principal client and the other a former non-client, it is appropriate to have the former non-client consent that if a conflict of interest occurs, the law firm may remain as counsel for the original client.[4]

Comment 33, however, travels leaps and bounds beyond case law. It would essentially allow law firms to represent whomever they wish in the future regardless of their past representations. As is the case with the current draft of Rule 1.7(a), these advance waivers destroy the concept of loyalty.

Comment 33 states that two factors to be considered in determining the adequacy of a waiver are "the use of an adequate ethics screen" and the advice of independent counsel. In this respect, the Commission's comment reads like an appellate court decision that the Commission is attempting to legislate, rather than leaving such standards to our courts. Screening is very limited under California case law, so to allow an "adequate ethics screen" to be a factor in considering the adequacy of a waiver is either to allow only that narrow definition permitted by case law or to legislate a change in what an acceptable screen is by this comment to the rule.

The reference to consulting independent counsel sounds beneficial to the client at first blush. However, it is important to remember that no amount of consultation with independent counsel will overcome the *lack of adequate disclosure*. Independent counsel – here, potentially, including in-house general counsel, who may feel under internal pressures from the client/employer – will be forced into the position of opining on a conflicts waiver without adequate information to make that determination. It is the adequacy of disclosure that governs here, not who is reviewing an *inadequate* disclosure.

3. The Rule 1.8.1 draft would improperly allow lawyers to bypass the current requirements of Rule 3-300 when they modify their fee agreements with clients.

A. The current and proposed rules.

Lawyers have long been able to enter into initial fee contracts with clients at arms' length. As in most states, California case law makes it clear that a lawyer's fiduciary duty to a client begins only *after* inception of the attorney-client relationship. This allows lawyers and clients to negotiate freely over the retention of lawyer by client.

Any *subsequent modification* of a fee agreement with a client is done under circumstances where the lawyer has already taken on *ongoing fiduciary duties to the client*. Thus, a modification of a fee agreement is a business transaction with a client, and may involve acquiring a pecuniary interest adverse to the client as well. Current Rule 3-300 would therefore require that before such modification could be entered into, the lawyer must: (a) make the terms of the transaction fair and reasonable; (b) advise in writing that the client seek independent counsel to advise about the transaction; and (c) give the client a reasonable period of time to seek that advice.

[4] This is the holding of *Zador v. Kwan* (1995) 31 Cal. App. 4th 1285.

The current draft of Rule 1.8.1 simply eliminates these requirements. It does so by making several changes in current Rule 3-300, including muddying the distinction in the comments section between business transactions and adverse pecuniary interests. However, two other changes in the rule stand out (see below).

B. Modifications of fee contracts excluded.

Unlike the current rule, Comments 5 and 6 to the present draft specifically exclude fee contract modifications. The proposed language from Comment 5 adds the italicized language to the existing comment: "This Rule is not intended to apply to an agreement by which a lawyer is retained by a client *or to the modification of such an agreement*."

The only possible justification for this language is lawyers' own self-interest – to modify fee contracts in the middle of representation without the existing protections afforded those clients.

Indeed, Comment 6 acknowledges that lawyers do have "other fiduciary principles [that] might apply." Further, the comment states that "[o]nce a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement." In essence, then, the Commission's draft sets up a *conflict between common law principles of fiduciary duty and the ethics rules themselves*. In advising lawyers to "consult case law and ethics opinions" about their fiduciary duties, the Commission even begs the question of attempting to reconcile these duties with their proposed rule.[5]

C. Inappropriate use of independent counsel.

The current draft of Rule 1.8.1(b) eliminates the requirement that the lawyer wishing to engage in a business transaction or acquisition of pecuniary interest of a client must advise the client of the opportunity to seek the advice of independent counsel. The modified rule states that if the client is already represented by independent counsel, there need be no notice. However, this – read together with Comments 14 and 15 of the proposed rule, and with the failure of the proposed rule to parallel ABA Model Rule 1.8(A)(3) – substantially diminishes client protection.

Comments 14 and 15 define independent counsel in such a way as to include any corporate general counsel. Such counsel need not be California counsel and need not be schooled in the requirements of California rules or contracts. Unlike ABA 1.8(A)(3), the proposed California rule does not require that the contracting lawyer disclose the "transaction *and the lawyer's role in the transaction*, including whether the lawyer is representing the client in the transaction." Thus, independent counsel not hired for the specific purpose of examining the transaction in question may well miss the very issues necessary to evaluate the transaction.

In short, having independent counsel is no substitute for adequate disclosure and advice by the lawyer wishing to engage in the transaction.

4. Rule 1.7(d) does not afford adequate client protection as drafted.

[5] Further, its first citation, to *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, is to an extraordinarily unusual case in which a lawyer represented, then ceased representing, then represented anew, the same client. The case is oft-debated among legal scholars as to its implications on fiduciary duty and is extremely unlikely to provide practical guidance for the average attorney.

A. The issue of client consent must be addressed.

Originally, Rule 1.7(b), the current rule that parallels proposed 1.7(b), required the informed consent of clients, not merely disclosure. In 1992, the consent requirement was eliminated because the Commission considered that the broad language of the subparts of the rule made consent in every case impractical and unnecessary. The problem remains, however, that consent in some and perhaps most of these cases very much continues to be necessary. The Commission has done nothing to address this problem.

Rule 1.7(d) cuts too broad a swath to allow mere disclosure without consent to suffice. On the other hand, we recognize that there is some validity to the position that requiring informed consent in each and every application of the rule may be impractical and perhaps unnecessary. For example, under Rule 1.7(d)(1), a lawyer's child or current business partner could be a witness against the client. Such a key relationship does not require the client's consent under this rule. On the other hand, under (d)(3) and (d)(4), if the lawyer knows of a casual business associate who owns stock in one of the companies involved in the transaction, informed consent is less significant.

There are a variety of ways to solve this problem. One solution to the issue of consent lies in close adherence to the ABA rule, which sets forth a cleaner delineation of responsibility. Others involve reasonable standards, such as "materiality," that could be used to set forth what 1.7(d) situations require consent. Whatever solutions are to be used, the issue of consent – completely unaddressed by the Commission – should be squarely met and determined.

B. Inadequate parallel language in (d)(3) and (d)(4).

Section 1.7(d)(3) makes reference to "personal relationship" but the word "personal" is inexplicably left out of 1.7(d)(4). It should be included. Furthermore, while (d)(3) refers to the conflict that arises when the *lawyer's* friends or associates are "affected substantially," this language should include the *client* being affected substantially. That is, "the lawyer has ... a ... relationship with another ... that the lawyer knows or reasonably should know would be affected substantially by the matter, *or could substantially affect the client in the matter*." (Italicized language added.)

This letter is not intended to be exhaustive. For example, careful scrutiny should be given to the comments on non-consentable conflicts and class action conflicts. The purpose of this letter is to highlight the matters of greatest concern to the signers. Further information about the signers and this letter may be obtained by contacting Richard Zitrin per the contact information set forth in the letterhead.

Respectfully yours,

Michele Benedetto
Associate Professor of Law, Golden Gate University, San Francisco

Steven Berenson
Associate Professor, Thomas Jefferson School of Law, San Diego

Continued on next page

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THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation Law Office of Carol M. Langford

Commenting on behalf of an organization
- ○ Yes
- ◉ No

*** Name** Carol M. Langford

*** City** Walnut Creek

*** State** California

*** Email address** (You will receive a copy of your comment submission.) langford@usfca.edu

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.7 Conflict of Interest: Current Clients [3-310]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
- ◉ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

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6/12/2008	Post-PC	C-2008-245 Carol M. Langford [1.7]	Entire Rule	1.7	Online

Comment on Proposed Rule 1.7: Conflict of Interest: Current Clients

The following is a comment on proposed rule 1.7 pertaining to conflicts of interest. You should know that I have served as the Chair and Special Advisor to the State Bar Committee on Professional Responsibility and Conduct, in addition to being a member for several years. I have also Chaired the Law Practice Management & Technology Section of the Bar and the Council of Section Chairs. I am currently an adjunct professor at the University of San Francisco School of Law and Hastings College of the Law teaching courses in legal ethics, and I have a full-time practice specializing in legal ethics and attorney conduct.

My comment explains how proposed rule 1.7 directly contradicts well-established California case law and the fundamental notions of the attorney-client privilege. My comment concludes by suggesting a solution to this direct conflict that would avoid undesirable or unintended interpretations of the proposed rule.

Proposed rule 1.7 states: "A lawyer shall not accept or continue representation of a client in a matter in which the lawyer's representation of that client in that matter will be directly adverse to another client the lawyer currently represents in another matter, without informed written consent from each client." By specifying that the lawyer's representation of the first client be directly adverse *in that matter*, the proposed rule suggests that the attorney's continued representation turns on the nature of the cases involved. If the first case is related to the second, then the interests would be adverse in that matter and the lawyer would need consent. But if the cases were unrelated, then the interests would not be adverse in that matter and the lawyer need not obtain consent. For example, an attorney is representing A (A v. B) in a breach of contract case. While the

suit is pending, B asks the attorney to represent him in an unrelated tort case (B v. X). Here, the interests between the two clients are directly adverse (A v. B), but not in *that matter* (B v. X). Thus the proposed rule would not require the lawyer to obtain consent before agreeing to represent B.

However, the current California Rules and well-established California case law expressly prohibit such a situation. The California Supreme Court has held that even where simultaneous representations are wholly unrelated and there is no possibility of breach of confidentiality, disqualification is required in all but a few cases. Flatt v. Superior Court, 9 Cal. 4th 275, 284-285 (1994). Essentially, this is a holding that an attorney cannot represent a client against another current client without informed consent. Id. at 284-286.

In Truck Ins. Exchange v. Fireman's Fund Ins. Co., 6 Cal. App. 4th 1050, 1055-1056 (1st Dist. 1992), an attorney was representing Fireman's Fund Insurance Company (FFIC) in a wrongful termination suit. While this suit was pending, Truck Insurance Exchange asked the same attorney to represent it against FFIC in an unrelated indemnification suit. In interpreting rule 3-310 of the California Rules of Professional Conduct, the court held that the attorney could not concurrently represent clients whose interests conflicted without obtaining informed consent. Id. at 1056. In Jeffry v. Pounds, 67 Cal. App. 3d 6, 9-10 (3d Dist. 1977), the court held that an attorney representing a client in a personal injury case could not concurrently represent the client's wife in divorce proceedings (without informed consent).

Some argue that an ethical screen can overcome the problems inherent in representing a client who is directly adverse to another client. However, California courts

have expressly rejected that notion. Courts have held that the central concern in concurrent representation conflicts is the attorney's duty of undivided loyalty, rather than the duty of confidentiality. Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796, 822 (N.D.Cal. 2004). Since an ethical screen is aimed at preserving the duty of confidentiality, it can "do nothing to mitigate conflict arising from concurrent adverse client relationships." Id. The purpose of the prohibition on concurrent representation without consent is to "maintain the public confidence in the legal profession by assuring existing clients that they will have the undivided loyalty of their lawyers." Cal. Practice Guide: Professional Responsibility (The Rutter Group 2007) ¶ 4:36.

Allowing an attorney to represent an adverse client without obtaining consent may be an unintended consequence of the proposed rule. Comment four of proposed rule 1.7 states: "[T]he duty of undivided loyalty means that, without the informed written consent of each affected client, a lawyer may not act as an advocate or counselor in a matter against a person or organization the lawyer represents in another matter, even when the matters are wholly unrelated." This comment is in line with California case law, suggesting that it would be improper for an attorney to represent adverse clients without their consent. However, due to the manner in which the proposed rule is currently drafted, it could be interpreted to allow just the opposite. Therefore, the language of proposed rule 1.7(a) should be changed to become consistent with California case law and proposed comment four.

There seems to be a simple solution to this undesirable interpretation of the proposed rule. I agree with Richard Zitrin that the three clauses using the "in that matter" language should be eliminated from the proposed rule. The proposed rule would then

read: “A lawyer shall not accept or continue representation of a client [where] the lawyer’s representation of that client will be directly adverse to another client the lawyer currently represents, without informed written consent from each client.” This would require an attorney to obtain informed consent before representing someone whose interests would conflict with a current client *in any matter*, even if unrelated.

In addition, comment four of the proposed rule should include guidelines as to how thorough the informed consent would have to be. The attorney should be required to fully explain to his clients the reasonably foreseeable adverse consequences of concurrent adverse representation, in sufficient detail to make the consent truly informed.

TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

To: Rules Revision Commission

From: Margaret G. Lodise, Chair, Ethics Subcommittee of the Trusts & Estates Section Executive Committee

Date: June 6, 2008

Re: Public Comment to Proposed New Rule 1.7 (Former 3-310)

Proposed new Rule 1.7 (former 3-310) proposes to require disqualification where an attorney represents a client in a matter directly adverse to another client without tying the disqualification to the possession of confidential information relevant to the new matter. The Trusts & Estates Section believes this change to the rule potentially severely impacts estate planners, who may do planning for a client, completely unrelated to other work for that client, and place their firms into a conflict position merely by the representation of the individual without access to any information which is in any way confidential or material to the new representation. Moreover, in a non-litigation situation, it may be extremely difficult to even determine whether a new representation is adverse. The prior rule, which allows a showing that no material confidential information was exchanged, allows this situation to be dealt with by allowing an attorney to continue representation so long as no confidential information would be affected. Thus, the old rule offers a bright line test more easily followed that a rule referring only to directly adverse representation in situations where there is no litigation, a situation frequently encountered by trusts and estates attorneys. As additional rules are being discussed and circulated later (Rules 1.9 and 1.18) the Trusts & Estates Section requests that consideration be given to the unique role of estate planners as non-litigating parties.

The Trust & Estates Section further notes that the prior version of the rule contained a comment relating to the situation of reciprocal will for a husband and wife or of representation in an antenuptial agreement as situations where a potential conflict might exist. The current version deletes this example. The Trusts & Estates Section believes the example was useful and should be returned to the comments.

DISCLAIMER

This position is only that of the TRUSTS & ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUSTS & ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

THE STATE BAR
OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL

Scott J. Drexel, *Chief Trial Counsel*

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639 TELEPHONE: (415) 538-2063

August 26, 2008

Randall Difuntorum, Director
Office of Professional Competence & Planning
State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Comments of the Office of the Chief Trial Counsel to Proposed Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

Thank you for the opportunity to submit the comments of the Office of the Chief Trial Counsel to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in March 2008. I apologize that these comments have been submitted after the comment deadline but hope that they will nevertheless be considered by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

~~Proposed Rule 1.5 [Fees for Legal Services]~~

~~1. Unconscionable Fees~~

~~The Office of the Chief Trial Counsel is opposed to any attempt to specifically define the term "unconscionable" in subsection (b) of proposed rule 1.5. The phrase "unconscionable fee" is sufficiently defined by case law and has been found not to be unconstitutionally vague. (*In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 732.) In our view, any attempt to specifically define what constitutes an unconscionable fee is likely to be either overbroad or under inclusive. Sufficient guidance regarding the determination of whether a fee is unconscionable is provided by the list of facts set forth in subsection (c) of proposed rule 1.5. However, we urge the Commission to consider adding two additional factors to the list set forth in subsection (c). Those additional factors are: (1) whether the fee involves an element of fraud or overreaching on the attorney's part (see *Herrscher* v. *State Bar* (1935) 4 Cal.2d 399, 403; *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989); and (2) whether there was any failure on the attorney's part to disclose the true facts to the client (see *Herrscher* v. *State Bar*, *supra*, 4 Cal.2d at p. 403). In addition, the Commission may wish to more clearly state in the rule itself whether the factors set forth in subsection (c) are intended to be the exclusive factors to be considered in determining whether a fee is unconscionable. At least one~~

~~these exceptions has been provided in either the Summary of Proposed New and Amended Rules or in the Comments to proposed rule 1.5.~~

~~4. Non-Refundable Fees~~

~~While we understand that the Commission is seeking in proposed subsection (f) to provide guidance to lawyers regarding the difference between non-refundable fees and true retainers, the impact of placing this distinction in proposed rule 1.5 is that it will make members subject to discipline for charging or collecting a non-refundable retainer. Currently, the collection or retention of a purportedly non-refundable fee is typically handled as either a fee arbitration matter or, in egregious cases where the legal employment has terminated, as a failure to return unearned fees in violation of current rule 3-700(D)(2).~~

Proposed Rule 1.7 [Conflict of Interest: Current Clients]

A definition of what may constitute an actual or potential conflict of interest under these rules might be helpful to a clear understanding of the rule. (See, e.g., *COPRAC Formal Opinion No. 1999-153* for a listing of what may constitute an actual or potential conflict of interest in a multiple-client engagement.)

The proposed rule's use of the term "directly adverse" is vague, ambiguous and potentially too limiting and confusing. We believe that the term "directly adverse" will be subject to a great deal of interpretation and, therefore, litigation. The use of the modifier "directly" may pose problems for the lawyer trying to comply with the rule. Lawyers may not understand the distinction between an "adverse" as opposed to a "directly adverse" interest and may, therefore, fail to seek the appropriate client consent. The use of the term "directly" may also pose problems for the Office of the Chief Trial Counsel, the State Bar Court and the Supreme Court as we attempt to evaluate possible violations of the proposed rule. Using the term "adverse" without the modifier "directly" may be clearer, less ambiguous and more appropriate.

The Office of the Chief Trial Counsel recognizes that the Commission has tried to explain the term "directly adverse" in Comments 5, 6 and 7. However, these comments may not provide adequate guidance in distinguishing the difference, if any, between "adverse" and "directly adverse" interests and may, instead, add to the problems with enforcement of the rule. If the word "directly" is stricken from proposed rule 1.7, then Comment 5 should also be deleted.

Comment 6 defines an attorney's cross examination of his or her own client, even if the client is not a party in the particular action, as directly adverse. The Office of the Chief Trial Counsel understands that the cross-examination of one's own client is an example of an adverse situation, but it does not seem "directly" adverse where the cross-examination does not affect the client in the representation for which the client hired the attorney. If a client is not a party to the action, then one must examine the client's reasonable expectations, as well as the impact of such a cross-examination on

the client's interests and on the attorney's duty of loyalty and confidentiality to the client. Such analysis is necessary regardless of whether the modifier "directly" is included in the proposed rule.

We recommend striking the second sentence of Comment 6 because, if a client is adversely affected by an attorney's work on a matter, even if the client is not a party to the matter, it may still raise the issue of whether the attorney adhered to his or her duty of undivided loyalty and, if not, create a direct conflict of interest.

In Comment 7 to proposed rule 1.7, the Office of the Chief Trial Counsel recommends striking the modifier "directly" before "adverse."

Subsection (d) of proposed rule 1.7 requires an attorney to provide written disclosure to a client prior to accepting or continuing representation under specified circumstances. The Office of the Chief Trial Counsel recommends that this subsection instead require informed written consent to avoid assertions by the client that he or she did not receive the disclosure. The Office of the Chief Trial Counsel further recommends that the Comments acknowledge that informed consent requires that the client have a deeper level of understanding of the circumstances that would be required if the attorney was obligated to provide only written disclosure. This comment could be similar to Comment 20 to ABA Model Rule 1.7, which provides as follows:

> "The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risk and advantages, if any, of representation burdened with a conflict of interest, as well as reasonable available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing."

In Comment 1, which lists factors that may be helpful in considering "whether the lawyer's duties to a client or other person could impair the lawyer's ability to fulfill the lawyer's duties to another client," is confusing and vague. As written, it can be understood to suggest that, if one factor exists and another does not, there may or may not be a conflict. Whether a conflict exists should be determined based upon an analysis of all of the circumstances, with the guiding principle being that any interference with the attorney's undivided loyalty to the client suggests the existence of a conflict.

In Comment 10, the Office of the Chief Trial Counsel recommends striking the word "full" from "full performance." The term "performance," by itself, is clearer, more efficient and adequate.

Comment 11 should be included in the text of the rule itself, perhaps as a definition, rather than simply in a comment.

With respect to Comment 13, the Office of the Chief Trial Counsel agrees with the approach contained in the comment contained in paragraph 7 of the comments to current rule 3-310 on this issue and finds it clearer and less ambiguous. The current comment states, in relevant part, that "[i]n such

~~the fire and commented upon the fact that there was a large amount of paper and cardboard in the basement of the building to use as tinder for the fire.~~

~~The State Bar Court Review Department did not find respondent Dale culpable of a violation of current rule 2-100 of the Rules of Professional Conduct because the incarcerated arsonist was represented in his criminal proceeding, but not in the civil action in which respondent Dale solicited the information.~~

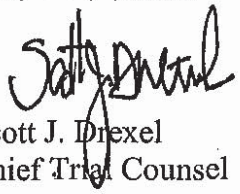
~~It is the Office of the Chief Trial Counsel's position that respondent Dale should have been found culpable of violating rule 2-100. As such, we recommend that subsection (a) of the proposed rule should read as follows:~~

> ~~In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation,~~ **~~or a related subject~~**~~, with a person the lawyer knows to be represented by another lawyer in the matter,~~ **~~or a related matter~~**~~, unless the lawyer has the consent of the other lawyer.~~

~~The Office of the Chief Trial Counsel does not have any comments to offer at this time with respect to proposed rules 1.16, 3.5, 3.10, 4.3 or 5.4.~~

Thank you again for the opportunity to comment upon these proposed amendments to the Rules of Professional Conduct.

Very truly yours,



Scott J. Drexel
Chief Trial Counsel

SJD:dim
Attachment

PUBLIC COMMENTS [1.8.1] ~ FILE LIST

C-2008-213c SDCBA [1.8.1]

C-2008-214b Robert Sall [1.8.1]

C-2008-225 Carol M. Langford [1.8.1]

C-2008-230c OCBA [1.8.1]

C-2008-232c COPRAC [1.8.1]

C-2008-242b Richard Zitrin [1.8.1]

C-2008-253c Chief Trial Counsel [1.8.1]

MEMORANDUM

Date: April 22, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subject: Proposed Rule 1.8.1 – Business Transactions with or a Client or Acquiring Interest Adverse to a Client
[Existing CRPC Rule 3-300]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 1.8.1with the following modification: 1.8.1(a) – change the provision in the text of the proposed rule as marked in bold: "The transaction or acquisition and its terms are fair and reasonable to the client **at the time of the transaction or acquisition** and are fully disclosed ...

Rationale for Comment 1: This change would address the situation in which an asset becomes valuable later (e.g., stock in a start up company) and the regulator is tempted to assess the fairness of the transaction after-the-fact (e.g. when the start up company has become successful). Typically, the lawyer in this situation looks greedy, but in fact did not overreach because the risk-adjusted value of the asset was small at the time of the transaction.

Comment 2: Approve Proposed Rule 1.8.1 with the following modification:
Add a sentence at the end of Proposed Rule Comment 4 that states: "However, the rule may apply if the lawyer has, or should have, any reason to believe the client is investing, in part, because of the client's confidence in the lawyer's judgment."

Rationale for Comment 2: The last eight lines of Proposed Rule Comment 4 address the situation in which a lawyer and the client both enter an investment together, for example

in a limited partnership. The comment assumes that when the lawyer also invests, the lawyer and client will both be making independent financial assessments and there will be no risk of undue influence. That's not entirely true, since the client may be relying too much on the lawyer's judgment. The lawyer's situation and risk tolerance simply may be different.

Comment 3: Approve Proposed Rule 1.8.1 with the following modification: Delete the words "or to the modification of such an agreement" in line 2 and the words "and modifications to such agreements" in line 6 of Proposed Rule Comment 5.

Rationale for Comment 3: Comment 5 slips in the notion that modifications of a retainer agreement don't fit under this rule, on the theory that 1.5 covers retainer agreements. There's a big difference, however, between the initial and modified retainer, because by the time of modification the client will have become more dependent on the lawyer and the lawyer has the upper hand if he threatens to resign. All Rule 1.5 does is require the total fees to be reasonable; it doesn't require the lawyer to make sure clients sign only wise modifications.

Comment 4: Approve Proposed Rule 1.8.1 with the following modification: Delete the first two sentences (including the citation to Seltzer) of Proposed Rule 1.8.1 Comment 6.

Rationale for Comment 4: Proposed Rule 1.8.1 Comment 6, in oversimplified fashion, states that the negotiation of a retainer agreement is an arms-length transaction. While courts have sometimes said that, they have also said the opposite. The issue actually is very complicated. (I know, because I've written a 70 page article on the subject: *The Preemployment Ethical Role of Lawyers; Are Lawyers Really Fiduciaries?*, 49 WM. & MARY L. REV. 569 (2007)).

Comment 5. Approve Proposed Rule 1.8.1 with the following modifications: Add the following sentence at the end of Proposed Rule 1.8.1 Comment 8: "However, a lawyer who has reason to believe that the client does not understand the disclosure must explain the issues further."

Rationale for Comment 5: Proposed Rule 1.8.1 Comment 8 says the issue of "whether the disclosure reasonably can be understood by the client is based on what is objectively reasonable under the circumstances." The addition protects the dumb client against claims of objective reasonableness.

Comment 6. Approve Proposed Rule 1.8.1 with the following modifications: Delete everything in the first sentence of Proposed Rule 1.8.1 Comment 9 after the words "paragraph (a)", the subsequent citation, and the word "It" at the beginning of the second sentence.

Rationale for Comment 6: Proposed Rule 1.8.1 Comment 9 overstates the holding of Beery v. State Bar when it asserts "The requirement for full disclosure in writing in paragraph (a) requires a lawyer to provide the client with the same advice regarding the

transaction or acquisition that the lawyer would provide to the client in a transaction with a third party." Actually, in the third-party transaction, a client sometimes can reasonably rely on the lawyer to act for him; the lawyer need not make all of the disclosures that are necessary in a personal transaction (in which the rules assume the client needs protections against the lawyer.)

Comment 7: Approve Proposed Rule 1.8.1 with the following modification: In Proposed Rule 1.8.1 Comment 9, line 12, right before the last word of the line (i.e. "and"), insert the words "at the time of the transaction or acquisition".

Rationale for Comment 7: The reason is explained in Comment 1 above, in connection with the suggested change to the text of the proposed rule.

Comment 8: Approve Proposed Rule 1.8.1 with the following modification: Insert "1.7(b) and" before "1.7(d)".

Rationale for Comment 8: Proposed Rule 1.8.1 Comment 10, line 5 says, in connection with the lawyer who represents both the client and himself in a transaction, "The lawyer must also comply with Rule 1.7(d).

Comment 9: Approve Proposed Rule 1.8.1 with the following modification: Proposed Rule 1.8.1 Comment 11, line 8, after "The lawyer must", insert ", before the transaction or acquisition is completed,".

Rationale for Comment 9: Modification is needed for clarification.

Comment 10: Approve Proposed Rule 1.8.1 with the following modification: Proposed Rule 1.8.1 Comment 11, second to the last line, change "1.7(d)" to "1.7"

Rationale for Comment 10: Same reason as stated in Rationale for Comment 9 above.

Comment 11: Approve Proposed Rule 1.8.1 with the following modification: Delete Proposed Rule 1.8.1 Comment 13.

Rationale for Comment 11: Proposed Rule 1.8.1 Comment 13 misses the mark. The only situation in which "the lawyer's interest will preclude the lawyer from obtaining the client's consent" is when the lawyer doesn't want the client to engage in the transaction but must offer the deal for some reason. But the remedy of Comment 13 is that no transaction is possible, even if the transaction is a good deal for the client.

Comment 12: Approve Proposed Rule 1.8.1 with the following modification: Delete the sentence starting "Under such circumstances . . ." through the semi-colon of Proposed Rule 1.8.1 Comment 15.

Rationale for Comment 12: Proposed 1.8.1 Comment 15, line 5 says that when the client gets an independent lawyer, the lawyer is not required to provide legal advice. Can we be sure that the lawyer in this situation will never have continuing fiduciary duties?

Comment 13: Approve Proposed Rule 1.8.1 with the following modification: Add the following abbreviated Comment 16 to Proposed Rule 1.8.1: "The obligations imposed under this rule apply to lawyers associated in a firm with the lawyer who represents the client directly. These lawyers must make all of the required disclosures before entering into a business transaction with or acquiring an interest adverse to the client."

Rationale for Comment 13: ABA rule 1.8.1 has a comment on imputation. The Proposed Rule 1.8.1 does not. It should.

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June 6, 2008

Via Facsimile & U.S. Mail

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning
and Development
180 Howard Street
San Francisco, CA 94105

Re: Public Comment on Proposed Rules of Professional Conduct

Dear Ms. Hollins:

I am submitting public comment on the current set of Proposed Rules of Professional Conduct. I a member of the Orange County Bar Associations Professionalism and Ethics Committee, and the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee. However, these comments are mine alone and do not reflect the deliberations of those committees. I am also a former member of COPRAC and a former chair of the Standing Committee on Mandatory Fee Arbitration.

Rule 1.5 -- Fees for Legal Services

It is time that California get on board with the reasonable fee standard applicable in all other states. It is my perception that a lawyer should never charge an unreasonable fee. There is plenty of case law that mandates a fee agreement must be fair and reasonable to a client, so high could that requirement exist in an environment where the fee charged can be unreasonable?

I recognize that a reason for maintaining the "unconscionability" standard is out of a concern that lawyers should not be disciplined if they make a fee request in a court or arbitration, and the trier of fact decides to disallow some portion of the fee as unreasonable, or determines a different amount. This problem can be avoided by crafting the rule to set the policy that an attorney may only charge a reasonable fee, but that the State Bar shall not prosecute an attorney unless he or she has sought to charge a fee that is unconscionable.

Let's face it. The Rules establish standards of conduct, even if they don't create civil cause

of action. We look to the rules for guidance. As a matter of public policy, lawyers must be told that there fees cannot be unreasonable. Once that practice standard is established, it is permissible to have a slightly more elevated requirement (such as unconscionability) for discipline beyond a mere private reproval to be imposed. I can imagine that some on the Commission will say that they cannot impose this two-step process of setting one standard for policy reasons, and a different standard for discipline, yet that is exactly what exists in our current rule 2-400 which sets a policy against discrimination, yet subsection (C) prohibits any disciplinary investigation unless there has been an adjudication of wrongdoing in a different forum. You can impose the same dichotomy on reasonable versus unconscionable fees.

We need to bring California in line with the rest of the country on this one. Please adopt the reasonable fee standard.

With respect to the definition of "unconscionability" in subsection (b), the reference to determining unconscionability "at the time the agreement is entered into" is a problem because many of the key elements are determined on subsequent events. I realize this language is part of the current rule, but it creates problems in practical application. The sentence is unnecessary and is in fact contradicted by the concepts in factors 5, 6, and 10 in subsection (c). The time spent, the results obtained, the extent of hostility, the nature of the litigation and the effort involved are all determined at the end of the representation, not at the beginning. The parties don't necessarily contemplate that those factors will affect the fee at the outset, but the rule expressly makes such factors an important consideration. Thus, to determine whether unconscionability exists from the setting at the time of making the contract ignores major elements of the analysis, and the statement is simply wrong. Coercive behavior can lead to unconscionable results, especially in fees, yet that does not exist at the beginning -- it arises later -- and it is not something contemplated by the parties in advance.

Finally, with respect to subsection (f), I have seen a great deal of litigation and arbitrated many disputes over the problem of nonrefundable fees, especially in the family law context. I perceive that there will be great objection to the proposed rule prohibiting nonrefundable fees, especially from the organized bars and the criminal bar. I strongly support the Commission's decision to ban the nonrefundable fee. However, you need to provide better guidance as to the definition of a "true retainer" because there is widespread confusion. You also need to clarify the principal that the reason a lawyer cannot charge a nonrefundable fee is because the lawyer has an obligation to return fees that have not truly been earned. The comments fail to explain the rationale driven by the obligation to return an unearned fee.

Rule 1.8.1 -- Business Transactions with a Client

I believe that you have substantially weakened Rule 3-300 by providing in subsection (c)

of the proposed rule that there is no need to advise the client of the right to independent counsel if the client is already represented by counsel in the litigation. The way the rule is drafted, it assumes that merely because the client has representation, that is adequate. Yet, I have seen multiple instances when the attorney entering into the investment or loan or other business deal has merely sent the client down the hall to a tenant of the lawyer, or even an affiliated lawyer, so that the letter can say "you have already consulted with independent counsel" when in fact no such thing has taken place.

I understand that it may be seen as surplusage but it is a simple rule to follow as presently drafted in 3-300, and it is a no brainer to add that sentence: "You have the right to consult with independent counsel, and I will give you the appropriate time to do so." Why take it out?

The deletion of the requirement to make the independent counsel disclosure may in some instances emasculate the duty to make any written disclosure at all, other than the transaction documents themselves. For example, a promissory note may be fair and reasonable, it may fully disclose the terms. If the client has counsel representing him or her, even the "down the hall" kind of counsel, the rule as drafted would be satisfied without a disclosure letter and indeed no disclosure at all because the terms are set forth in the note, and the client signs it. This is, in my opinion, a serious weakening of the rule.

Finally, I address the question of fee modifications under 1.8.1. I have always felt that a fee modification with an existing client should be treated as being subject to 3-300. There is a fiduciary duty to the client! How hard is it to suggest that the client consult with independent counsel before there is a material modification to the fee arrangement? There is nothing arms length at all about midstream fee modifications, especially those that are imposed at critical stages of the relationship, when the client has no choice but to rely upon the lawyer. The Commission almost gets there with Comment 6. If the Commission won't come right out and say that fee modifications are governed by the rule, then at least Comment 6 should say that the prudent lawyer will advise the client to consult with independent counsel at the time of a fee modification.

Rule 1.7 -- Conflict of Interest: Current Clients

I am opposed to advance waivers as they are rarely sufficient to disclose either the circumstance or the foreseeable adverse consequences. Each advance waiver must be evaluated on a case by case basis, depending upon the actual conflict that later develops. What is most

troubling is that when the Commission expressly endorses advance waivers, as in Comment 33, it will have the effecting of encouraging their widespread use.

An advance waiver flies in the face of the notion that the attorney must make disclosure and obtain informed consent at two stages, once when the conflict is merely potential, and again when the conflict becomes actual. That is the whole point of the "shall not accept or continue" language. The advance waiver is only a one stage disclosure, when the conflict is merely potential. That is the defect. The Commission is bending to the will of large law firms that want to put business interests above client interests, and I think that is a mistake.

As a realist, I must concede that law firms will continue to use advance waivers, regardless of the content of the rule. They are here to stay, but that does not mean they are adequate. I strongly urge you to tone down the endorsement of advance waivers. At a minimum, the sentence in Comment 33 that suggests an open ended general waiver may be sufficient should be deleted. Also, the suggestion that it is okay to obtain an advance waiver where the future facts and circumstances cannot be know, it a misguided approach. That is a blanket authorization for open ended waivers that cannot possibly satisfy the requirement of informed consent. By openly embracing advance consents on general terms that do not set forth the foreseeable consequences the Commission waters down the whole concept, long a part of our rules, that informed consent be obtained at the time an actual conflict arises.

Finally, let me express the concern that the focus on sophisticated clients versus unsophisticated clients is not appropriate. There are not two classes of clients with different rules for each. All clients are entitled to the same protection of the rules, and all disclosures should be sufficiently thorough to explain the circumstances to every client. The assumption that corporate clients are well represented by their in house counsel, or by an experienced group of business persons who understand litigation and waivers is just that, an assumption. Many corporate clients are just as unsophisticated as the individuals who own and operate them. It is my opinion that disclosures should be required to be the same, thorough, complete and adequate to obtain an informed consent, regardless of the nature of the client.

I am also troubled by the Commission's new concepts of "direct" and indirect adversity, which are ill-defined. There needs to be much better guidance as to what types of transactional or situational conflicts would be direct or indirect. The average practitioner is not going to be able to figure out the distinctions absent better guidance. I think a focus on what is not a direct conflict would be helpful. The statement in Comment 5 that there is no single definition for what

constitutes a direct conflict is really not very helpful at all, and should be deleted.

In closing, I applaud your effort with these rules, and admire your dedication and commitment in this task. Thank you for your service to the public and to the profession.

Very truly yours,

THE SALL LAW FIRM

Dictated, but not read

Robert K. Sall

RKS/jvb

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation Law Office of Carol M. Langford

Commenting on behalf of an organization
- ○ Yes
- ◉ No

*** Name** Carol Langford

*** City** Walnut Creek

*** State** California

*** Email address** (You will receive a copy of your comment submission.) langford@usfca.edu

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client [3-300]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

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6/6/2008	PC	C-2008-225 Carol M. Langford [1.8.1]	Entire Rule	1.8.1	Online

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Carol M. Langford Comment on Proposed Rule 1.8.1: Business Transactions with a Client and Acquiring Interests Adverse to the Client

The following is a comment on proposed rule 1.8.1, pertaining to pecuniary interests adverse to a client. I have served as the Chair and Special Advisor to the State Bar Committee on Professional Responsibility and Conduct, in addition to being a member for several years. I have also chaired the Law Practice Management & Technology Section of the Bar and the Council of Section Chairs. I am currently an adjunct professor at the University of San Francisco School of Law and Hastings College of the Law teaching courses in legal ethics, and I have a full-time practice specializing in legal ethics and attorney conduct.

The focus of my comment will be on proposed rule 1.8.1 and how proposed comments 5 and 6 specifically exclude modifications of fee agreements from the rule. The proposed comments support the concept that modifications of fee agreements need not comply with the requirements of rule 1.8.1., but only with the requirement of rule 1.5. For the reasons set forth below, rule 1.8.1 should be changed to specifically include fee modifications.

Rule 1.8.1 states that when a lawyer gains a pecuniary interest adverse to client, three requirements must be met. The terms of the agreement must be fair and reasonable, the attorney must advise the client to seek independent counsel, and the client must consent in writing. Modifications of fee agreements should qualify as adverse pecuniary interests. Modifications that increase attorney fees clearly represent a monetary loss on the part of the client that he did not agree to at the beginning of the representation, when negotiating the fee contract was at arms-length. Modifications are also business

transactions with a client because the initial contract has already been signed, and now a new "deal" is being made when the client may be vulnerable.

Proponents of the exclusion of fee modifications from the rule cite Ramirez v. Sturdevant, 21 Cal. App. 4th 904 (1st Dist. 1994) as their supporting authority. In that case, Ramirez hired Sturdevant to pursue a wrongful termination action on a contingency fee basis. After summary judgment was granted in favor of the defendant, Ramirez asked Sturdevant to appeal the case. Sturdevant agreed on the condition that Ramirez pay a monthly fee and appellate and postjudgment costs, in addition to the contingency fee. The court held that the agreement was valid, despite the fact that Sturdevant did not advise Ramirez to seek independent counsel. Id. at 918.

Some have interpreted this decision to mean that modifications of fee agreements need not comply with the requirements of rule 1.8.1. However, Ramirez does not support this interpretation for two reasons. First, the case is distinguishable from the average fee modification situation. The subsequent agreement was not simply a modification of an existing agreement, but a new agreement altogether. Since the court found that Sturdevant was under no duty to represent Ramirez in the appeal, the first agreement was already complete. This left Sturdevant free to negotiate the terms under which he would take on the second representation for the appeal. Ramirez, 21 Cal. App. 4th at 916.

Second, while the court found that failure to advise the client to seek independent counsel did not render the fee agreement invalid, this holding was specific to the facts of the Ramirez case. The court held that under the particular circumstances of the case, independent counsel could only have reinforced that the terms of the agreement were reasonable. Id. at 918. Thus the agreement should not be nullified when independent

counsel would have served little purpose. However, more often, independent counsel would be able to give valuable advice to a client as to whether he should enter into an agreement that might end up costing him far more than the original deal, excluding work originally promised by the lawyer, or hurting him in other ways.

There are several other problems with excluding modifications of fee agreements from rule 1.8.1. First, fee modifications would be exempt from the more stringent "fair and reasonable" standard of 1.8.1 and would only need to meet the "not unconscionable" standard of rule 1.5. Unconscionable is defined as being "so exorbitant and wholly disproportionate to the services performed as to shock the conscience." Goldstone v. State Bar, 214 Cal. 490, 498-499 (1931). The unconscionable standard has been interpreted by the courts to be a higher standard than the unreasonable standard. Courts have held that while a fee may be unreasonable, it is not necessarily unconscionable. Herrscher v. State Bar, 4 Cal. 2d 399, 402 (1935). Thus an unconscionable standard may let in unreasonable modifications that fall short of "shocking the conscience," but are harmful to clients nonetheless.

For example, in Ramirez, the court found that while other attorneys routinely calculate a contingency fee from the net proceeds of a settlement, to do otherwise could not be said to shock the conscience. Ramirez, 21 Cal. App. 4th at 914. However, basing fees off the gross settlement before costs are deducted may well be considered unreasonable, considering this is not the practice of most attorneys. Thus if an attorney decides mid-representation to change its contingency from a percentage of the net settlement to a percentage of the gross settlement, this might not "shock the conscience."

However, I cannot think of a reason why this would not violate the lawyer's fiduciary duty to the client.

Another example I have seen in my practice is where an attorney initially agrees to accept payment on an hourly basis. Halfway through the representation, he realizes that the case is worth much more than he expected and gets his client to agree to a contingency fee of 30% for the same exact work. As the proposed rule stands now, the attorney would not have to advise his client to seek independent counsel. All that would be required is that the modification to a 30% contingency fee is not so disproportionate to the services performed as to shock the conscience. Since most courts have found that a 30% contingency fee does not shock the conscience, the agreement would likely stand, even with the initial hourly payments (if they were low). However, the attorney had no right to increase his fees since he had a full opportunity to assess the case at the outset; and violates his fiduciary duty by doing so.

The opposite occurs even more often; the lawyer signs on to a contingency, and when he realizes the case's low value, he switches to an hourly fee. Clients who are poor, or even middle class, have no idea that the lawyer should not be doing this, and the proposed rule says nothing about it.

In initial fee agreements the parties are dealing at arms-length, and the confidential relationship has not yet begun. However, in the context of modifications, the attorney client relationship is already established, and a duty is owed to the client to protect his best interests, and not the lawyer's. The proposed rule directly conflicts with case law establishing the lawyer's fiduciary duty to his client. That is a grave injustice to

the typical personal injury, divorce or landlord-tenant client, and I urge that rule 1.8.1. be changed to specifically include fee modifications.

MEMORANDUM

Date: June 6, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct The State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.8.1 – Business Transactions with a Client and Acquiring Interests Adverse to the Client**

Founded over 100 years ago, the Orange County Bar Association has over 9,800 members, making it the second largest voluntary bar association in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following concerning the subject proposed Rule:

*****

The OCBA believes that a change to Comment 5 is appropriate to alert lawyers to the possible application of the Rule to the modification of a fee agreement.

> This Rule may apply to an agreement by which a lawyer is retained by a client, or to the modification of such an agreement, involving the payment of the lawyer's fees. In this regard, if the agreement, or modification of the agreement, confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, (such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees), then this Rule does apply. An agreement by which a lawyer is retained by a client and modifications to such agreements are governed, in part, by Rule 1.5 [Rule 4-200]. Generally, an agreement to advance to, or deposit with, a lawyer a sum to be applied to fees or costs incurred in the future is not an ownership, possessory, security, or other pecuniary interest adverse to the client for purposes of this Rule. This Rule is not intended to apply to an agreement with a client for a contingent fee in a civil case.

The OCBA also recommends the deletion of the last sentence of Comment 15. We do not think that whether the client is represented by independent counsel is relevant to whether the terms of the transaction are fair and reasonable.

MEMORANDUM

Date: June 6, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct The State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.13 – Organization as Client**

Founded over 100 years ago, the Orange County Bar Association has over 9,800 members, making it the second largest voluntary bar association in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this Comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following concerning the subject proposed Rule:

*****

COMMENT:

The Orange County Bar Association ("OCBA"), with the assistance of the OCBA Professionalism and Ethics Committee, provides the following Comments for the Commission's consideration with respect to proposed Rule 1.13 -- Organization As Client.

The OCBA supports the Commission's attempt to preserve California's position on the duty of confidentiality through the elimination of the language in ABA Model Rule 1.13 that permits a lawyer to reveal information relating to the representation outside of the organization under certain conditions. Nevertheless, the OCBA believes that the Commission's removal of current Rule 3-600's reference to urging reconsideration by the constituent with whom the lawyer is dealing, in favor of proposed Rule 1.13's focus on referring certain matters to higher authority, may create unnecessary tension in the relationship and convey the wrong message about the lawyer's role. In this regard, it is a lawyer's duty to advise his or her client. If the lawyer believes the constituent's conduct or intended conduct is misguided under the standards provided by paragraph (b), it is the OCBA's opinion that urging reconsideration and further explaining the potential consequences may result in the constituent deciding to follow the course recommended by the lawyer. Moreover, as recognized by Comments 4 and 10, the lawyer should not substitute his or her decision making or judgment for that of the organization. There may be good reasons for the constituent's chosen course of action or inaction, and further discussion with the constituent may alter the lawyer's opinion regarding the propriety of the conduct.

The OCBA realizes that reconsideration is addressed in Comment 7, but believes that it belongs in the rule as generally the first step to be taken before appealing to higher authority

in the organization. Of course, the OCBA believes the rule should recognize that, if requesting reconsideration is not an option under the circumstances, the lawyer may immediately refer the matter to higher authority. This approach would be consistent with the existing requirements under Rule 3-100, where making a good faith effort to persuade the client is generally the lawyer's first obligation before revealing such information, even in the more serious situation where death or bodily harm is at issue.

On a related topic with respect to paragraph (b), the OCBA is concerned that the proposed rule does not provide guidance on what constitutes "the best lawful interest of the organization." This objective standard may result in unfair second-guessing or hindsight determinations. Consequently, the OCBA suggests that it be replaced with a subjective standard or that further guidance be provided in the related Comments.

In addition, paragraph (e) discusses the lawyer's obligation of informing the organization's highest authority of the lawyer's discharge, resignation or withdrawal, "unless the lawyer reasonably believes that it is not in the best lawful interest of the organization to do so." This phrase does not appear in the Model Rule, and the OCBA believes that further guidance is necessary as to when and how this exception would apply.

With regard to the Comments to proposed Rule 1.13, the OCBA provides the following observations:

The OCBA believes that Comment 6 is somewhat confusing as presently worded and recommends that the first two sentences be revised as follows: "Paragraph (b) distinguishes between the lawyer's knowledge of the conduct and knowledge of the consequences of that conduct, using 'knows' with respect to the conduct and 'knows or reasonably should know' with respect to the consequences."

If the Commission were to incorporate urging reconsideration into paragraph (b) of the proposed rule, the OCBA believes that the penultimate sentence in Comment 7 also should be revised as follows: "If a constituent persists in conduct contrary to the lawyer's advice, *and the lawyer still believes it is in the best lawful interest of the organization after further discussing the matter with the constituent,* it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization."

Comment 8 includes the statement that "Paragraph (b) also makes clear that, when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer...." The OCBA does not believe the language of paragraph (b) "makes clear" that "timely" action is required. Rather, a timely response may be implicit in acting "as is reasonably necessary," and the Comment should be reworded accordingly.

Similarly, Comment 12 states: "Paragraph (d) confirms that a lawyer may not withdraw from representing an organization unless the lawyer is permitted or required to do so under Rule 1.16 [3-700]." The OCBA does not believe that the language of paragraph (d) "confirms"

this. Rather, this sentence should be rephrased to remind members that Rule 3-700 applies when withdrawal is at issue.

The OCBA believes that minor rephrasing also would be beneficial to clarify Comment 13. Specifically, Comment 13 states: "This Rule applies to the representation of governmental organizations." Rather, the OCBA believes that the Comment should indicate that it applies to governmental organizations as *well as* other types of organizations.

Further, the OCBA is concerned about the substantive implications of Comments 13 and 14. In this regard, the Comment references other duties defined by statutes and regulations, stating that it "does not limit that authority." However, this language might suggest that such statutes and regulations always control or preempt this rule.

A similar concern exists with respect to Comment 14, which states: "Although this Rule does not authorize a governmental organization's lawyer to act as a whistle-blower in violation of Business and Professions Code section 6068, subdivision (e) or Rule 3-100, a governmental organization has the option of considering and establishing internal organizational policies that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers." The OCBA is concerned about the impact of this statement on the lawyer's duty to maintain confidences, especially if the designated recipient is outside of the client organization. Is it the Commission's intention that such a policy necessarily satisfies "informed consent" under current Rule 3-100?

Finally, a few typographical corrections should be noted -

- in Comment 3, an apostrophe is necessary at the end of "constituents" on the sixth line;
- in Comment 15, "communication" should be plural in the last sentence; and
- in Comment 16, there is an errant "of representation" in the second sentence that should be deleted.

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

Z&F

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June 6, 2008

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State Bar Board Liaison to Commission

BY E-MAIL & U.S. MAIL

Re: Comment on Rules 1.7 and 1.8.1

Dear Commission, Chair Sondheim, and President Bleich:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics at a law school in California. Future undersigneds will be forwarded to you when they are available. We are providing you with identification for each professor of Legal Ethics, including their law schools and other significant identifying information. The information is for identification purposes only.

INTRODUCTION:

First, ethical precepts concerning loyalty and conflicts of interest are, along with those addressing confidentiality, perhaps the most significant of all rules being reviewed by the Commission. It is essential to adhere to the basic principle that the rules of professional conduct are designed to *protect clients and the public*. Any variation from this course, any effort by our profession at putting self-interest or self-protection first, must fail. Not only would such a course be a disservice to the consumers of legal services, but it will likely result in demeaning the very profession we all desire to improve.

Second, the black-letter rules serve not only as rules of discipline but as *guidance* to the tens of thousands of responsible lawyers who look to these rules for benchmarks that govern their behavior. The Commission must clearly recognize that not most of California's lawyers do not have the level of sophistication that members of the Commission, or the State Bar Board of Governors, bring to the table. The State Bar would be abrogating an important portion of its

responsibility unless it makes it clear that these rules shall serve as guideposts to the average practitioner.

Third and finally, just as the rules must speak to the average lawyer, they must serve to protect the *average client*. So long as the Rules of Professional Conduct apply to all lawyers in all circumstances of legal representation, it would be inappropriate, perhaps even extremely so, to focus analysis on big, sophisticated institutional clients. California, our nation's most populous state, is filled with 35,000,000 ordinary people, the majority of whom will need legal services in their lifetime. One rule must work for our entire constituency.

With this perspective, we are concerned that the modifications to the ethics rules relating to conflicts of interest too often benefit lawyers more than clients, institutions – including large law firms – more than individuals. While it is true that our global village is expanding rapidly, this is no reason to abandon basic tenets of loyalty and fiduciary duty that are part of the foundations of our legal system.

We articulate below four specific areas of concern:

1. Rule 1.7 would allow a lawyer to be adverse to that lawyer's own client, and must be modified.

(A) Rule 1.7(a) – the crux of the problem:

Perhaps the most shocking change in the conflicts rules is current 1.7(a), which, closely read, would allow lawyers or law firms to be adverse to, and even sue, their own clients.[1] This would substantially and significantly abrogate the basic notion of loyalty, one of the most essential duties of a lawyer.

Not a single jurisdiction in the United States now allows a lawyer or law firm to be directly adverse to that individual or firm's own client. There is no excuse, in our view, for California to move in this direction. The effort to move closer to the ABA numbering system would best be paralleled by an effort to move the conflicts rule closer to the ABA model.

Rule 1.7(a) is, fortunately, easily fixed. The three phrases concerning "matters," italicized in the footnote, must be removed. What then remains is a simple, straightforward statement of the duty of loyalty.

(B) Rule 1.7(c):

Once Rule 1.7(a) has been amended, Rule 1.7(c) becomes superfluous. Rule 1.7(c) is an amended restatement of current rule 3-310(C)(3). It is superfluous if Rule 1.7 is changed as

[1] To make this clear, consider that the current draft of Rule 1.7(a) says "A lawyer shall not accept or continue representation of a client *in a matter* in which the lawyer's representation of that client *in that matter* will be directly adverse to another client the lawyer currently represents *in another matter* without informed written consent from each client. That means that if a lawyer represents A in A v. B, the lawyer may undertake representation of B in B v. X *without consent*, even though B is directly adverse to the lawyer's client A.

suggested to avoid eliminating the concept of loyalty. Two points should be noted, however. First, this restatement of current Rule 3-310(C)(3) is considerably narrower than the current rule. It removes language that now reads "*whose interest in the ... matter* is adverse," adds the word "direct" to the word adverse, and puts the "matters" in chronological order, thus narrowing the rule's application.[2]

(C) Rule 1.7(b):

Unlike Rule 1.7(c), this section is neither superfluous nor changed from the current rule, now embodied in Rule 3-310(C)(1) and (2). However, the rule section, which retains the concepts of actual and potential conflicts of interest, could easily be combined in one statement rather than two, by saying "potentially or actually conflict."

2. The Commission's position on "advance waivers" is untenable and must be removed.

A. Inadequate disclosure:

Comment 33 to Rule 1.7 inappropriately allows clients to consent to blanket advance waivers of conflicts of interest even where adequate disclosure, as required by the Commission's own definition, cannot possibly be met. These waivers are far broader than what should be permitted.

The Commission has adopted the strong current State Bar standards on disclosure and informed consent: "Disclosure means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences of those circumstances...." "Informed written consent" is consent after this disclosure.

Comment 33, however, allows a broad exception to informed written consent "where the lawyer cannot provide all the information and explanation Comment 30 [on informed consent] ordinarily requires." The Commission would make it permissible to substitute the following for disclosure: "an explanation that the lawyer is requesting the client to consent to a possible future conflict that would involve *future facts and circumstances that to a degree cannot be known* when the consent is requested." The waiver may also "permit the lawyers to be *adverse to the client on any matter in the future*...."[3]

B. Case law and "factors":

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[2] The rule originally was to have a parallel rule, 3-310(C)(4), an omission that was inadvertent and recognized by the first constitution of this Commission in its report to the State Bar and ultimately the Supreme Court. Not only is this (C)(4) provision not set forth, though the Supreme Court's holding in *Flatt v. Superior Court* (1998) 9 Cal.4th 275 captures much of that non-existent rule's essence, but the existing (C)(3) has been unnecessarily narrowed. Although the suggested change to 1.7(a) would moot this issue, the direction espoused by the Commission in this regard is troubling.

[3] The sentence in Comment 33 stating that "[a]n advance consent normally will comnply with this Rule if it is limited to a particular type of conflict with which the client already is familiar" is puzzling in light of the Comment's previous language acknowledging that disclosure will be inadequate – unless the Commission intends that the client is already "familiar" with conflicts that "cannot be known" at the time of consent.

Advance waivers under narrow circumstances have been permitted in California. Thus, where a law firm agrees to represent two parties, one of which is a principal client and the other a former non-client, it is appropriate to have the former non-client consent that if a conflict of interest occurs, the law firm may remain as counsel for the original client.[4]

Comment 33, however, travels leaps and bounds beyond case law. It would essentially allow law firms to represent whomever they wish in the future regardless of their past representations. As is the case with the current draft of Rule 1.7(a), these advance waivers destroy the concept of loyalty.

Comment 33 states that two factors to be considered in determining the adequacy of a waiver are "the use of an adequate ethics screen" and the advice of independent counsel. In this respect, the Commission's comment reads like an appellate court decision that the Commission is attempting to legislate, rather than leaving such standards to our courts. Screening is very limited under California case law, so to allow an "adequate ethics screen" to be a factor in considering the adequacy of a waiver is either to allow only that narrow definition permitted by case law or to legislate a change in what an acceptable screen is by this comment to the rule.

The reference to consulting independent counsel sounds beneficial to the client at first blush. However, it is important to remember that no amount of consultation with independent counsel will overcome the *lack of adequate disclosure*. Independent counsel – here, potentially, including in-house general counsel, who may feel under internal pressures from the client/employer – will be forced into the position of opining on a conflicts waiver without adequate information to make that determination. It is the adequacy of disclosure that governs here, not who is reviewing an *inadequate* disclosure.

3. The Rule 1.8.1 draft would improperly allow lawyers to bypass the current requirements of Rule 3-300 when they modify their fee agreements with clients.

A. The current and proposed rules.

Lawyers have long been able to enter into initial fee contracts with clients at arms' length. As in most states, California case law makes it clear that a lawyer's fiduciary duty to a client begins only *after* inception of the attorney-client relationship. This allows lawyers and clients to negotiate freely over the retention of lawyer by client.

Any *subsequent modification* of a fee agreement with a client is done under circumstances where the lawyer has already taken on *ongoing fiduciary duties to the client*. Thus, a modification of a fee agreement is a business transaction with a client, and may involve acquiring a pecuniary interest adverse to the client as well. Current Rule 3-300 would therefore require that before such modification could be entered into, the lawyer must: (a) make the terms of the transaction fair and reasonable; (b) advise in writing that the client seek independent counsel to advise about the transaction; and (c) give the client a reasonable period of time to seek that advice.

[4] This is the holding of *Zador v. Kwan* (1995) 31 Cal. App. 4th 1285.

The current draft of Rule 1.8.1 simply eliminates these requirements. It does so by making several changes in current Rule 3-300, including muddying the distinction in the comments section between business transactions and adverse pecuniary interests. However, two other changes in the rule stand out (see below).

B. Modifications of fee contracts excluded.

Unlike the current rule, Comments 5 and 6 to the present draft specifically exclude fee contract modifications. The proposed language from Comment 5 adds the italicized language to the existing comment: "This Rule is not intended to apply to an agreement by which a lawyer is retained by a client *or to the modification of such an agreement*."

The only possible justification for this language is lawyers' own self-interest – to modify fee contracts in the middle of representation without the existing protections afforded those clients.

Indeed, Comment 6 acknowledges that lawyers do have "other fiduciary principles [that] might apply." Further, the comment states that "[o]nce a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement." In essence, then, the Commission's draft sets up a *conflict between common law principles of fiduciary duty and the ethics rules themselves*. In advising lawyers to "consult case law and ethics opinions" about their fiduciary duties, the Commission even begs the question of attempting to reconcile these duties with their proposed rule.[5]

C. Inappropriate use of independent counsel.

The current draft of Rule 1.8.1(b) eliminates the requirement that the lawyer wishing to engage in a business transaction or acquisition of pecuniary interest of a client must advise the client of the opportunity to seek the advice of independent counsel. The modified rule states that if the client is already represented by independent counsel, there need be no notice. However, this – read together with Comments 14 and 15 of the proposed rule, and with the failure of the proposed rule to parallel ABA Model Rule 1.8(A)(3) – substantially diminishes client protection.

Comments 14 and 15 define independent counsel in such a way as to include any corporate general counsel. Such counsel need not be California counsel and need not be schooled in the requirements of California rules or contracts. Unlike ABA 1.8(A)(3), the proposed California rule does not require that the contracting lawyer disclose the "transaction *and the lawyer's role in the transaction*, including whether the lawyer is representing the client in the transaction." Thus, independent counsel not hired for the specific purpose of examining the transaction in question may well miss the very issues necessary to evaluate the transaction.

In short, having independent counsel is no substitute for adequate disclosure and advice by the lawyer wishing to engage in the transaction.

4. Rule 1.7(d) does not afford adequate client protection as drafted.

[5] Further, its first citation, to *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, is to an extraordinarily unusual case in which a lawyer represented, then ceased representing, then represented anew, the same client. The case is oft-debated among legal scholars as to its implications on fiduciary duty and is extremely unlikely to provide practical guidance for the average attorney.

A. The issue of client consent must be addressed.

Originally, Rule 1.7(b), the current rule that parallels proposed 1.7(b), required the informed consent of clients, not merely disclosure. In 1992, the consent requirement was eliminated because the Commission considered that the broad language of the subparts of the rule made consent in every case impractical and unnecessary. The problem remains, however, that consent in some and perhaps most of these cases very much continues to be necessary. The Commission has done nothing to address this problem.

Rule 1.7(d) cuts too broad a swath to allow mere disclosure without consent to suffice. On the other hand, we recognize that there is some validity to the position that requiring informed consent in each and every application of the rule may be impractical and perhaps unnecessary. For example, under Rule 1.7(d)(1), a lawyer's child or current business partner could be a witness against the client. Such a key relationship does not require the client's consent under this rule. On the other hand, under (d)(3) and (d)(4), if the lawyer knows of a casual business associate who owns stock in one of the companies involved in the transaction, informed consent is less significant.

There are a variety of ways to solve this problem. One solution to the issue of consent lies in close adherence to the ABA rule, which sets forth a cleaner delineation of responsibility. Others involve reasonable standards, such as "materiality," that could be used to set forth what 1.7(d) situations require consent. Whatever solutions are to be used, the issue of consent – completely unaddressed by the Commission – should be squarely met and determined.

B. Inadequate parallel language in (d)(3) and (d)(4).

Section 1.7(d)(3) makes reference to "personal relationship" but the word "personal" is inexplicably left out of 1.7(d)(4). It should be included. Furthermore, while (d)(3) refers to the conflict that arises when the *lawyer's* friends or associates are "affected substantially," this language should include the *client* being affected substantially. That is, "the lawyer has ... a ... relationship with another ... that the lawyer knows or reasonably should know would be affected substantially by the matter, *or could substantially affect the client in the matter*." (Italicized language added.)

This letter is not intended to be exhaustive. For example, careful scrutiny should be given to the comments on non-consentable conflicts and class action conflicts. The purpose of this letter is to highlight the matters of greatest concern to the signers. Further information about the signers and this letter may be obtained by contacting Richard Zitrin per the contact information set forth in the letterhead.

Respectfully yours,

Michele Benedetto
Associate Professor of Law, Golden Gate University, San Francisco

Steven Berenson
Associate Professor, Thomas Jefferson School of Law, San Diego

Continued on next page

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THE STATE BAR
OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL

Scott J. Drexel, *Chief Trial Counsel*

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639 TELEPHONE: (415) 538-2063

August 26, 2008

Randall Difuntorum, Director
Office of Professional Competence & Planning
State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Comments of the Office of the Chief Trial Counsel to Proposed Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

Thank you for the opportunity to submit the comments of the Office of the Chief Trial Counsel to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in March 2008. I apologize that these comments have been submitted after the comment deadline but hope that they will nevertheless be considered by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

~~Proposed Rule 1.5 [Fees for Legal Services]~~

~~1. Unconscionable Fees~~

~~The Office of the Chief Trial Counsel is opposed to any attempt to specifically define the term "unconscionable" in subsection (b) of proposed rule 1.5. The phrase "unconscionable fee" is sufficiently defined by case law and has been found not to be unconstitutionally vague. (*In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 732.) In our view, any attempt to specifically define what constitutes an unconscionable fee is likely to be either overbroad or under inclusive. Sufficient guidance regarding the determination of whether a fee is unconscionable is provided by the list of facts set forth in subsection (c) of proposed rule 1.5. However, we urge the Commission to consider adding two additional factors to the list set forth in subsection (c). Those additional factors are: (1) whether the fee involves an element of fraud or overreaching on the attorney's part (see *Herrscher* v. *State Bar* (1935) 4 Cal.2d 399, 403; *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989); and (2) whether there was any failure on the attorney's part to disclose the true facts to the client (see *Herrscher* v. *State Bar*, *supra*, 4 Cal.2d at p. 403). In addition, the Commission may wish to more clearly state in the rule itself whether the factors set forth in subsection (c) are intended to be the exclusive factors to be considered in determining whether a fee is unconscionable. At least one~~

~~situations, for the sake of convenience or economy, the parties may prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representations (e.g., Evid. Code, § 962) and must obtain the informed written consent of the clients thereto pursuant to paragraph (C)(1) [of rule 3-310]." Rather than mandate conflict waivers in all cases of joint representation as the current comment does, proposed Comment 13 appears to make it just one factor that may sometimes be required.~~

~~Comment 23 appears to undermine an attorney's duty to have adequate conflict checking procedures and programs in place. The Office of the Chief Trial Counsel does not expect associates to necessarily know all of the personnel of the firm in which they work. However, the rule should encourage firms to have adequate conflict checking programs.~~

~~Comment 33 discusses advance waivers. There are no disciplinary cases on advanced waivers. Some courts have held that an attorney may have an advanced conflict waiver, but those have been in very limited situations. The Office of the Chief Trial Counsel is concerned that clients, particularly unsophisticated clients, may not fully understand the ramifications of a conflict that has not yet arisen. Under these circumstances, an advance waiver could easily be abused. Furthermore, even the attorney can not fully understand or be able to adequately explain the ramifications of a potential conflict. For these reasons, the Office of the Chief Trial Counsel recommends that advance conflict waivers be prohibited.~~

Proposed Rule 1.8.1 [Business Transactions with a Client; Acquiring Interests Adverse to the Client]

The Office of the Chief Trial Counsel does not oppose exempting original fee agreements from the conflict of interest rules. However, for the reasons stated in the Office of the Chief Trial Counsel's July 31, 2008 written comment to COPRAC's Proposed Formal Opinion Interim No. 05-0001, we vigorously oppose exempting modifications to original fee agreements from the application of either current rule 3-300 or proposed rule 1.8.1. A copy of the Office of the Chief Trial Counsel's July 31, 2008 comment is attached hereto as Appendix A.

~~**Proposed Rule 1.13 [Organization as a Client]**~~

~~The phrase "other person associated with the organization" contained in subsection (b) of proposed rule 1.13 is vague and overbroad. Whether a person is "associated" with an organization is open to interpretation and, therefore, potential litigation.~~

~~The Office of the Chief Trial Counsel seeks clarification regarding the meaning of this rule. We interpret the proposed this rule to apply equally to in-house counsel and to outside counsel. The Office of the Chief Trial Counsel wishes to clarify whether that is the intent of the rule. If so, we interpret the rule to impose a duty under certain circumstances for outside counsel to withdraw from the employment and for in-house counsel to resign from his or her employer organization. The Office of the Chief Trial Counsel seeks clarification as to whether that is the intent of the rule or whether there are circumstances~~

~~the fire and commented upon the fact that there was a large amount of paper and cardboard in the basement of the building to use as tinder for the fire.~~

~~The State Bar Court Review Department did not find respondent Dale culpable of a violation of current rule 2-100 of the Rules of Professional Conduct because the incarcerated arsonist was represented in his criminal proceeding, but not in the civil action in which respondent Dale solicited the information.~~

~~It is the Office of the Chief Trial Counsel's position that respondent Dale should have been found culpable of violating rule 2-100. As such, we recommend that subsection (a) of the proposed rule should read as follows:~~

> ~~In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation,~~ **~~or a related subject~~**~~,~~ ~~with a person the lawyer knows to be represented by another lawyer in the matter,~~ **~~or a related matter~~**~~,~~ ~~unless the lawyer has the consent of the other~~ lawyer.

~~The Office of the Chief Trial Counsel does not have any comments to offer at this time with respect to proposed rules 1.16, 3.5, 3.10, 4.3 or 5.4.~~

Thank you again for the opportunity to comment upon these proposed amendments to the Rules of Professional Conduct.

Very truly yours,

Scott J. Drexel
Chief Trial Counsel

SJD:dim
Attachment

THE STATE BAR
OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL

Scott J. Drexel, *Chief Trial Counsel*

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639 TELEPHONE: (415) 538-2063

July 31, 2008

Angela Chang
Office of Professional Competence,
Planning and Development
The State Bar of California
180 Howard Street, 8th Floor
San Francisco, California 94105

Re: Comment of the Office of the Chief Trial Counsel on Proposed Formal Opinion Interim No. 05-0001

Dear Ms. Chang:

Thank you for the opportunity to submit a public comment on the Standing Committee on Professional Responsibility and Conduct's ("COPRAC") proposed Formal Opinion Interim No. 05-0001 regarding the applicability of rule 3-300 of the Rules of Professional Conduct to two fact patterns involving the mid-representation modification of written fee agreements between an attorney and his/her client.

In its interim opinion, COPRAC has tentatively concluded that modification of a fee agreement is not a "business transaction" between the attorney and the client within the meaning of rule 3-300. Additionally, COPRAC has also tentatively concluded that neither of the fact patterns set forth in the interim opinion confers upon the attorney the type of adverse interest contemplated by the rule. As a result, COPRAC has tentatively concluded that rule 3-300 is not applicable to either of the modifications to the fee agreement set forth in the interim opinion. The Office of the Chief Trial Counsel respectfully disagrees with COPRAC's interim opinion.

We believe that it is indisputable that a contract between an attorney and a client is a "business transaction." Nevertheless, we agree that the negotiation of an initial fee agreement between an attorney and a prospective client is an arm's length transaction. (*Ramirez* v. *Sturdevant* (1994) 21 Cal.App.4th 904, 913; *Setzer* v. *Robinson* (1962) 57 Cal.2d 213, 217.) The discussion to rule 3-300 specifically provides that "[r]ule 3-300 is not intended to apply to the agreement by which the member is retained by the client . . ." The rationale for that exclusion is that, during the initial negotiations regarding the terms upon which the attorney is willing to represent the client, there is no fiduciary relationship between them. Therefore, the parties may deal at arm's length. (See *Cooley* v. *Miller & Lux* (1909) 156 Cal. 510, 524; *Lee* v. *Gump* (1936) 14 Cal.App.2d 729, 733.)

However, once the relationship of attorney and client is established, the parties stand in a fiduciary relationship of the very highest character, a relationship that binds the attorney to the most conscientious fidelity to his or her client. (*Lee* v. *State Bar* (1970) 2 Cal.3d 927, 939; *Yorn* v. *Superior Court* (1979) 90 Cal.App.3d 669, 675.) The parties are no longer in an equal bargaining position. Further, the attorney owes the client undivided loyalty and it is a violation of that duty to assume a position adverse or antagonistic to his client without the client's free and intelligent consent. (See *Santa Clara County Counsel Attys. Assn.* v. *Woodside* (1994) 7 Cal.4th 525, 548.) In most cases, the client has shared his or her confidences with the attorney, has developed a high level of trust in the attorney and justifiably believes that the attorney is solely motivated by the client's best interests. The Supreme Court has recognized that one of the purposes of rule 3-300 is to protect clients from their attorneys' use of financial information gained from confidences disclosed during the attorney-client relationship. (See *Hunniecutt* v. *State Bar* (1988) 44 Cal.3d 362, 370 [applying former rule 5-101].) Consequently, the Supreme Court has applied the rule to transactions that occur after the creation of the attorney-client relationship because the Court recognizes that often a special trust develops as a result of that relationship. (See *Hunniecutt* v. *State Bar*, *supra*, 44 Cal.3d at pp. 370-372.)

In light of the creation and existence of a fiduciary relationship between the attorney and his or her client, a mid-representation modification of the fee agreement between them cannot, and should not, be viewed as an arm's length transaction. Likewise, the rationale for excluding the negotiation of the initial fee agreement from the ambit of rule 3-300 (i.e., that there is no fiduciary relationship between the parties) no longer existences. Thus, in the view of the Office of the Chief Trial Counsel, the modification of an existing fee agreement is a business transaction within the meaning of rule 3-300 of the Rules of Professional Conduct and is subject to its requirements.

In *In re Silverton* (2005) 36 Cal.4th 81, 84-87, 91, the Supreme Court found the attorney culpable of a violation of rule 3-300 where, subsequent to his settlement of the client's personal injury claims, he negotiated with the client a written authorization for the attorney to compromise the client's medical bills and to keep any amount saved as a result of the compromise. In consideration for this authorization, the attorney agreed to increase the client's share of the proceeds from the personal injury settlement. However, pursuant to COPRAC's interim opinion that rule 3-300 does not apply to either the initial fee agreement or to a modified subsequent agreement, the attorney's conduct could not constitute a violation of rule 3-300.

In addition, in *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989 (fn. 13), the State Bar Court Review Department stated, during a discussion of the attorney's alleged violation of rule 4-200 and without making any specific reference to rule 3-300, that a second contingency fee could be charged pursuant to a fee agreement, but only if the attorney has fully disclosed the exact nature of his or her fees and the attorney has obtained the informed consent of the client (i.e., the essential requirements of rule 3-300).

Moreover, earlier this year, the Office of the Chief Trial Counsel tried a matter before the State Bar Court Hearing Department in which a client who could no longer afford to pay for the attorney's legal services entered into a modification agreement with the attorney whereby the client agreed to exchange contractor services for legal services at the client's rate of $80 per hour. The attorney's hourly rate had been and remained at $285 per hour. The Office of the Chief Trial Counsel argued that this modification of the fee agreement constituted a business transaction with the client and that the attorney did not comply with the requirements of rule 3-300. The hearing judge did not find the violation and the Office of the Chief Trial Counsel did not seek review because of other considerations; nevertheless, the Office of the Chief Trial Counsel believes that its position is correct and reserves the right to file charges against an attorney in an appropriate case.

The Office of the Chief Trial Counsel does not believe that requiring members to comply with rule 3-300 when a modification to a fee agreement is contemplated would be either difficult or unreasonable. In *Hawk* v. *State Bar* (1988) 45 Cal.3d 589, 601, the Supreme Court specifically stated that requiring an attorney to comply with former rule 5-101 (current rule 3-300) before acquiring an interest adverse to his or her client is not an onerous obligation.

Finally, the issue of whether the modification of an existing fee agreement with a client constitutes a business transaction within the meaning of rule 3-300 has not been specifically decided by either the State Bar Court or the Supreme Court and it should not be decided by COPRAC for all purposes. In our view, COPRAC should limit its Formal Opinion to situations where there is clearly not a business transaction with the client or a pecuniary interest adverse to the client as that phrase was intended, but leave open the possibility that a fee modification could constitute a business transaction with a client. To do otherwise may lead the unwary practitioner into a false sense of security.

Very truly yours,

Scott J. Drexel
Chief Trial Counsel

SJD:dim

PUBLIC COMMENTS [1.13] ~ FILE LIST

C-2008-213d SDCBA [1.13]

C-2008-229c SCCBA [1.13]

C-2008-230l OCBA [1.13]

C-2008-232d COPRAC [1.13]

C-2008-238a LACBA [1.13]

C-2008-253d Chief Trial Counsel [1.13]

MEMORANDUM

Date: April 22, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subject: Proposed Rule 1.13 – Organization as a Client
[Existing CRPC Rule 3-600]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 1.13.

Rationale For Comment 1: Lack of uniformity with ABA Model Rule 1.13 is justified to preserve B&P Code §6068(e) on confidentiality.

SCCBA COMMENTS TO Rule 1.13: Organization As Client

Overall Observation: Rule 1.13, like several of the proposed rules (e.g., Rule 1.7 & 1.17.1), seems to be so overly detailed, trying too hard to cover all possible scenarios, that the rules overly regulate attorney's conduct instead of articulating clear, straightforward ethical rules. This problem is also evidenced by the number and complexity of the comments to these rules, where the comments seem to and often do extend the scope of the rules instead of merely elucidating the rules (see not only proposed Rule 1.13 but most glaringly proposed Rule 1.7). We encourage the Rules Revision Commission to seriously review the proposed rules for this pattern.

Rule 1.13(b) & (f): Recommend deleting the requirement that the lawyer reasonably should know by deleting the words "… or reasonably should know." This is such a high standard in the context of the attorney's obligation so as to put the attorney in unreasonable jeopardy of violating this rule. Comment [6] defines "knowing or reasonably should know" standard as requiring "the lawyer to engage in the level of analysis that a lawyer of reasonable prudence and competence would undertake to ascertain whether the conduct meets the criteria that trigger the lawyer's obligations under paragraph (b)." However, this is a different standard from the usual articulation of the "reasonably should know" standard. While what is set out in Comment [6] may be what the drafters intend, that is not what is set out in subpart (b) as currently written. If the "reasonably should know" standard is retained, the SCCBA recommends making the last sentence of Comment [6] part of the Rule. Despite that, the best standard for purposes of this rule should be "actual knowledge" on the part of the attorney.

Rule 1.13(b) & Comment [7] as they relate to subordinate lawyers in a government entity or corporation: Recommendation is to clarify the requirement for an attorney to report to a higher authority, so that in the context of a government entity or corporation where there is a legal department, that for a subordinate lawyer the report structure must first include the legal department. It should be clear that a subordinate lawyer does not have an ethical obligation to report a problem as outlined in Rule 1.13(b) higher up the corporate or government governing structure. This is probably best accomplished by adding a separate comment after Comment [7] or at minimum including it in Comment [7].

Comment [13]: Recommendation is to delete this sentence: "Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances." This sentence is superfluous and adds more confusion that it clarifies. The rule as stated and the comment with this sentence deleted is sufficiently clear.

Comment [14]: Recommendation is to delete this comment in its entirety. This comment attempts to allow the attorney to become a whistleblower and avoid the constraints of the attorney-client privilege and duty of confidentiality. It does this by

giving a government agency the authority to provide for an attorney-whistle blower to report to some other designated entity, person, or agency outside the organization. While authority complies with the "consent" exception to the duty of confidentiality, such a broad "consent" does not meet the standard of a "knowing" consent as required by the rule on attorney-client confidentiality. The government entity is giving advance consent to waive the attorney-client confidentiality and privilege without knowing exactly what is going to be divulged and what limits, if any, there should be on what is divulged. "Knowing" consent cannot be given by a client without advice of the attorney who has the duty to explain to the client all the ramifications of waiving confidentiality and/or the privilege. That simply cannot be done in advance and so broadly as this power would indicate.

Proposed Rule 1.13: Organization As Client

(a) In representing an organization, a lawyer shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or other constituent overseeing the particular engagement.

(b) If a lawyer representing an organization knows that an officer, employee or other person associated with the organization is acting~~,~~ or intends to act ~~or refuses to act~~ in a matter related to the representation in a way that the lawyer knows, or if the lawyer knows that such a person refuses to take an action in a matter related to the representation and the lawyer knows that such refusal is, ~~or reasonably should know~~ is (i) a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization~~,~~ and (ii) likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) In taking any action pursuant to paragraph (b), the lawyer shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e)(1).

(d) If, despite the lawyer's actions in accordance with paragraph (b), the officer, employee or other person insists upon action, ~~or fails to act,~~ in a manner that, or refuses to act in a situation where such refusal, is a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and is likely to result in substantial injury to the organization, the lawyer shall continue to proceed as is reasonably necessary in the best lawful interests of the

organization. The lawyer may have a~~'s response may include the lawyer's right, and where appropriate,~~ duty to resign or withdraw in accordance with Rule 1.16.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), shall inform the organization's highest authority of the lawyer's discharge, resignation or withdrawal, unless the lawyer reasonably believes that it is not in the best lawful interest of the organization to do so.

(f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer representing an organization shall explain the identity of the lawyer's client to the constituent with whom the lawyer is dealing whenever the lawyer knows ~~or reasonably should know~~ (i) that the organization's interests are adverse to those of ~~the~~ such constituent~~(s) with whom the lawyer is dealing~~ or (ii) that the constituent mistakenly believes ~~is under the mistaken belief~~ that he or she is in a client-lawyer relationship with the lawyer. [See Rule 4.3.] The lawyer shall not mislead such a constituent into believing, and shall make a reasonable effort to correct the constituent's mistaken belief, that the constituent is in a lawyer-client relationship with the lawyer or that the constituent may communicate confidential information to the lawyer that will not be disclosed to the organization or used for the organization's benefit.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rules 3-310 [1.7 (3-310(B), (C)), 1.8.2 (3-310(E), 1.8.7 (3-310(D), 1.8.6 (3-310(F)]. If the organization's consent to the dual representation is required by any of these Rules, the consent shall be given by an appropriate official of the organization. ~~other than the individual who is to be represented, or by the shareholders.~~

Comment

The Entity as the Client

[1] This Rule is intended to apply to all forms of legal organizations such as corporations, limited liability companies, partnerships, and incorporated and unincorporated associations. An organizational client cannot act except through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. Any agent or fiduciary

authorized to act on behalf of an organization is a constituent of the organization for purposes of this Rule.~~e authorized matter~~.

[2] When a lawyer is retained by an organization, the lawyer is required to take direction from and communicate with the constituent(s) authorized by the organization or by law to instruct or communicate with the lawyer with respect to the matter for which the organization has retained the lawyer.

[3] When a constituent of an organizational client communicates with the organization's lawyer in that constituent's organizational capacity, the lawyer has a duty to the organization under Business and Professions Code section 6068, subdivision (e)(1) to protect the confidential information imparted. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or [impliedly authorized] by the organizational client in order to carry out the representation or as otherwise permitted by Rule 3-100 or by law.

[4] When constituents of an organization make decisions for it, a lawyer ordinarily must accept those decisions even if their utility or prudence is doubtful. It is not within the lawyer's province to make decisions on behalf of the organization concerning policy and operations~~, including ones entailing serious risk~~. A lawyer, however, has a duty to inform the client of significant developments related to the representation under Rule 1.4 and Business and Professions Code, section 6068, subdivision (m). Paragraph (b) involves one aspect of that duty. It applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging or has engaged in conduct that the lawyer knows ~~or reasonably should know~~ violates a legal obligation to the organization or is a violation of law reasonably imputable to the organization, and is likely to result in substantial injury to the organization. In those circumstances, the lawyer must proceed as is reasonably necessary in the best lawful interest of the organization.

[5] Paragraph (b) applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging or has engaged in the conduct. Under this knowledge standard, a lawyer is not required to audit the client's activities or initiate an investigation to uncover the existence of such conduct. (Nevertheless, knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. [See Rule 1.0(f).])

[6] Paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of that conduct. When a lawyer knows of the conduct, the lawyer's obligations under paragraph (b) are triggered when the lawyer knows or reasonably should know that the conduct is (i) a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization. The "knows or reasonably should know" standard requires the lawyer to engage in the level of analysis that a lawyer of

reasonable prudence and competence would undertake to ascertain whether the conduct meets the criteria that trigger the lawyer's obligations under paragraph (b). ~~The "knows or reasonably should know" standard requires the lawyer to engage in the level of analysis that a lawyer of reasonable prudence and competence would undertake to ascertain whether the conduct meets the criteria that trigger the lawyer's obligations under paragraph (b).~~

[7] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its potential consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent.

[8] Paragraph (b) also makes clear that, when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. ~~However, applicable law may prescribe that under certain conditions the highest authority is elsewhere, for example, the independent directors of a corporation.~~

[9] Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed in the manner prescribed in paragraph (b), a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization. For example, if a lawyer acting on behalf of an organizational client knows that an actual or apparent agent of the organization acts or intends ~~or refuses~~ to act in a matter related to the representation in a manner that is ~~or may be~~ a violation of a legal duty to the organization or a violation of law reasonably imputable to the organization, but the lawyer does not know such conduct is likely to result in substantial injury to the organization, paragraph (b) does not apply. Nevertheless, in such circumstances, subject to Business and Professions Code section 6068, subdivision (e)(1), the lawyer may take such actions as appear to the lawyer to be in the best lawful interest of the organization. Such actions may include among others (i) urging reconsideration of the matter while explaining its likely consequences to the organization; or (ii) referring the

matter to a ~~the next~~ higher authority in the organization, including, if warranted by the seriousness of the matter, ~~referral~~ to the highest authority, as determined by applicable law, that can act on behalf of the organization.

[10] Proceeding in the best lawful interest of the organization under this Rule does not authorize a lawyer to substitute the lawyer's judgment for that of the organization or to take action on behalf of the organization independently of the direction the lawyer receives from the highest authorized constituent overseeing the particular engagement. In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.

Relation to Other Rules

[11] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.4, 1.8, 1.16, [3.3] or [4.1].

[12] Absent circumstances that would require withdrawal under paragraph (d), the lawyer may continue to represent an organizational client if, despite the lawyer's actions under paragraph (b), the constituent continues to insist on or continues to act or refuse to act in a manner that triggers the application of paragraph (b). Paragraph (d) confirms that a lawyer may not withdraw from representing an organization unless the lawyer is permitted or required to do so under Rule 1.16 [3-700]. Where the lawyer continues to represent the organization, the lawyer must proceed as is reasonably necessary in the best lawful interests of the organization, including continuing to urge reconsideration, where appropriate. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2.1 [1.2(d)] may also be applicable, in which event the lawyer may be required to withdraw from the representation under Rule 1.16(a)(1).

Government Agencies and Organizations

[13] This Rule applies to the representation of governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. [See Scope [18].] Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. ~~Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances.~~ In addition, duties of lawyers

employed by the government or lawyers in military service may be defined by statutes and regulations. This Rule does not limit that authority.

~~[14] Although this Rule does not authorize a governmental organization's lawyer to act as a whistle-blower in violation of Business and Professions Code section 6068, subdivision (e) or Rule 3-100, a governmental organization has the option of considering and establishing internal organizational policies that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers.~~

Clarifying the Lawyer's Role

[15] There are times when the lawyer knows ~~or reasonably should know~~ that the organization's interest may be or become adverse to those of one or more of its constituents or when the constituent with whom the lawyer is communicating mistakenly believes that the lawyer has formed a lawyer-client relationship with that constituent. Under paragraph (f), in such circumstances the lawyer must not mislead the constituent into believing that a lawyer-client relationship exists between the lawyer and the constituent when such is not the case and shall make a reasonable effort to correct a constituent's mistaken belief in that regard. In such circumstances, the lawyer must advise the constituent that the lawyer does not represent the constituent and that communication between the lawyer and the constituent are not confidential as to the organization and may be disclosed to the organization or used for the benefit of the organization. [See Rule 4.3]

Dual Representation

[16] Paragraph (g) allows lawyers to represent both an organization and a constituent of an organization in the same matter, so long as the lawyer complies with these Rules, including Rules 1.7, [1.8.2], [1.8.6], and [1.8.7]. ~~Paragraph (g) requires that the organization's consent to dual representation of representation of the organization and a constituent of the organization must be provided by someone other than the constituent who is to be represented. However, when there is no other constituent who can consent for the organization, the constituent to be represented in the dual representation may provide such consent in some cases.~~ An appropriate "official of the organization" as used in paragraph (g) shall mean an individual other than the constituent on whose behalf the representation is being provided unless there is no other constituent who can consent for the organization. (See State Bar Formal Opn. 1999-153.)

[17] This Rule is not intended to prohibit lawyers from representing both an organization and a constituent of an organization in separate matters, so long as the lawyer has addressed the conflicts of interest that may arise. (See State Bar Formal Opn. 2003-163.) In dealing with a closely held corporation or small association, lawyers commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, a lawyer's duties as

counsel for the organization may preclude the lawyer from representing the organization's constituents in matters related to control of the organization. In resolving such multiple relationships, lawyers must rely on case law. (See *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) Similar issues can arise in a shareholder derivative action. (See *Forrest v. Baeza* (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857].)

MEMORANDUM

Date: June 6, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct The State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.13 – Organization as Client**

Founded over 100 years ago, the Orange County Bar Association has over 9,800 members, making it the second largest voluntary bar association in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this Comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following concerning the subject proposed Rule:

*****

COMMENT:

The Orange County Bar Association ("OCBA"), with the assistance of the OCBA Professionalism and Ethics Committee, provides the following Comments for the Commission's consideration with respect to proposed Rule 1.13 -- Organization As Client.

The OCBA supports the Commission's attempt to preserve California's position on the duty of confidentiality through the elimination of the language in ABA Model Rule 1.13 that permits a lawyer to reveal information relating to the representation outside of the organization under certain conditions. Nevertheless, the OCBA believes that the Commission's removal of current Rule 3-600's reference to urging reconsideration by the constituent with whom the lawyer is dealing, in favor of proposed Rule 1.13's focus on referring certain matters to higher authority, may create unnecessary tension in the relationship and convey the wrong message about the lawyer's role. In this regard, it is a lawyer's duty to advise his or her client. If the lawyer believes the constituent's conduct or intended conduct is misguided under the standards provided by paragraph (b), it is the OCBA's opinion that urging reconsideration and further explaining the potential consequences may result in the constituent deciding to follow the course recommended by the lawyer. Moreover, as recognized by Comments 4 and 10, the lawyer should not substitute his or her decision making or judgment for that of the organization. There may be good reasons for the constituent's chosen course of action or inaction, and further discussion with the constituent may alter the lawyer's opinion regarding the propriety of the conduct.

The OCBA realizes that reconsideration is addressed in Comment 7, but believes that it belongs in the rule as generally the first step to be taken before appealing to higher authority

in the organization. Of course, the OCBA believes the rule should recognize that, if requesting reconsideration is not an option under the circumstances, the lawyer may immediately refer the matter to higher authority. This approach would be consistent with the existing requirements under Rule 3-100, where making a good faith effort to persuade the client is generally the lawyer's first obligation before revealing such information, even in the more serious situation where death or bodily harm is at issue.

On a related topic with respect to paragraph (b), the OCBA is concerned that the proposed rule does not provide guidance on what constitutes "the best lawful interest of the organization." This objective standard may result in unfair second-guessing or hindsight determinations. Consequently, the OCBA suggests that it be replaced with a subjective standard or that further guidance be provided in the related Comments.

In addition, paragraph (e) discusses the lawyer's obligation of informing the organization's highest authority of the lawyer's discharge, resignation or withdrawal, "unless the lawyer reasonably believes that it is not in the best lawful interest of the organization to do so." This phrase does not appear in the Model Rule, and the OCBA believes that further guidance is necessary as to when and how this exception would apply.

With regard to the Comments to proposed Rule 1.13, the OCBA provides the following observations:

The OCBA believes that Comment 6 is somewhat confusing as presently worded and recommends that the first two sentences be revised as follows: "Paragraph (b) distinguishes between the lawyer's knowledge of the conduct and knowledge of the consequences of that conduct, using 'knows' with respect to the conduct and 'knows or reasonably should know' with respect to the consequences."

If the Commission were to incorporate urging reconsideration into paragraph (b) of the proposed rule, the OCBA believes that the penultimate sentence in Comment 7 also should be revised as follows: "If a constituent persists in conduct contrary to the lawyer's advice, *and the lawyer still believes it is in the best lawful interest of the organization after further discussing the matter with the constituent,* it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization."

Comment 8 includes the statement that "Paragraph (b) also makes clear that, when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer...." The OCBA does not believe the language of paragraph (b) "makes clear" that "timely" action is required. Rather, a timely response may be implicit in acting "as is reasonably necessary," and the Comment should be reworded accordingly.

Similarly, Comment 12 states: "Paragraph (d) confirms that a lawyer may not withdraw from representing an organization unless the lawyer is permitted or required to do so under Rule 1.16 [3-700]." The OCBA does not believe that the language of paragraph (d) "confirms"

this. Rather, this sentence should be rephrased to remind members that Rule 3-700 applies when withdrawal is at issue.

The OCBA believes that minor rephrasing also would be beneficial to clarify Comment 13. Specifically, Comment 13 states: "This Rule applies to the representation of governmental organizations." Rather, the OCBA believes that the Comment should indicate that it applies to governmental organizations as *well as* other types of organizations.

Further, the OCBA is concerned about the substantive implications of Comments 13 and 14. In this regard, the Comment references other duties defined by statutes and regulations, stating that it "does not limit that authority." However, this language might suggest that such statutes and regulations always control or preempt this rule.

A similar concern exists with respect to Comment 14, which states: "Although this Rule does not authorize a governmental organization's lawyer to act as a whistle-blower in violation of Business and Professions Code section 6068, subdivision (e) or Rule 3-100, a governmental organization has the option of considering and establishing internal organizational policies that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers." The OCBA is concerned about the impact of this statement on the lawyer's duty to maintain confidences, especially if the designated recipient is outside of the client organization. Is it the Commission's intention that such a policy necessarily satisfies "informed consent" under current Rule 3-100?

Finally, a few typographical corrections should be noted -

- in Comment 3, an apostrophe is necessary at the end of "constituents" on the sixth line;
- in Comment 15, "communication" should be plural in the last sentence; and
- in Comment 16, there is an errant "of representation" in the second sentence that should be deleted.

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.

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

Dennis Peter Maio, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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June 5, 2008

Audrey Hollins
The State Bar of California
Office of Professional Competence,
Planning and Development
180 Howard Street
San Francisco, CA 94105-1639

RE: Rule 1.13 – Organization as Client [3-600]

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) has the following comments on Proposed Rule 1.13.

Proposed Rule 1.13 would supplant current Rule 3-600 and involves a number of important changes. It also contrasts sharply in several instances from Model Rule 1.13.

Proposed **Rule 1.13(a)** states the general rule that where an attorney has been engaged by an organization the organization is the client, acting through its representatives. It makes no substantive change from Rule 3-600, inserting "lawyer" in place of "member", a change that is universal in the proposed revisions. We disagree with this approach and support the approach taken by the current Model Rule. The proposed rule misses an opportunity to make suitable changes in the face of problems that have long existed in the current California rule. We recognize that the deficiencies identified below are ameliorated to some extent by the comments accompanying proposed Rule 1.13, but we believe that the rule itself must be revised to be clear and conform to the realities of other forms of organization such as partnerships and limited liability companies:

a. ABA Model Rule 1.13(a) states: "In representing an organization, a lawyer shall conform his or her representation to the concept that the client is the organization itself, acting through the duly authorized constituents."

b. By contrast, current Rule 3-600 and proposed Rule 1.13 both speak in terms of the "**highest authorized**" representative. The fact is that organizations may act through multiple representatives, depending on the subject matter of the engagement, the nature of the decision, and availability. Often, perhaps most often, the attorney is not taking direction from the "highest authorized" representative. "**Duly authorized**", the term used in the Model Rule, is more realistic and accurate.

c. The Model Rule uses the single term, "**constituents**" which is clearly understood and in all events explained in Comment 1 of the Model Rule. By contrast, the current and proposed rules use the phrase "**officer, employee, body or constituent.**" This ignores the possibility of other duly authorized individual representatives. In the partnership setting, it ignores partners. Given the advent of limited liability corporations and their proliferation, the rule fails to recognize "members" or "managing members." The ABA approach obviates the distinctions by using a single suitable term, "constituent," and we urge this approach be taken.

d. Comments 1 and 2 to the proposed Rule 1.13 are consistent with the foregoing comments and would not have to be changed if the State Bar opted to use the Model Rule language. We support both comments but favor revising the rule to conform to the current version of Model Rule 1.13.

Proposed **Rule 1.13(b)** largely tracks the Model Rule, and as a result differs from Rule 3-600 in adding a separate questioned act, an act in "violation of a legal obligation to the organization." We support this aspect of the proposed Rule 1.13.

Both the Model Rule 1.13(b) and Rule 3-600 also provide guidance by identifying factors relevant to how the lawyer acts in the face of the information. The two rules are not materially different and in the proposed revision the factors are discussed in Comment 7, rather than in the rule itself. We support this approach.

Whether the questioned conduct involves a breach of duty to the organization or a violation of the law imputable to the organization, the lawyer must know or reasonably should know that such conduct is "likely to result in substantial injury to the organization." That phrase is found in both the Model Rule 1.13 and Rule 3-600. The revised rule makes clear, as explained in Comment 6, that actual knowledge standard applies to the questioned conduct itself, and knew/should reasonably know standard applies to the first prong as to the nature of the conduct (violation of a legal obligation or violation of law reasonably immutable to the organization) and the second prong as to the "substantial injury" consequence. By contrast, Rule 3-600 speaks to actual knowledge and does not acknowledge the aforementioned distinctions. We support the proposed revision in these respects.

Proposed **Rule 1.13(c)** makes clear that there is no right to "blow the whistle" and the lawyer's duty of confidentiality as stated in Business & Professions Code § 6068(e)(1) must be observed throughout compliance with this rule. This is consistent with current Rule 3-6000 ("....the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e)."). Model Rule 1.13 contains no such explicit admonition. The proposed revision is consistent with California law governing the duty of confidentiality and we support it.

Proposed Rule **1.13(d)** addresses the lawyer's options where, despite taking the steps described in (b), the problem has not been solved. Both Model Rule 1.13 and current Rule 3-600 speak to one step: resignation or withdrawal. The proposed revision instead provides: "the lawyer shall continue to proceed as is reasonably necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right, and where appropriate, duty to resign or withdraw in

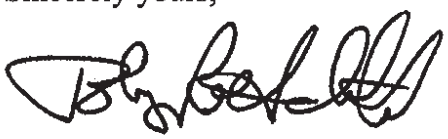
accordance with Rule 1.16." Comment 10 provides suitable clarification of what it means to "proceed in the best interests of the organization." We support these changes.

Proposed Rule **1.13(e)** imposes a new disclosure duty (not previously contained in Rule 3-600 or a part of the Model Rule) on an attorney who is discharged as a result of taking the steps called for by subsection (b) or who has chosen or is required to withdraw or resign. Proposed Rule 1.13(e) calls upon the departing attorney to disclose the fact of the termination of the attorney-client relationship to "the organization's highest authority." There is an exception if the attorney "reasonably believes" such disclosure is "not in the best *lawful* interest of the organization to do so." (Italics added for emphasis) We understand this to be a limited disclosure obligation, as it (a) only requires disclosing the fact of discharge or resignation (not the events giving rise thereto or the reasons therefor) (b) is made in a confidential communication to the "highest authority" in the organization (for example, the Board of Directors of a corporate client). Given that a failure to comply with this rule could subject the attorney to discipline, the limited scope and objective of the proposed rule, and the fact that the information to be disclosed may already be known to the "highest authority" within the client organization by virtue of the steps called for by Rule 1.13(b), many members of our committee question whether this rule should be adopted, and whether a final disclosure by a departing attorney should simply be recommended as a consideration to be weighed depending on the events giving rise to the termination of the attorney-client relationship, the knowledge of the highest authority and the best interests of the client. Other members of the committee support this new disclosure obligation inasmuch as it is potentially constructive and not at all burdensome. Some members would entertain a disclosure obligation that would disclose more than simply the fact of the termination of the attorney-client relationship by way of discharge or withdrawal, pointing to the analogy of a public accounting firm's duty to disclose the existence of a dispute over application of accounting principles when it resigns as outside auditors of a public company (albeit here the duty to disclose remains within the confidential confines of the client organization). Certainly, as our entire committee believes, it should be actively reconsidered by the RRC. For example, Rule 1.13(e) fails to take into account the possibility that the lawyer represents both the organization and an officer or principal in the organization in his or her individual capacity, and is withdrawing based on information communicated in confidence by the individual client. It has also been suggested that the term "highest authority" may be ambiguous in the non-corporate setting (such as a limited liability company or a general partnership) and warrants clarification by way of comment. Another reason to reconsider is the exception in the rule where the attorney reasonably believes that this exit disclosure is not "in the best lawful interests" of the organization. This phrase is also used in paragraph (b) governing reporting up the ladder and paragraph (d) when the up the ladder approach has failed and the lawyer must decide whether to continue representing the organization. One wonders how any attorney could be disciplined given the breadth of the exception. We also think it is notable that the RRC did not address this new disclosure rule in any of the 17 comments associated with proposed Rule 1.13.

Proposed **Rule 1.13(f)** offers several changes from the Model Rule and Rule 3-600(D) that are largely for ease of reading. It preserves the language from the California rule about not misleading a constituent into believing that confidential information may be revealed to the lawyer but not to the organizational client, and it adds a new provision that the lawyer must make a reasonable effort to correct such an erroneous belief upon realizing that one may exist. We support this additional obligation.

Proposed **Rule 1.13(g)** is consistent with the Model Rule and Rule 3-600(E), changed to have the correct cross references to the provisions of the Proposed Rule that replace Rule 3-310. The final clause of the section reads, "The consent should be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders." Rule 3-600(E) differs in ending the clause "or by the shareholder(s) or organization members." Neither version seems to cover all situations, although comment [16] is helpful in explaining the issue in more generalized terms. In order to utilize language more consistent with the rest of the rule, the rule revision committee might consider "the consent should be given by **a duly authorized constituent** of the organization other than the individual who is to be represented, or by the shareholder**(s) or the appropriate ownership group**."

Sincerely yours,



Toby J. Rothschild, Chair
Professional Responsibility and Ethics Committee

cc: Gretchen M Nelson, President
LACBA PREC Members

THE STATE BAR
OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL

Scott J. Drexel, *Chief Trial Counsel*

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639 TELEPHONE: (415) 538-2063

August 26, 2008

Randall Difuntorum, Director
Office of Professional Competence & Planning
State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Comments of the Office of the Chief Trial Counsel to Proposed Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

Thank you for the opportunity to submit the comments of the Office of the Chief Trial Counsel to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in March 2008. I apologize that these comments have been submitted after the comment deadline but hope that they will nevertheless be considered by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

~~Proposed Rule 1.5 [Fees for Legal Services]~~

~~1. Unconscionable Fees~~

~~The Office of the Chief Trial Counsel is opposed to any attempt to specifically define the term "unconscionable" in subsection (b) of proposed rule 1.5. The phrase "unconscionable fee" is sufficiently defined by case law and has been found not to be unconstitutionally vague. (*In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 732.) In our view, any attempt to specifically define what constitutes an unconscionable fee is likely to be either overbroad or under inclusive. Sufficient guidance regarding the determination of whether a fee is unconscionable is provided by the list of facts set forth in subsection (c) of proposed rule 1.5. However, we urge the Commission to consider adding two additional factors to the list set forth in subsection (c). Those additional factors are: (1) whether the fee involves an element of fraud or overreaching on the attorney's part (see *Herrscher* v. *State Bar* (1935) 4 Cal.2d 399, 403; *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989); and (2) whether there was any failure on the attorney's part to disclose the true facts to the client (see *Herrscher* v. *State Bar*, *supra*, 4 Cal.2d at p. 403). In addition, the Commission may wish to more clearly state in the rule itself whether the factors set forth in subsection (c) are intended to be the exclusive factors to be considered in determining whether a fee is unconscionable. At least one~~

~~situations, for the sake of convenience or economy, the parties may prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representations (e.g., Evid. Code, § 962) and must obtain the informed written consent of the clients thereto pursuant to paragraph (C)(1) [of rule 3-310]." Rather than mandate conflict waivers in all cases of joint representation as the current comment does, proposed Comment 13 appears to make it just one factor that may sometimes be required.~~

~~Comment 23 appears to undermine an attorney's duty to have adequate conflict checking procedures and programs in place. The Office of the Chief Trial Counsel does not expect associates to necessarily know all of the personnel of the firm in which they work. However, the rule should encourage firms to have adequate conflict checking programs.~~

~~Comment 33 discusses advance waivers. There are no disciplinary cases on advanced waivers. Some courts have held that an attorney may have an advanced conflict waiver, but those have been in very limited situations. The Office of the Chief Trial Counsel is concerned that clients, particularly unsophisticated clients, may not fully understand the ramifications of a conflict that has not yet arisen. Under these circumstances, an advance waiver could easily be abused. Furthermore, even the attorney can not fully understand or be able to adequately explain the ramifications of a potential conflict. For these reasons, the Office of the Chief Trial Counsel recommends that advance conflict waivers be prohibited.~~

~~Proposed Rule 1.8.1 [Business Transactions with a Client; Acquiring Interests Adverse to the Client]~~

~~The Office of the Chief Trial Counsel does not oppose exempting original fee agreements from the conflict of interest rules. However, for the reasons stated in the Office of the Chief Trial Counsel's July 31, 2008 written comment to COPRAC's Proposed Formal Opinion Interim No. 05-0001, we vigorously oppose exempting modifications to original fee agreements from the application of either current rule 3-300 or proposed rule 1.8.1. A copy of the Office of the Chief Trial Counsel's July 31, 2008 comment is attached hereto as Appendix A.~~

Proposed Rule 1.13 [Organization as a Client]

The phrase "other person associated with the organization" contained in subsection (b) of proposed rule 1.13 is vague and overbroad. Whether a person is "associated" with an organization is open to interpretation and, therefore, potential litigation.

The Office of the Chief Trial Counsel seeks clarification regarding the meaning of this rule. We interpret the proposed this rule to apply equally to in-house counsel and to outside counsel. The Office of the Chief Trial Counsel wishes to clarify whether that is the intent of the rule. If so, we interpret the rule to impose a duty under certain circumstances for outside counsel to withdraw from the employment and for in-house counsel to resign from his or her employer organization. The Office of the Chief Trial Counsel seeks clarification as to whether that is the intent of the rule or whether there are circumstances

in which an in-house counsel's response may be less drastic than resignation from his or her place of employment. If resignation is not necessary, the Office of the Chief Trial Counsel recommends that information be set forth in the Comments to the rule distinguishing the circumstances requiring an in-house counsel's withdrawal from representation of the organization as opposed to the in-house counsel's resignation.

Proposed Rule 1.17.1 [Purchase and Sale of a Law Practice]

Subsections (b)(1)(i) and (b)(2) of proposed rule 1.17.1 contain the new phrase "and might have the right to act on his or her own behalf." This phrase is unnecessary because the rule already establishes that client has the right to retain counsel. It is also confusing because it implies: (1) that, in some instances, the client might not have the right to act in his or her own behalf and (2) that, if the client has the right to retain other counsel, the client does not have the right to act in his or her own behalf. In subsection (b)(1)(i), the Commission has used the word "and" between the right to retain other counsel but in subsection (b)(2)(i), the Commission used the word "or." Is there a reason for the use of the word "and" in one subsection and the use of the word "or" in the other?

In Comment 7, the Office of the Chief Trial Counsel suggests that the phrase "and prior to client notification as described in paragraph (b)" to added immediately following the phrase "or does so during the 90-day period as described in paragraph (b)."

Comment 12 states that proposed rule 1.17.1 does not apply to the sale only of a substantive field of practice or of a geographic area of practice, both of which are covered by proposed rule 1.17.2. The Office of the Chief Trial Counsel recommends that this comment specifically discuss the application of rule 1.17.1 where the substantive field of practice or geographic area of practice being sold also constitutes substantially all of the law practice of a lawyer.

Proposed Rule 1.17.2 [Purchase and Sale of Geographic Area or Substantive Field of Law]

To the extent that subsections (a)(3), (a)(10) and (a)(11) of proposed rule 1.17.2 permanently precludes a lawyer from practicing law in a geographic area or in a substantive field of law, the Office of the Chief Trial Counsel is concerned that such rules are improper and potentially unconstitutional and that their adoption will likely lead to significant litigation. The result of a sale under this proposed rule will be to create limited licenses to practice law, a concept that has never been authorized or approved by the Supreme Court.

If subsection (a)(3) is not deleted for the reasons stated above, the Office of the Chief Trial Counsel recommends that it be modified. As currently drafted, subsection (a)(3) is vague because it does not define what constitutes a "geographic area". Could "geographic area" include the entire State of California or Northern or Southern California? The rule might also be clearer if subsections (a)(3) and (a)(10) were combined.

the fire and commented upon the fact that there was a large amount of paper and cardboard in the basement of the building to use as tinder for the fire.

The State Bar Court Review Department did not find respondent Dale culpable of a violation of current rule 2-100 of the Rules of Professional Conduct because the incarcerated arsonist was represented in his criminal proceeding, but not in the civil action in which respondent Dale solicited the information.

It is the Office of the Chief Trial Counsel's position that respondent Dale should have been found culpable of violating rule 2-100. As such, we recommend that subsection (a) of the proposed rule should read as follows:

> In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation, **or a related subject**, with a person the lawyer knows to be represented by another lawyer in the matter, **or a related matter**, unless the lawyer has the consent of the other lawyer.

The Office of the Chief Trial Counsel does not have any comments to offer at this time with respect to proposed rules 1.16, 3.5, 3.10, 4.3 or 5.4.

Thank you again for the opportunity to comment upon these proposed amendments to the Rules of Professional Conduct.

Very truly yours,

Scott J. Drexel
Chief Trial Counsel

SJD:dim
Attachment

PUBLIC COMMENTS [1.16] ~ FILE LIST

C-2008-213e SDCBA [1.16]

C-2008-230d OCBA [1.16]

C-2008-232e COPRAC [1.16]

C-2008-238b LACBA [1.16]

MEMORANDUM

Date: April 22, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subject: Proposed Rule 1.16 – Declining or Terminating Representation [Existing CRPC Rule 3-700]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 1.16.

Rationale For Comment 1: The proposal is similar to the material points in the existing rule but clearer.

MEMORANDUM

Date: June 6, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.16 - Declining or Terminating Representation**

Founded over 100 years ago, the Orange County Bar Association has over 9,800 members, making it the second largest voluntary bar association in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following concerning the subject proposed Rule:

*****

Comment:

The OCBA believes that the proposed rule should require cause to withdraw only when there is pending litigation or when doing so will prejudice the client's rights. This position was endorsed by *Ramirez v. Sturdevant,* 21 Cal. App. 4th 904, 915 (1994) which stated that "we see no basis in law, or in logic, for a conclusion that an attorney never may withdraw from a case except for cause." Accordingly, we propose adding (b)(11) to the rule, to provide that:

> (11) The lawyer believes in good faith, in a proceeding not pending before a tribunal, that there will be no prejudice to the client's rights if the attorney withdraws, subject to the requirements of (d) and (e).

Paragraph (b)(10) says withdrawal is allowed where "the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal." Although the rule's intent appears to be to impose a good cause requirement in cases pending before a tribunal, where the tribunal has no such rule of its own, the wording of the rule – requiring a lawyer to speculate as to what a court would deem good faith, as opposed simply to acting in good faith – sets a standard that will be confusing and challenging for attorneys to follow in practice. Accordingly, we propose changing paragraph (b)(10) to read as follows:

> (10) the lawyer believes in good faith, in a proceeding pending before a tribunal, that other good cause for withdrawal exists, subject to the requirements of paragraphs (c), (d) and (e).

We also believe that there is a discrepancy between paragraph (b)(5) and the Comment regarding optional withdrawal. Paragraph (b)(5) allows withdrawal where "the client breaches an agreement or obligation to the lawyer *as to expenses or fees*, and the lawyer has given the client a reasonable warning…" (emphasis added). However, the Comment does not similarly limit breaches of agreement to fee disputes. It reads: "Paragraph (b)(5) is intended to allow a lawyer to withdraw from a representation if the client refuses to abide by a material term of an agreement relating to the representation, *such as* an agreement concerning fees, court costs or other expenses, *or an agreement limiting the objectives of the representation.*" (emphasis added).

We suggest that the provision in the Rule be revised to match the Comment so that paragraph (b)(5) is inclusive as to breaches other than fee agreements. This would not only align the Rule with the Comment, but would align the Rule with the common practice of attorneys to include retainer agreement provisions authorizing the attorney to withdraw if the client fails to adhere to certain non-pecuniary obligations (e.g., to respond to communications in a timely fashion and attend required court hearings).

We suggest that the Rule be revised so that paragraph (b)(5) reads as follows:

> the client breaches a material term of the agreement or obligation to the lawyer, including as to expenses or fees, and the lawyer has given the client reasonable advance notice confirmed in writing after the breach that the lawyer will withdraw unless the agreement or obligation is fulfilled.

Finally, we have a concern with regard to lawyers who threaten to withdraw and demand unreasonable increases in fees. In this regard, we suggest that you consider cross-referencing the comments in Rule 1.8.1 regarding the modification of fee agreements somewhere in the comments to this rule.

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.

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

Dennis Peter Maio, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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June 5, 2008

Audrey Hollins
The State Bar of California
Office of Professional Competence,
Planning and Development
180 Howard Street
San Francisco, CA 94105-1639

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

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) has the following comments on Proposed Rule 1.16.

Proposed Rule 1.16, "Declining Or Terminating Representation," has been modeled on ABA Model Rule 1.16, "Declining Or Terminating Representation" with modifications to include most, if not all, of the provisions of California Rule of Professional Conduct 3-700, "Termination of Employment." The result is a longer rule that covers certain circumstances in which a lawyer must decline representation as well as when a lawyer must or should withdraw.

1. Proposed Rule 1.16(a), like Model Rule 1.16(a), sets forth three conditions where a lawyer must decline representation or withdraw, if representation has commenced, including where the representation will result in violation of the rules of professional conduct. The committee is concerned that every lawyer who violates another rule, for example, the conflict of interests rule, in taking a new matter may also be charged with violating Rule 1.16(a). Should monetary sanctions ever be imposed in disciplinary matters pursuant to Business and Professions Code section 6086.13, this could result in an injustice, as the statute provides that sanctions are not to exceed $5,000 per each violation, subject to a $50,000 limit.

The committee suggests a comment stating that Rule 1.16(a)(1) is not intended to result in duplicative disciplinary charges.

2. Proposed Rule 1.16(d) tracks the language of CRPC 3-700(A)(2) rather than adopting the language of ABA Model Rule 1.16(d). Proposed Rule 1.16(d) states:

> A lawyer shall not terminate a representation until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).

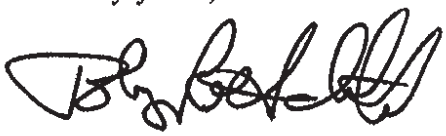
Under the rule as proposed, a lawyer may not terminate a representation until after the lawyer has complied with the requirements of paragraph (e) regarding the transfer of the client files. This rule does not fit all situations. For example, if a client discharges an attorney but does not ask for a copy of the file for six months, the rule above suggests the attorney cannot terminate the representation during that six-month period. It seems far more reasonable to impose a duty that is concurrent with the termination of the representation as required under ABA Rule 1.16(d).

Our proposal for a revised Proposed Rule 1.16(d) incorporates the language of the ABA Rule 1.16(d) as follows:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, and complying with paragraph (e).

3. Proposed Rule 1.16(e) defines "client papers and property" but does not specify whether attorney work product is included in this definition. The comment states that the rule codifies existing case law and includes a citation to *Weiss v. Marcus,* (1975) 51 Cal.App.3d 590, which holds that the attorney's work product belongs to the client whether the client has paid for it or not. The committee suggests that the comment also cite to *Rose v. State Bar*, 49 Cal.3d 646, 655 (1989) which states that whether an attorney has a duty to surrender uncommunicated work product to a client for the client's use in a malpractice action against the attorney appears to be an open question.

Sincerely yours,



Toby J. Rothschild, Chair
Professional Responsibility and Ethics Committee

cc: Gretchen M Nelson, President
LACBA PREC Members

PUBLIC COMMENTS [1.17.1] ~ FILE LIST

C-2008-203a Leslie A Minkus [1.17.1]

C-2008-213f SDCBA [1.17.1]

C-2008-229d SCCBA [1.17.1]

C-2008-230e OCBA [1.17.1]

C-2008-238c LACBA [1.17.1]

C-2008-253e Chief Trial Counsel [1.17.1]

Ms Audrey Hollins
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rules 1.17.1 and 1.17.2

Dear Ms. Hollins,

I have enclosed the BASF Legal Ethics Committee's response to the Rules Revision Commission's draft of the above rules. If there is anything more you need, my address is 1600 Dana Avenue, Palo Alto, CA 94303, and my phone number is 650-328-6849.

Sincerely,

Leslie A. Minkus

Commission for the Revision of the Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rules 1.17.1 and 1.17.2

Dear Commission Members

On June 1, 2006, two members of our committee, Jim Dimitriou and I responded to your request for comments on the first draft of these rules. In that letter they expressed the view that the primary purpose of the rule should be to allow a sole practitioner the same economic benefits available to a member of a firm upon the lawyer's retirement. That view, based upon simple concepts of fairness, is one that our committee adopts. The notion that allowing a sole practitioner to realize the value of the goodwill created during the years of practice should somehow be restricted is one which we categorically reject. Medical professionals have been doing this for years with no decline in their ethical behavior, nor any lowered perception of it by their patients or the general public. The double standard created by Rules 1.17.1(e) and 1.17.2(a)(9)(10), and (g) has no legitimate purpose and simply discriminates against a sole practitioner.

With respect to 1.17.1, we strongly object to comment 12, which is plainly inconsistent with section (e) of the Rule. Section (e) clearly exempts from the Rule's provisions transactions by which a sole practitioner creates a partnership with a proposed purchaser of the practice. Comment 12 adds the additional requirement that the formation of the firm be done "in good faith . . . and not for the purpose of avoiding the limitations of the rule." Setting aside the disingenuousness of this device, it completely undermines what should be one of the Rules' primary objectives---to enable a lawyer to understand his or her obligations by reading the Rule itself.

But beyond that, we object to the language of the exception, whether in a comment or the Rule, as being contrary to the important goal of client protection. Consider the following example:

Lawyer S1 negotiates an agreement with lawyer B1 to create a partnership from which S1 intends to retire within, e.g., one year. S1 notifies his clients of the formation of the partnership, his intent to retire, and a discussion of B1's qualifications and S1's endorsement of him. In the letter, S1 clearly explains that the client is free to stay with B or not, and perhaps even encourages the client to meet B1. The effect of this is to give S1's clients a year during which they may have an opportunity to evaluate B1's work, or at least to determine whether they feel comfortable with him.

Lawyer S2 negotiates an agreement with lawyer B2 to sell S2's practice and to notify S2's clients in the manner prescribed in Rule 1.17.1(a) through (d). Despite S2's recommendation and

discussion of B2's qualifications, the fact remains that the clients have no independent basis for determining whether B2 is a person they are confident in and comfortable with. It seems clear to us that S1's clients are in a substantially better position to make an intelligent decision, and to make that decision when not faced with the immediate need for legal representation.

We should not forget that this is a disciplinary Rule. Yet it seems to us improbable at best that the State Bar would commence disciplinary proceedings based on the "good faith" exception. With the State Bar's limited resources it would be absurd to initiate proceedings against a retired lawyer, and it is not at all clear that the purchasing lawyer is even covered by the Rule. We then have a Rule which lawyers would quickly realize they could disregard. Such rules encourage cynicism rather than ethical behavior.

We find Rule 1.17.2 even more problematic, in that it creates a rule of discipline that is totally inconsistent with Rule 1.17.1. In that Rule, the sale of an entire practice does not preclude the seller from returning to the practice of law. This is sensible because nothing precludes the buyer from including in the agreement a reasonable non-compete clause. However, Rule 1.17.2, with no explanation or obvious rationale, ipse dixit precludes the seller of a portion of a practice returning to the practice of law without establishing that there are "extraordinary circumstance" whatever that term may mean. Worse, the Rule precludes the seller of a geographic area of practice from ever returning to the practice of law.

These restrictions have no ethical component at all. They are business decisions to be negotiated by the parties to the contract. We are at a loss to understand the rationale, if any, on which these portions of the Rule are based. They are inconsistent not only with 1.17.1, but also with Howard v. Babcock and Section 16600 of the Business and Professions Code. And to return to our original point, the large firm bias is painfully obvious. Absent an agreement, a retiring partner could receive retirement benefits and return to practice the next day.

We of course recognize that these Rules are in a very real sense a political document and that it is extraordinarily difficult in such a document to harmonize the interests of clients, lawyers, the public, and the legal system generally. Needless to say, we appreciate the enormous amount of time and energy expended by the members of the Commission in this task. But in light of our objections, and in fairness to all sole practitioners, we urge you to reconsider these two rules.

Very truly yours,

Leslie A. Minkus for the
Legal Ethics Committee of the Bar Association of San Francisco

MEMORANDUM

Date: April 22, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subject: Proposed Rule 1.17.1– Purchase and Sale of a Law Practice [Existing CRPC Rule 2-300]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 1.17.1

Rationale For Comment 1: The Proposed Rule clarifies the existing rule.

PROPOSED RULE 1.17.1, SCCBA EDITS

SCCBA COMMENTS TO Rule 1.17.1: Purchase and Sale of a Law Practice

The SCCBA believes that the 90 day term used in the Proposed Rule is too long a period for a purchaser to wait to start acting on behalf of his new clients. Once the transaction has been finalized the parties to the transaction want to move forward. A shorter period not only accommodates the intent of the seller and purchaser, but also provides more protection to the client whose rights might be prejudiced while his or her matter is in a holding pattern. Although there is an exception allowing the purchaser to act on behalf of the client where a client's rights might be prejudiced, without all of the information at the purchasers' disposal (such as the client' confidential information and the previous attorney's work product), the purchaser might not be able to determine whether the client's rights are in fact in jeopardy.

All other changes are proposed to provide clarity. In Particular, the SCCBA proposes to spell out that it is the purchaser who needs to receive the consent in all instances. Otherwise the purchaser will be in limbo as to whether he or she can act on behalf of the client.

Rule 1.17.1: Purchase and Sale of a Law Practice

All or substantially all of the law practice of a lawyer, living or deceased, including goodwill, may be sold to a lawyer or law firm subject to all the following conditions:

(a) Fees charged to clients shall not be increased solely by reason of the ~~purchase or~~ sale.

(b) If the purchase ~~or sale~~ contemplates the transfer of responsibility for work not yet completed or responsibility for a client's files or information protected by Rule 3-100 and Business and Professions Code section 6068, subdivision (e), then:

(1) If the seller is deceased, or has a conservator or other person acting in a representative capacity, and no lawyer has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, then: ~~prior to the transfer:~~

(i) Prior to the transfer the purchaser shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel and might have the right to act in his or her own behalf; that the client may take possession of any client papers and property held by the lawyer in any form or format as provided by Rule 1.16(e); and that, if no response is received by the purchaser to the notification within ~~90~~30 days of sending the notice or ~~after it is sent or~~, if the client's rights would be prejudiced by a failure of the purchaser to act on behalf of the

client during the 30-day period ~~at time,~~ the purchaser may act on behalf of the client until otherwise notified by the client, and

(ii) ~~the purchaser shall obtain the written consent of the client, provided that t~~The client's consent to the purchaser acting on behalf of the client shall be presumed until the purchaser is otherwise notified by the client, if the purchaser receives no response to the paragraph (b)(1)(i) notification within 30~~90~~ days of~~after~~ the notice being ~~it is~~ sent to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by a failure of the purchaser to act on behalf of the client during the ~~90~~30-day period.

(2) In all other circumstances, ~~not less than 90 days prior to the transfer:~~

(i) Not less than 30 days prior to the transfer, the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel or might have the right to act in his or her own behalf; that the client may take possession of any client papers and property held by the lawyer in any form or format as provided by Rule 1.16(e); and that, if no response is received by the purchaser to the notification within ~~90~~30 days of the notice being sent or if the client's rights would be prejudiced by a failure of the purchaser to act on behalf of the client during the 30 day period, ~~after it is sent,~~ the purchaser may act on behalf of the client until otherwise notified by the client, and

(ii) ~~the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer, provided that t~~The client's consent to the purchaser acting on behalf of the client shall be presumed until the purchaser is otherwise notified by the client if the purchaser does not receive a ~~receives no~~ response to the paragraph (b)(2~~1~~)(i) notification within ~~90~~30 days of the notice being sent ~~after it is sent~~ to the client's last address as shown on the records of the seller~~;~~. or if the client's rights would be prejudiced by a failure of the purchaser to act on behalf of the client during the 30-day period.

(c) ~~If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a lawyer shall be taken.~~ All lawyers involved in

the purchase and sale of a law practice shall comply with the rule of a tribunal in which a matter is pending with regard to substitution of counsel.

(d) ~~A lawyer shall not disclose confidential information to a non-lawyer in connection with a sale under this Rule.~~Purchaser and seller must comply with all applicable rules governing attorney client privileged communication and confidential information.

(e) This Rule does not apply to the admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice.

Comment

[1] Any sale of a law practice necessarily raises substantive issues regarding the rights and interests of the seller's clients and the public's perception of the Bar. Accordingly, this Rule permits a lawyer to sell a practice only in accordance with the limitations contained in this Rule and in other Rules and in State Bar Act provisions to which this Rule and Comment refer. These limitations are intended to assure that the interests and reasonable expectations of the seller's clients have priority over the seller's interests.

Sale of Entire Practice

[2] The requirement that substantially all of the seller's practice be sold is intended to prohibit piecemeal sales of individual cases and to protect those clients whose matters are less lucrative or who for other reasons might find it difficult to secure other counsel if a sale could be limited to only some lucrative matters. This Rule also recognizes that, in some instances, a seller will be unable to transfer some matters to the purchaser because, for example, the purchaser has a conflict of interest or lacks pertinent expertise, and the seller is permitted to retain those individual files. (See Comments [4] and [10].) However, when a seller seeks only to sell some substantive fields or geographic areas of practice but retain other substantive fields or other geographic areas, the seller must comply with Rule 1.17.2 (Area of Practice Rule).

[3] Paragraph (a) is satisfied even if the seller retains clients who decide not to accept the purchaser as their lawyer or whom the purchaser cannot represent because of conflicts of interest. Paragraph (a) also is satisfied even if seller is employed after the sale as a lawyer for a public agency, by a legal services organization, or as in-house counsel to a business.

[4] Transfer of individual client matters, where permitted, is governed by Rule 1.5.1 [2-200]. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by Rule 5.4(a) [1-320(A)].

Termination of Practice by the Seller

[5] This Rule is not intended to prohibit a selling lawyer from returning to the private practice of law after the entire practice has been sold.

Fee Arrangement Between Client and Purchaser

[6] Paragraph (a) applies to the seller, who may not raise fees solely for the purpose of a sale, and to the purchaser, who may not raise fees solely because of the sale. If a client agrees to retain the purchaser, the purchaser may assume the seller's fee agreement with the client or enter into a fee agreement with the client. (See, for example, Business and Professions Code sections 6147, 6147.5, and 6148.) If a client decides not to retain the purchaser, the selling lawyer might have to continue to represent the client unless the selling lawyer is disabled or is deceased.

[7] This rule is not intended to create a contract by estoppel between the purchaser and any client. If the purchaser acts to protect the interests of a client following the 9~~3~~0-day period described paragraphs (b)(1) or (2) but has not entered into a written fee agreement with the client, or does so during the 9~~3~~0-day period as described in paragraph (b), the purchaser might be entitled to payment on a quantum meruit basis.

Sale of Practice of Disabled or Deceased Lawyer

[8] When the selling lawyer is disabled or deceased, relevant statutes may also be applicable. (See, e.g. Probate Code, sections 2468, 9764, and Business and Professions Code sections 6180, et seq. and 6190, et seq.)

Other Applicable Ethical Standards

[9] If the purchaser would have a potential or actual conflict of interest by accepting the representation of any client of the seller, the transaction may not proceed as to that client absent compliance with Rules 1.7, 1.8 and 1.9, as applicable. The notice required by paragraph (b) shall comply with the requirements of Rule 7.1(b) and (c) and with Rule 1.5.

Confidential Information and Client Consent

[10] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a reasonably identifiable client no more violate the seller's duty of confidentiality than do similar discussions concerning the possible association of another lawyer or mergers between firms, and to engage in such discussions the seller is not required to give notice to or obtain consent form any client. However, the seller is required to obtain client consent before providing to a potential purchaser any confidential client information. The obligation to obtain client consent under paragraphs (b) ~~and (c)~~ does not require disclosure of the terms of the agreement between purchaser and seller, but there might be circumstances in which disclosure of particular

terms might be required under Rule 1.4 and Business and Professions Code section 6068, subdivision (m).

[11] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive any sale under this Rule.

Applicability of the Rule

[12] This Rule does not apply to the formation of a law firm, admission of a lawyer to a law firm, retirement from a law firm, or retirement plans and similar arrangements, when done in good faith as part of engaging in the practice of law together and not for the purpose of avoiding the limitations of this Rule. This Rule also does not apply to a sale of tangible assets of a law practice. This Rule also does not apply to the sale only of a substantive field of practice or of a geographic area of practice, both of which are governed by Rule 1.17.2 (Area of Practice Rule).

RULES OF PROFESSIONAL CONDUCT OF STATE BAR OF CALIFORNIA

Please indicate which proposed rule you are commenting on:

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

Agree: Agree as Modified: **X** Disagree :

Comments: Modify subdivision (d) to make clear "confidential information" is confidential client information and not general financial information or due diligence information pertaining to the law practice being offered for sale. Comment 10 appears to address this issue but the distinction should be made clear within the body of the Rule.

Name: Cathrine Castaldi **Title: President**

Organization: Orange County Bar Association

☑ **Commenting on behalf of an organization**

Address: P.O. Box 6130

City, State, Zip: Newport Beach, CA 92658

Please **write** or **fax** or **respond using the Internet** to:

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, CA 94105

Internet: http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=90842

DEADLINE FOR COMMENT: 5:00 P.M. Friday, June 6, 2008

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June 5, 2008

Audrey Hollins
The State Bar of California
Office of Professional Competence,
Planning and Development
180 Howard Street
San Francisco, CA 94105-1639

RE: Rule 1.17.1 – Purchase and Sale of a Law Practice [2-300] and Rule 1.17.2 – Purchase and Sale of Geographic Area or Substantive Field of a Law Practice [2-300]

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association suggests that, with regard the proposed draft of Rule 1.17.1, the Commission consider:

(a) changing "may be sold by a lawyer or law firm" to "may be sold to a lawyer or law firm." A lawyer or small firm may have several specialties which would necessitate the sale of each specialty to a separate buyer. Also, why cannot the seller be "a lawyer or law firm"?

With regard to the proposed draft of Rule 1.17.2, the Commission consider:

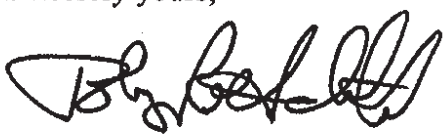
(a) The definition of "extraordinary circumstances" should not include the lawyer's resuming practice when returning to private practice after government service. That is a relatively ordinary occurrence and should either be specifically permitted or specifically prohibited, but using it as an example of "extraordinary circumstances" weakens the concept of "extraordinary."

(b) Subparagraphs (3), (9), (10) and (11) of (a) should be reviewed and harmonized and any differences in treatment re-considered, as extraordinary circumstances probably should apply equally to resuming practice in a substantive area and a geographic area, and similarly the multiple sale of either a substantive area or a geographic area seem to involved similar considerations. The rule should, however, be written in a way so that multiple sales are not be a way for a lawyer to engage in periodically ridding himself of unprofitable matters, or ridding himself of a particular unprofitable matter.

With regard to the proposed draft of both 1.17.1 and 1.17.2 the Commission consider:

If the practical aspect of selling a practice is that the purchase price will be measured, directly or indirectly by the fees generated by the buyer, if the sale can be made without full disclosure of the terms to the client, and be subject to the client's written consent, is that inconsistent with the prohibition on fee splitting?

Sincerely yours,



Toby J. Rothschild, Chair
Professional Responsibility and Ethics Committee

cc: Gretchen M Nelson, President
LACBA PREC Members

THE STATE BAR
OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL

Scott J. Drexel, *Chief Trial Counsel*

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639 TELEPHONE: (415) 538-2063

August 26, 2008

Randall Difuntorum, Director
Office of Professional Competence & Planning
State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Comments of the Office of the Chief Trial Counsel to Proposed Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

Thank you for the opportunity to submit the comments of the Office of the Chief Trial Counsel to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in March 2008. I apologize that these comments have been submitted after the comment deadline but hope that they will nevertheless be considered by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

~~Proposed Rule 1.5 [Fees for Legal Services]~~

~~1. Unconscionable Fees~~

~~The Office of the Chief Trial Counsel is opposed to any attempt to specifically define the term "unconscionable" in subsection (b) of proposed rule 1.5. The phrase "unconscionable fee" is sufficiently defined by case law and has been found not to be unconstitutionally vague. (*In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 732.) In our view, any attempt to specifically define what constitutes an unconscionable fee is likely to be either overbroad or under inclusive. Sufficient guidance regarding the determination of whether a fee is unconscionable is provided by the list of facts set forth in subsection (c) of proposed rule 1.5. However, we urge the Commission to consider adding two additional factors to the list set forth in subsection (c). Those additional factors are: (1) whether the fee involves an element of fraud or overreaching on the attorney's part (see *Herrscher* v. *State Bar* (1935) 4 Cal.2d 399, 403; *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989); and (2) whether there was any failure on the attorney's part to disclose the true facts to the client (see *Herrscher* v. *State Bar*, *supra*, 4 Cal.2d at p. 403). In addition, the Commission may wish to more clearly state in the rule itself whether the factors set forth in subsection (c) are intended to be the exclusive factors to be considered in determining whether a fee is unconscionable. At least one~~

~~in which an in-house counsel's response may be less drastic than resignation from his or her place of employment. If resignation is not necessary, the Office of the Chief Trial Counsel recommends that information be set forth in the Comments to the rule distinguishing the circumstances requiring an in-house counsel's withdrawal from representation of the organization as opposed to the in-house counsel's resignation.~~

Proposed Rule 1.17.1 [Purchase and Sale of a Law Practice]

Subsections (b)(1)(i) and (b)(2) of proposed rule 1.17.1 contain the new phrase "and might have the right to act on his or her own behalf." This phrase is unnecessary because the rule already establishes that client has the right to retain counsel. It is also confusing because it implies: (1) that, in some instances, the client might not have the right to act in his or her own behalf and (2) that, if the client has the right to retain other counsel, the client does not have the right to act in his or her own behalf. In subsection (b)(1)(i), the Commission has used the word "and" between the right to retain other counsel but in subsection (b)(2)(i), the Commission used the word "or." Is there a reason for the use of the word "and" in one subsection and the use of the word "or" in the other?

In Comment 7, the Office of the Chief Trial Counsel suggests that the phrase "and prior to client notification as described in paragraph (b)" to added immediately following the phrase "or does so during the 90-day period as described in paragraph (b)."

Comment 12 states that proposed rule 1.17.1 does not apply to the sale only of a substantive field of practice or of a geographic area of practice, both of which are covered by proposed rule 1.17.2. The Office of the Chief Trial Counsel recommends that this comment specifically discuss the application of rule 1.17.1 where the substantive field of practice or geographic area of practice being sold also constitutes substantially all of the law practice of a lawyer.

~~**Proposed Rule 1.17.2 [Purchase and Sale of Geographic Area or Substantive Field of Law]**~~

~~To the extent that subsections (a)(3), (a)(10) and (a)(11) of proposed rule 1.17.2 permanently precludes a lawyer from practicing law in a geographic area or in a substantive field of law, the Office of the Chief Trial Counsel is concerned that such rules are improper and potentially unconstitutional and that their adoption will likely lead to significant litigation. The result of a sale under this proposed rule will be to create limited licenses to practice law, a concept that has never been authorized or approved by the Supreme Court.~~

~~If subsection (a)(3) is not deleted for the reasons stated above, the Office of the Chief Trial Counsel recommends that it be modified. As currently drafted, subsection (a)(3) is vague because it does not define what constitutes a "geographic area". Could "geographic area" include the entire State of California or Northern or Southern California? The rule might also be clearer if subsections (a)(3) and (a)(10) were combined.~~

the fire and commented upon the fact that there was a large amount of paper and cardboard in the basement of the building to use as tinder for the fire.

The State Bar Court Review Department did not find respondent Dale culpable of a violation of current rule 2-100 of the Rules of Professional Conduct because the incarcerated arsonist was represented in his criminal proceeding, but not in the civil action in which respondent Dale solicited the information.

It is the Office of the Chief Trial Counsel's position that respondent Dale should have been found culpable of violating rule 2-100. As such, we recommend that subsection (a) of the proposed rule should read as follows:

> In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation, **or a related subject**, with a person the lawyer knows to be represented by another lawyer in the matter, **or a related matter**, unless the lawyer has the consent of the other lawyer.

The Office of the Chief Trial Counsel does not have any comments to offer at this time with respect to proposed rules 1.16, 3.5, 3.10, 4.3 or 5.4.

Thank you again for the opportunity to comment upon these proposed amendments to the Rules of Professional Conduct.

Very truly yours,

Scott J. Drexel
Chief Trial Counsel

SJD:dim
Attachment

PUBLIC COMMENTS [1.17.2] ~ FILE LIST

C-2008-203b Leslie A Minkus [1.17.2]

C-2008-213g SDCBA [1.17.2]

C-2008-229e SCCBA [1.17.2]

C-2008-230f OCBA [1.17.2]

C-2008-238d LACBA [1.17.2]

C-2008-253f Chief Trial Counsel [1.17.2]

Ms Audrey Hollins
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rules 1.17.1 and 1.17.2

Dear Ms. Hollins,

I have enclosed the BASF Legal Ethics Committee's response to the Rules Revision Commission's draft of the above rules. If there is anything more you need, my address is 1600 Dana Avenue, Palo Alto, CA 94303, and my phone number is 650-328-6849.

Sincerely,

Leslie A. Minkus

Commission for the Revision of the Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rules 1.17.1 and 1.17.2

Dear Commission Members

On June 1, 2006, two members of our committee, Jim Dimitriou and I responded to your request for comments on the first draft of these rules. In that letter they expressed the view that the primary purpose of the rule should be to allow a sole practitioner the same economic benefits available to a member of a firm upon the lawyer's retirement. That view, based upon simple concepts of fairness, is one that our committee adopts. The notion that allowing a sole practitioner to realize the value of the goodwill created during the years of practice should somehow be restricted is one which we categorically reject. Medical professionals have been doing this for years with no decline in their ethical behavior, nor any lowered perception of it by their patients or the general public. The double standard created by Rules 1.17.1(e) and 1.17.2(a)(9)(10), and (g) has no legitimate purpose and simply discriminates against a sole practitioner.

With respect to 1.17.1, we strongly object to comment 12, which is plainly inconsistent with section (e) of the Rule. Section (e) clearly exempts from the Rule's provisions transactions by which a sole practitioner creates a partnership with a proposed purchaser of the practice. Comment 12 adds the additional requirement that the formation of the firm be done "in good faith . . . and not for the purpose of avoiding the limitations of the rule." Setting aside the disingenuousness of this device, it completely undermines what should be one of the Rules' primary objectives---to enable a lawyer to understand his or her obligations by reading the Rule itself.

But beyond that, we object to the language of the exception, whether in a comment or the Rule, as being contrary to the important goal of client protection. Consider the following example:

Lawyer S1 negotiates an agreement with lawyer B1 to create a partnership from which S1 intends to retire within, e.g., one year. S1 notifies his clients of the formation of the partnership, his intent to retire, and a discussion of B1's qualifications and S1's endorsement of him. In the letter, S1 clearly explains that the client is free to stay with B or not, and perhaps even encourages the client to meet B1. The effect of this is to give S1's clients a year during which they may have an opportunity to evaluate B1's work, or at least to determine whether they feel comfortable with him.

Lawyer S2 negotiates an agreement with lawyer B2 to sell S2's practice and to notify S2's clients in the manner prescribed in Rule 1.17.1(a) through (d). Despite S2's recommendation and

discussion of B2's qualifications, the fact remains that the clients have no independent basis for determining whether B2 is a person they are confident in and comfortable with. It seems clear to us that S1's clients are in a substantially better position to make an intelligent decision, and to make that decision when not faced with the immediate need for legal representation.

We should not forget that this is a disciplinary Rule. Yet it seems to us improbable at best that the State Bar would commence disciplinary proceedings based on the "good faith" exception. With the State Bar's limited resources it would be absurd to initiate proceedings against a retired lawyer, and it is not at all clear that the purchasing lawyer is even covered by the Rule. We then have a Rule which lawyers would quickly realize they could disregard. Such rules encourage cynicism rather than ethical behavior.

We find Rule 1.17.2 even more problematic, in that it creates a rule of discipline that is totally inconsistent with Rule 1.17.1. In that Rule, the sale of an entire practice does not preclude the seller from returning to the practice of law. This is sensible because nothing precludes the buyer from including in the agreement a reasonable non-compete clause. However, Rule 1.17.2, with no explanation or obvious rationale, ipse dixit precludes the seller of a portion of a practice returning to the practice of law without establishing that there are "extraordinary circumstance" whatever that term may mean. Worse, the Rule precludes the seller of a geographic area of practice from ever returning to the practice of law.

These restrictions have no ethical component at all. They are business decisions to be negotiated by the parties to the contract. We are at a loss to understand the rationale, if any, on which these portions of the Rule are based. They are inconsistent not only with 1.17.1, but also with Howard v. Babcock and Section 16600 of the Business and Professions Code. And to return to our original point, the large firm bias is painfully obvious. Absent an agreement, a retiring partner could receive retirement benefits and return to practice the next day.

We of course recognize that these Rules are in a very real sense a political document and that it is extraordinarily difficult in such a document to harmonize the interests of clients, lawyers, the public, and the legal system generally. Needless to say, we appreciate the enormous amount of time and energy expended by the members of the Commission in this task. But in light of our objections, and in fairness to all sole practitioners, we urge you to reconsider these two rules.

Very truly yours,

Leslie A. Minkus for the
Legal Ethics Committee of the Bar Association of San Francisco

MEMORANDUM

Date: April 22, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subject: Proposed Rule 1.17.2– Purchase and Sale of a Geographic Area or Substantive Field of a Law Practice
[Existing CRPC Rule 2-300]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 1.17.2

Rationale For Comment 1: The Proposed Rule is new and tracks ABA Model Rule 1.17.2. It should be adopted in the interest of uniformity.

PROPOSED RULE 1.17.2, SCCBA EDITS

SCCBA COMMENTS TO Rule 1.17.2: Purchase and Sale of Geographic Area or Substantive Field of Law Practice

The SCCBA believes that on the whole Proposed Rule 1.17.2 too narrowly restricts the purchase and sale of a law practice. There are many examples of situations where segment of a practice could be defined in other terms and the sale of that segment would not violate the policy against selling a practice on a case by case basis. One example that was given was the case where a lawyer might sell a patent practice of a large corporate client. Under the current proposed rule that segment of an attorney's practice could not be sold. The SCCBA believes that attorneys should be free to negotiate which segment of a practice they wish to sell as long there is a rational basis for the division and the policies against fee splitting and capping are not violated.

The SCCBA also recommends deleting all references prohibiting what a seller can do after the sale. These provisions violate Business and Professions Code Section 16600 and the policy of the State of California. The SCCBA strongly believes that these restrictive clauses should be left as a matter of contract between the parties and should not be a matter for regulation by the Rules of Professional Conduct.

The SCCBA recommends shortening the 90 day period to 30 days because of the belief that the 90 day term used in the Proposed Rule is too long a period for a purchaser to wait to start acting on behalf of his new clients. Once the transaction has been finalized the parties to the transaction want to move forward. A shorter period not only accommodates the intent of the seller and purchaser, but also provides more protection to the client whose rights might be prejudiced while his or her matter is in a holding pattern. Although there is an exception allowing the purchaser to act on behalf of the client where a client's rights might be prejudiced, without all of the information at the purchasers' disposal (such as the client' confidential information and the previous attorney's work product), the purchaser might not be able to determine whether the client's rights are in fact in jeopardy.

All other changes are proposed to provide clarity.

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

(a) A lawyer or personal representative of the estate of a lawyer may sell a geographic area or substantive field of a law practice, including goodwill, if:

(1) the seller in good faith makes all of the geographic area or substantive field of the practice available for sale;

(2) the seller sells all or substantially all of the geographic area or substantive field of the practice;

(3) ~~if a geographic area of practice is sold, the seller ceases practicing law in that geographic area;~~ fees charged to clients ~~in the seller's geographic area of practice or clients of the seller's substantive area of practice~~ are not increased solely by reason of the sale;

(4) the purchaser assumes the seller's obligations under existing client agreements regarding fees and the scope of work;

(5) notice is given to clients of the lawyer or of the firm whose geographic area or substantive area of practice will be sold, ~~and consents are obtained from them,~~ as stated in paragraphs (b) and (c) of this Rule;

(6) confidential information is not disclosed to a non-lawyer in connection with the sale;

(7) the sale is directly to one or more lawyers or law firms;

(8) absent extraordinary circumstances, the seller sells that substantive field of the practice only one time in the applicable geographic area;

~~(10) the seller never resumes practice in a geographic area covered by a sale; and~~

~~(11) absent extraordinary circumstances, the seller never resumes practice in the substantive field of law that is the subject of a sale.~~

(b) Notice to Clients if the Lawyer Whose Geographic Area or Substantive Field of Practice Is Sold Is Dead or Incapacitated. If the seller is deceased, or has a conservator or other person acting in a representative capacity, and no lawyer has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, then prior to the transfer:

(1) the purchaser shall cause a written notice to be given to ~~the~~ each affected client stating that the particular interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel and may have the right to act in his or her own behalf; that the client may take possession of any client papers and property held by the lawyer in any form or format, as provided by Rule 1.16; and that, if no response is received by the purchaser to the notification within ~~9~~30 days of the date ~~after~~ it is sent or, if the client's rights would be prejudiced by failure of the purchaser to act on behalf of the client during during the 30-day period ~~that time~~, the purchaser may act on behalf of the client until otherwise notified by the client; and

(2) ~~the purchaser shall obtain the written consent of the client, provided that t~~ The client's consent to the purchaser acting on behalf of the client shall be presumed until the purchaser is otherwise notified by the client if the purchaser receives no response to the paragraph (~~c~~b)(1) notification within 30~~ninety~~ days after it is sent to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure of the purchaser to act on behalf of the client during the 30-day ~~ninety-day~~ period.

(c) Notice to Clients in All Other Circumstances. In all other circumstances:~~, not less than 90 days prior to the transfer:~~

(1) Not less than 30 days prior to the transfer, the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to each effected ~~the~~ client stating that the particular interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel or might have the right to act in his or her own behalf; that the client may take possession of any client papers and property held by the lawyer in any form or format, as provided by Rule 1.16; and that, if no response is received by the purchaser to the notification within ~~93~~0 days of the notice being sent or if the client's rights would be prejudiced by a failure of the purchaser to act on behalf of the client during the 30-day period, ~~after it is sent,~~ the purchaser may act on behalf of the client until otherwise notified by the client; and

(2) ~~the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer, provided that t~~ The client's consent to the purchaser acting on behalf of the client shall be presumed until the purchaser is otherwise notified by the client if the purchaser does not receive a ~~receives no~~ response to the paragraph (c)(1) notification within ~~93~~0 days of the notice being sent ~~after it is sent~~ to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by a failure of the purchaser to act on behalf of the client during the 30-day period.

(d) Extraordinary Circumstances. For purposes of ~~this~~ paragraph (a)(8) of this Rule, the phrase "extraordinary circumstances" shall include, without limitation:

(1) a change of the lawyer's health, so that he or she must change the substantive fields or geographic area in which he or she practices; and

(2) a change in employment where ~~lawyer may resume handling cases in a substantive field or practice or in a geographic area of practice previously~~

~~sold if~~ the lawyer previously sold all or substantially all of his or her practice to enter government service, to work on the staff of a legal service entity that provides legal services to the poor, or to become in house counsel to a business, and then ~~and~~ later ~~returned~~ returns to private practice.

(e) ~~If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a lawyer shall be taken.~~ All lawyers involved in the purchase and sale of a law practice shall comply with the rules of a tribunal in which a matter is pending with regard to substitution of counsel.

(f) ~~A lawyer shall not disclose confidential information to a non-lawyer in connection with a sale under this Rule.~~Purchaser and seller must comply with all applicable rules governing attorney client privileged communication and confidential information.

(g) This Rule does not apply to the admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice.

Comment

[1] Any sale of part of a law practice necessarily raises substantive issues regarding the rights and interests of the seller's clients and the public's perception of the Bar. Accordingly, this Rule permits a lawyer or law firm to sell part of its practice only in accordance with the limitations contained in this Rule, and in other Rules and in State Bar Act provisions to which this Rule and Comment refer. These limitations are intended to assure that the interests and reasonable expectations of the seller's clients have priority over the seller's interests.

Direct Sale of a Geographic Area or Substantive Field of Practice

[2] The requirement that substantially all of the geographic area or substantive field of the seller's practice be sold is intended to prohibit piecemeal sales of individual cases and to protect those clients whose matters are less lucrative or who might find it difficult to secure other counsel if a sale could be limited to only some lucrative matters.

[3] Paragraph (a) is satisfied even if the seller retains clients who decide not to accept the purchaser as their lawyer or whom the purchaser cannot represent because of conflicts of interest. Paragraph (a) also is satisfied even if seller is employed after the sale as a lawyer for a public agency, by a legal services organization, or as in-house counsel to a business.

[4] Paragraph (a)(~~8~~7) requires that any sale under this Rule be direct to the purchaser without compensation to any broker, finder, or middleman.

Termination of Practice by the Seller

[5] This rule does not prohibit a lawyer who has sold a substantive field of the practice from resuming practice in that field of the law in the event of extraordinary circumstances. ~~However, a seller of a geographic area of practice may never resume practicing in that geographic area, regardless of future circumstances.~~

Fee Arrangement Between Client and Purchaser

[6] Paragraph (a)(~~4~~ 3) applies to the seller, who may not raise fees solely for the purpose of a sale, and to the purchaser, who may not raise fees solely because of the sale. If a client agrees to retain the purchaser, the purchaser may assume the seller's fee agreement with the client or enter into a fee agreement with the client that complies with paragraphs (a)(~~4~~3) and (~~5~~4). See Business and Professions Code sections 6147, 6147.5, and 6148. If a client decides not to retain the purchaser, the selling lawyer or law firm might have to continue to represent the client unless the selling lawyer is disabled or is deceased.

Sale of Practice of Disabled or Deceased Lawyer

[7] When the selling lawyer is disabled or deceased, relevant statutes may also be applicable. (See, e.g. Probate Code sections 2468, 9764, and Business and Professions Code sections 6180, et seq. and 6190, et seq.)

[8] This rule is not intended to create a contract by estoppel between the purchaser and any client. If the purchaser acts to protect the interests of a client following the ~~9~~30-day period described paragraphs (b)(1) or (c)(1) but has not entered into a written fee agreement with the client, or does so during the ~~9~~30-day period as described in paragraph (b)(2) and (c)(2), the purchaser might be entitled to payment on a *quantum meruit* basis.

Other Applicable Ethical Standards

[9] If the purchaser would have a potential or actual conflict of interest by accepting the representation of any client of the seller, the transaction may not proceed as to that client absent compliance with Rules 1.7, 1.8 and 1.9, as applicable. The notice required by paragraph (b) and (c) shall comply with the requirements of Rule 7.1(b) and (c).

[10] Lawyers who engage in a transaction described in this Rule also must comply with Rules 1.5.1 and 5.4 when applicable.

Confidential Information and Client Consent

[11] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a reasonably identifiable client no more violate the seller's duty of

confidentiality than do similar discussions concerning the possible association of another lawyer or mergers between firms, and to engage in such discussions the seller is not required to give notice to or obtain consent form any client. However, the seller is required to obtain client consent before providing to a potential purchaser any confidential client information. The obligation to obtain client consent under paragraphs (b) and (c) do not require disclosure of the terms of the agreement between purchaser and seller, but there might be circumstances in which disclosure of particular terms might be required under Rule 1.4 and Business and Professions Code section 6068, subdivision (m).

[12] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive any sale under this Rule.

Applicability of the Rule

[13] This Rule does not apply to the formation of a law firm, admission of a lawyer to a law firm, retirement from a law firm, or retirement plans and similar arrangements, when done in good faith as part of engaging in the practice of law together and not for the purpose of avoiding the limitations of this Rule. This Rule also does not apply to a sale of tangible assets of a law practice.

[14] This Rule does not apply to a transfer of legal representation between lawyers or law firms that is unrelated to the sale of a geographic area of practice or a substantive field of practice.

RULES OF PROFESSIONAL CONDUCT OF STATE BAR OF CALIFORNIA

Please indicate which proposed rule you are commenting on:

Rule 1.17.2
Purchase and Sale of Geographic Area or Substantive Field of a Law Practice [2-300]

Agree: Agree as Modified: **X** Disagree :

Comments: Subdivision (a), by not requiring the inclusion of goodwill in a sale, together with subdivisions (3), (9), (10), and (11) thereof, potentially embody within this Rule, a restraint of trade prohibited by Business and Professions Code Section 16601. If practice in an area or field is to be prospectively restrained, the proposed Rule should be modified to require the inclusion of goodwill. Subdivision (a)(8) prohibits compensation to any broker, finder or middleman for the purchase and sale of a geographic area or substantive field of law practice. There appears to be insufficient justification for not permitting the use of a compensated broker in this circumstance Accordingly, the proposed Rule should be modified to delete this prohibition.

Name: Cathrine Castaldi **Title: President**

Organization: Orange County Bar Association

☑ **Commenting on behalf of an organization**

Address: P.O. Box 6130

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Please **write** or **fax** or **respond using the Internet** to:

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DEADLINE FOR COMMENT: 5:00 P.M. Friday, June 6, 2008

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June 5, 2008

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180 Howard Street
San Francisco, CA 94105-1639

RE: Rule 1.17.1 – Purchase and Sale of a Law Practice [2-300] and Rule 1.17.2 – Purchase and Sale of Geographic Area or Substantive Field of a Law Practice [2-300]

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association suggests that, with regard the proposed draft of Rule 1.17.1, the Commission consider:

(a) changing "may be sold by a lawyer or law firm" to "may be sold to a lawyer or law firm." A lawyer or small firm may have several specialties which would necessitate the sale of each specialty to a separate buyer. Also, why cannot the seller be "a lawyer or law firm"?

With regard to the proposed draft of Rule 1.17.2, the Commission consider:

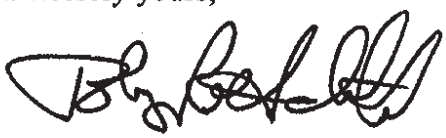
(a) The definition of "extraordinary circumstances" should not include the lawyer's resuming practice when returning to private practice after government service. That is a relatively ordinary occurrence and should either be specifically permitted or specifically prohibited, but using it as an example of "extraordinary circumstances" weakens the concept of "extraordinary."

(b) Subparagraphs (3), (9), (10) and (11) of (a) should be reviewed and harmonized and any differences in treatment re-considered, as extraordinary circumstances probably should apply equally to resuming practice in a substantive area and a geographic area, and similarly the multiple sale of either a substantive area or a geographic area seem to involved similar considerations. The rule should, however, be written in a way so that multiple sales are not be a way for a lawyer to engage in periodically ridding himself of unprofitable matters, or ridding himself of a particular unprofitable matter.

With regard to the proposed draft of both 1.17.1 and 1.17.2 the Commission consider:

If the practical aspect of selling a practice is that the purchase price will be measured, directly or indirectly by the fees generated by the buyer, if the sale can be made without full disclosure of the terms to the client, and be subject to the client's written consent, is that inconsistent with the prohibition on fee splitting?

Sincerely yours,



Toby J. Rothschild, Chair
Professional Responsibility and Ethics Committee

cc: Gretchen M Nelson, President
LACBA PREC Members

THE STATE BAR
OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL

Scott J. Drexel, *Chief Trial Counsel*

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639 TELEPHONE: (415) 538-2063

August 26, 2008

Randall Difuntorum, Director
Office of Professional Competence & Planning
State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Comments of the Office of the Chief Trial Counsel to Proposed Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

Thank you for the opportunity to submit the comments of the Office of the Chief Trial Counsel to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in March 2008. I apologize that these comments have been submitted after the comment deadline but hope that they will nevertheless be considered by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

~~Proposed Rule 1.5 [Fees for Legal Services]~~

~~1. Unconscionable Fees~~

~~The Office of the Chief Trial Counsel is opposed to any attempt to specifically define the term "unconscionable" in subsection (b) of proposed rule 1.5. The phrase "unconscionable fee" is sufficiently defined by case law and has been found not to be unconstitutionally vague. (*In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 732.) In our view, any attempt to specifically define what constitutes an unconscionable fee is likely to be either overbroad or under inclusive. Sufficient guidance regarding the determination of whether a fee is unconscionable is provided by the list of facts set forth in subsection (c) of proposed rule 1.5. However, we urge the Commission to consider adding two additional factors to the list set forth in subsection (c). Those additional factors are: (1) whether the fee involves an element of fraud or overreaching on the attorney's part (see *Herrscher* v. *State Bar* (1935) 4 Cal.2d 399, 403; *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989); and (2) whether there was any failure on the attorney's part to disclose the true facts to the client (see *Herrscher* v. *State Bar*, *supra*, 4 Cal.2d at p. 403). In addition, the Commission may wish to more clearly state in the rule itself whether the factors set forth in subsection (c) are intended to be the exclusive factors to be considered in determining whether a fee is unconscionable. At least one~~

~~in which an in-house counsel's response may be less drastic than resignation from his or her place of employment. If resignation is not necessary, the Office of the Chief Trial Counsel recommends that information be set forth in the Comments to the rule distinguishing the circumstances requiring an in-house counsel's withdrawal from representation of the organization as opposed to the in-house counsel's resignation.~~

~~**Proposed Rule 1.17.1 [Purchase and Sale of a Law Practice]**~~

~~Subsections (b)(1)(i) and (b)(2) of proposed rule 1.17.1 contain the new phrase "and might have the right to act on his or her own behalf." This phrase is unnecessary because the rule already establishes that client has the right to retain counsel. It is also confusing because it implies: (1) that, in some instances, the client might not have the right to act in his or her own behalf and (2) that, if the client has the right to retain other counsel, the client does not have the right to act in his or her own behalf. In subsection (b)(1)(i), the Commission has used the word "and" between the right to retain other counsel but in subsection (b)(2)(i), the Commission used the word "or." Is there a reason for the use of the word "and" in one subsection and the use of the word "or" in the other?~~

~~In Comment 7, the Office of the Chief Trial Counsel suggests that the phrase "and prior to client notification as described in paragraph (b)" to added immediately following the phrase "or does so during the 90-day period as described in paragraph (b)."~~

~~Comment 12 states that proposed rule 1.17.1 does not apply to the sale only of a substantive field of practice or of a geographic area of practice, both of which are covered by proposed rule 1.17.2. The Office of the Chief Trial Counsel recommends that this comment specifically discuss the application of rule 1.17.1 where the substantive field of practice or geographic area of practice being sold also constitutes substantially all of the law practice of a lawyer.~~

Proposed Rule 1.17.2 [Purchase and Sale of Geographic Area or Substantive Field of Law]

To the extent that subsections (a)(3), (a)(10) and (a)(11) of proposed rule 1.17.2 permanently precludes a lawyer from practicing law in a geographic area or in a substantive field of law, the Office of the Chief Trial Counsel is concerned that such rules are improper and potentially unconstitutional and that their adoption will likely lead to significant litigation. The result of a sale under this proposed rule will be to create limited licenses to practice law, a concept that has never been authorized or approved by the Supreme Court.

If subsection (a)(3) is not deleted for the reasons stated above, the Office of the Chief Trial Counsel recommends that it be modified. As currently drafted, subsection (a)(3) is vague because it does not define what constitutes a "geographic area". Could "geographic area" include the entire State of California or Northern or Southern California? The rule might also be clearer if subsections (a)(3) and (a)(10) were combined.

In subsection (a)(1), the Office of the Chief Trial Counsel believes that the word "substantially" was inadvertently omitted from between "makes" and "all of the geographic area" since that word was included in subsection (a)(2).

In subsection (c)(1), the language "the client has the right to retain other counsel or might have the right to act in his or her own behalf" is confusing because it implies that, in some instances (including instances in which the client has the right to retain counsel), the client might not have the right to act on his or her own behalf. In addition, while subsection (c)(1) uses the disjunctive word "or" between the above-referenced clauses, subsection (b)(1) uses the conjunctive "and." Is there a reason for use of the different words?

Proposed Rule 3.4 [Fairness to Opposing Party and Counsel]

Subsection (f) of proposed rule 3.4, which provides that a lawyer shall not knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based upon an assertion that no valid obligation exists, is vague and potentially overbroad. It is unclear whether "an obligation under the rules of a tribunal" includes, for example, local court rules; an individual judge's courtroom rules or procedures; a request from a judge made on the record in the case; or a judge's individualized preferences, such as a requirement regarding the type of binder into which exhibits must be placed or the number of copies to be provided to the court of any document or exhibit. Without additional clarification or definition, the intended meaning of "an obligation under the rules of a tribunal" will be a major source of debate and confusion.

The Office of the Chief Trial Counsel opposes the exceptions found in subsection (h) to the general rule that a lawyer shall not request a person other than a client to refrain from voluntarily giving relevant information to another party. The second exception is unnecessary. And the first exception is damaging both to the integrity of the profession and to the public's perception of lawyers. First, because the lawyer unilaterally decides whether the exception applies to his or her circumstances, it will be very difficult for the Office of the Chief Trial Counsel to enforce the rule. Second, the exception can be read as permitting lawyers to make it unnecessarily difficult for another party to obtain information relevant to the case without formal discovery or, worse, as permitting lawyers to hide the truth.

For example, in the context of a family law matter, such an exception would allow one party's lawyer to ask other family members to refrain from giving relevant information to the opposing party. This includes requesting that the children of a couple dissolving their marriage not speak to one of the lawyers in the case about highly relevant issues.

In the context of a personal injury matter, such an exception would permit a lawyer representing a party in an automobile accident case to ask family members who may have witnessed an accident or who were present in the automobile, but are not clients of the attorney, to refrain from disclosing relevant information to other parties.

the fire and commented upon the fact that there was a large amount of paper and cardboard in the basement of the building to use as tinder for the fire.

The State Bar Court Review Department did not find respondent Dale culpable of a violation of current rule 2-100 of the Rules of Professional Conduct because the incarcerated arsonist was represented in his criminal proceeding, but not in the civil action in which respondent Dale solicited the information.

It is the Office of the Chief Trial Counsel's position that respondent Dale should have been found culpable of violating rule 2-100. As such, we recommend that subsection (a) of the proposed rule should read as follows:

> In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation, **or a related subject**, with a person the lawyer knows to be represented by another lawyer in the matter, **or a related matter**, unless the lawyer has the consent of the other lawyer.

The Office of the Chief Trial Counsel does not have any comments to offer at this time with respect to proposed rules 1.16, 3.5, 3.10, 4.3 or 5.4.

Thank you again for the opportunity to comment upon these proposed amendments to the Rules of Professional Conduct.

Very truly yours,

Scott J. Drexel
Chief Trial Counsel

SJD:dim
Attachment

PUBLIC COMMENTS [3.4] ~ FILE LIST

C-2008-194 LACBA [3.4]

C-2008-213h SDCBA [3.4]

C-2008-229f SCCBA [3.4]

C-2008-232f COPRAC [3.4]

C-2008-253g Chief Trial Counsel [3.4]

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June 2, 2008

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RE: Rule 3.4 - Fairness to Opposing Party and Counsel [5-200(E)][5-220][5-310(A)]

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) has the following comments on Proposed Rule 3.4.

Subsection (a) of Proposed Rule 3.4 has no counterpart in the Rules of Professional Conduct. The language comes from the Model Rules. Proposed Rule 3.4 reads:

> A lawyer shall not:
>
> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

PREC has no difficulty with the proposition that a lawyer who intentionally engages in spoliation of evidence has acted unethically. The language of the Proposed Rule quoted above is subject to a much broader interpretation, which could be used to subject a lawyer to discipline for conduct that should not be considered unethical. The term "unlawfully" can have many meanings. For example, in litigation under Business & Professions Code section 17200, almost anything that violates a codified law or rule can be "unlawful" for the purposes of satisfying the conditions precedent for the application of the statute. The proposed rule does not require the lawyer to "knowingly" or "intentionally" engage in the unlawful obstruction or destruction. In today's world of Electronic Document Discovery and "litigation holds" applicable under federal law, failing to stop a routine document retention program that periodically purges or overwrites old data might be considered "unlawful." In addition, some federal case law requires lawyers to monitor the effectiveness of the litigation holds during the course of the litigation. If a lawyer fails to do that and documents with potential evidentiary value are lost forever, will the lawyer be subject to discipline? Will a lawyer be subject to discipline if he or she misplaces a box of relevant documents? Clearly, the lawyer could have the legal obligation to preserve and to produce those documents and may be subject to sanctions for a discovery violation.

The comments to the section do not help resolve the ambiguity in the Proposed Rule. The comment points out that destroying documents or other material "for the purpose of impairing its availability in a pending proceeding" is a criminal offense under state and

federal law. However, the comment does not say that "unlawful obstruction" is limited to conduct which constitutes a crime under one of those statutes. If it did, it would incorporate the criminal intent requirement that would create a clearer standard and eliminate the possibility of unintentional violations of the Rule.

In fact, Comment 3 states that a violation of a discovery rule or statute "does not by itself establish a violation of the Rule." However, it does not clarify what in addition to the violation of the discovery rule will constitute a violation. It only clarifies that it is not a standard governing discovery disputes. Our concern is that the Rule gives insufficient guidance concerning the conduct that would constitute a violation and could be used to discipline attorneys for unintentional destruction of documents.

Our suggestion would be to make it clear that conduct which, if proved, would constitute a criminal violation (not necessarily a conviction) is necessary for discipline or to add at the end of the first sentence "for the purpose of impairing its availability in a pending proceeding or one whose commencement is reasonably foreseeable."

Subparagraph (h) also has no direct counterpart in the Rules of Professional Conduct and also comes from the ABA Model Rules. It reads:

> A lawyer shall not:
>
> (h) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
>
> (1) the person is a relative or an employee or other agent of a client and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.
>
> (2) the person may be required by law to refrain from disclosing the information.

This seems substantially to increase the types of behavior in dealing with witnesses that is considered to be in violation of the ethical rules. The PREC wonders why that should be a matter of lawyer discipline when the third party remains available for formal discovery. Subparagraph (d) already prohibits an attorney from advising someone to leave the jurisdiction of the court for the purpose of making that person unavailable from the court's process, e.g., from a subpoena.

In addition, the language of the Proposed Rule is ambiguous concerning the scope of the term "request a person . . . to refrain from voluntarily giving relevant information to another party . . . ."Attorneys often interview third-parties and subparagraph (h), if adopted, would create a lot of "grey areas." Assume Attorney tells a third-party that they are free to talk with opposing counsel, but that Attorney would like to be present during any such interview. Is that "request[ing] a person . . . to refrain from voluntarily giving relevant information . . ."? Or a third-party may ask about the consequences of "getting involved" with the litigation; Attorney may inform the third-party about the burdens of being deposed, e.g., missing work. That could be interpreted by a non-lawyer as suggesting not to talk to other lawyers.

So long as the witness remains within the jurisdiction of the court, opposing counsel can subpoena the witness for a deposition and/or for trial testimony. That issue is already addressed by subparagraph (d) and, thus, we believe subparagraph (h) is unnecessary and can cause confusion.

In addition, it seems to us that there are a multitude of circumstances in which a lawyer should be able to attempt to restrict unfettered access by opposing counsel to witnesses. For example, former employees may be key witnesses with confidential or privileged information of the client. Those employees may not have a clear understanding of what information is privileged or confidential, and the presence of the client's lawyer to assert the privilege or confidentiality may be essential to protecting the information. As just one more example, the client may have a vendor that is manufacturing parts pursuant to an agreement that requires the vendor to maintain the confidentiality of the specifications or other information and that information may be material to a lawsuit. As the client's lawyer, it would seem that you might have an obligation to remind the vendor of its contractual confidentiality obligations. The Proposed Rule exceptions do not seem to protect the lawyer in this context as the restriction is contractual not "by law." There are many other examples.

Finally, the rule seems to suggest that it is always acceptable to request an employee not to talk to the other party, but such conduct could raise witness tampering and obstruction concerns when the other party is the government conducting a criminal investigation. *See* Cal. Penal Code section 136.1(b); 18 U.S.C. section 1512.

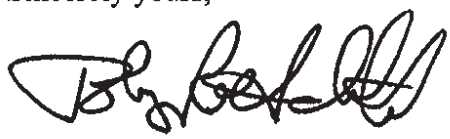
In short, although well-intended, PREC believes that subparagraph (h) should be deleted.

If subsection (h) is not deleted, the Commission should consider adding a comment to the effect that explaining factually the implications of talking with opposing counsel or an investigator for another party is not a violation of this Rule. It also should consider another exception to the effect that the lawyer reasonably believes that such instruction is likely to help protect the client's proprietary or confidential information or privileged information.

Finally, PREC noticed the following, which may be characterized as "typographical error:"

- Subparagraph (d): delete "a lawyer shall not" as redundant.
- Subparagraph (d): add a semicolon at the end of subparagraphs (1) and (2). Also add an "and/or" after the semicolon at the end of subparagraph (2). Add a period at the end of subparagraph (3).
- Subparagraph (h): add a semicolon followed by "or" at the end of subparagraph (1).

Sincerely yours,



Toby J. Rothschild, Chair
Professional Responsibility and Ethics Committee

cc: Gretchen M Nelson, President
LACBA PREC Members

MEMORANDUM

Date: April 22, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subject: Proposed Rule 3.4– Fairness to Opposing Party and Counsel [Existing CRPC Rules 5-200, 5-220, 5-310]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 3.4 with the following modification: Delete section (e)(3).

Rationale For Comment 1: The new rule is overbroad in two key respects, and the breadth is not necessary to achieve the stated policy objectives.

Proposed Rule 3.4 section (e) sets limits on compensation paid to witnesses. Subparts (1) and (2) limit to a reasonable amount any compensation or expenses paid to fact witnesses. These two limitations promote the policy that fact witnesses should not be paid an unreasonably high sum that would tend to improperly influence their testimony about facts necessary to a party's claims or defenses.

However, section (e)(3) sets limits on payments to expert witnesses. Expert witnesses are fundamentally different from fact witnesses, because they are typically sophisticated witnesses familiar with the legal system and retained to testify on behalf of one party. They negotiate a fee in exchange for professional expert services and typically have no first-hand knowledge of the facts giving rise to any party's claims or defenses. Although comment [4] attempts to define objective guidelines for what constitutes a reasonable fee, the test is inherently subjective. Experts are chosen by a party based upon perceived

qualifications, and a party should be free to negotiate any payment to an expert, whether subjectively or objectively reasonable to another party.

In litigation, the compensation to and potential biases of the expert can be brought out in discovery through deposition or at trial in cross-examination. A judge and jury are likely to react negatively to a fee they perceive as too high, and thus the system polices itself. An attorney should not be penalized with potential ethics violations if he or she, or his or her client, paid an amount for expert services that another person believes is too high to be objectively or subjectively reasonable.

In other words, improper influence of testimony is less of a concern with expert witnesses because of their unique situation. Comment [3] to ABA Model Rule 3.4, which was not included in the comments to proposed Rule 3.4, acknowledges that it is less of a concern by stating, "it is not improper ... to compensate an expert witness on terms permitted by law."

Therefore, we recommend that proposed rule section (e)(3) be struck as overbroad and unnecessary to accomplish the policy objective of preventing the improper influence of witness testimony. The rule should be limited to prevent undue influence of fact witnesses. If, in the alternative, section (e)(3) is retained, then the portion of comment [3] to ABA Model Rule 3.4 that states "it is not improper to compensate and expert witness on terms permitted by law" should be included, because it permits any compensation to an expert that is permitted by law.

Comment 2: Approve Proposed Rule 3.4 with the following modification: Delete section (h).

Rationale for Comment 2: Section (h) is too broad to be reasonably implemented by an attorney. Without section (h), proposed Rule 3.4 is more narrowly tailored to the policy of preventing obstructive tactics in discovery procedure. Section (h) requires an attorney to refrain from requesting a person other than a client to refrain from giving relevant information to another party unless: "(1) the person is a relative or employee or other agent of a client, and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information. (2) the person may be required by law to refrain from disclosing the information." Its effect is that an attorney could not advise someone other than a client (or a client's relative, employee or agent) to refrain from disclosing "relevant" information in any legal matter. Notably, section (h) is not limited to a discovery or litigation context. Therefore, it applies to attorneys participating in any legal transaction (real estate, mergers and acquisitions, licensing, etc.), including transactions where full disclosure of all "relevant" information may not be required or desirable. Therefore, section (h) should at least be limited to the litigation context.

However, even if section (h) was limited to the litigation context, it does not allow for full and frank participation in joint defense agreements (between parties or between a party and a non-party) or other normal commercial activity that would benefit a client's

interests. If section (h) were adopted, it could be unethical for an attorney to discuss legitimate tactics, such as timing or disclosure of potentially relevant business information in discovery, with an entity other than his or her client, even if the entity had entered into a joint defense agreement with the client. For example, the attorney could not request that the non-client refrain from producing relevant information unless served with a subpoena, and could not request that the non-client refrain from producing relevant information while the parties negotiated the scope of the potential production.

In other words, in some circumstances, there may be legitimate and legally permissible business reasons for refraining from giving relevant information voluntarily, at least for a particular period of time. An attorney should not be ethically prohibited from having these discussions, which are in the best interests of his or her client, particularly where the discussions do not obstruct legitimate discovery.

Section (h) also is unnecessary and duplicative in light of section (a), which more narrowly accomplishes the purpose of preventing a lawyer from unlawfully obstructing another party's access to evidence. Section (a) also prohibits a lawyer from counseling or assisting another person in any such obstruction.

Therefore, we recommend that proposed rule section (h) be struck as overbroad and unnecessary to accomplish the policy objective of preventing obstructive tactics in discovery, especially in light of section (a).

PROPOSED RULE 3.4, SCCBA EDITS

SCCBA COMMENTS TO Rule 3.4: Fairness To Opposing Party And Counsel

The SCCBA makes the following recommendations regarding proposed Rule 3.4.

- 3.4(d): Recommendation is to delete "A lawyer shall not… ." This change is merely for parallel construction of the rule. "A lawyer shall not " is redundant since it is used as the introductory phrase for each of the rules subparts.

- 3.4(f): Recommendation is to make this subpart more specific and clear. At a minimum there should be a corresponding comment to explain it and/or give some examples and cite explanatory case law, if there is any.

- 3.4(h): Recommendation is to delete (h) entirely. The rationale is as follows:
  - Appears to conflict with subpart (a) of this rule;
  - Requires the attorney to assume an obligation to a non-client which may require the attorney to make an assessment for which the attorney may not have all the relevant facts, i.e. to determine whether the non-client's interests would be adversely affected;
  - Creates a situation where the attorney's obligation in protecting the best interests of the client may conflict with the obligation under (h)(1) to the non-client. For example, it could be very likely that it is in the best interest of the client for the relative, employee or agent of the client to refrain from giving information. At the same time, it may not be in the best interest of the client's relative, employee or agent to provide the information. Under those circumstances, (h)(1) elevates the attorney's duty to the non-client above the client. Thus, either eliminate the requirement that the attorney evaluate the best interests of the non-client or simply allow the attorney to ask a client's relative, employee or agent to refrain from giving information or prohibit the entirely from asking any class of individuals to refrain from giving information.
  - In settlement agreements, it is often part of the settlement that a settling party will not voluntarily provide information unless compelled to do so by law. Subpart (h) would prohibit this.

- Comment [2]: Recommendation is to keep this sentence, which is included in the original MR comment. Without this sentence added back in, the comment can be misleading, suggesting that the attorney does not have an obligation to turn over evidence at some point, in certain circumstances. This part of the obligation is included in *People v. Meredith*, which the comment cites. The complete rule set out in *Meredith* ought to be articulated.

PROPOSED RULE 3.4, SCCBA EDITS

Rule 3.4: Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;

(c) falsify evidence or counsel or assist a witness to testify falsely;

(d) ~~A lawyer shall not~~ advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein;

(e) offer an inducement to a witness that is prohibited by law, or directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying.

(2) reasonable compensation to a witness for loss of time in attending or testifying.

(3) a reasonable fee for the professional services of an expert witness;

(f) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(g) in trial, assert personal knowledge of facts in issue except when testifying as a witness; or

~~(h) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:~~

~~(1) the person is a relative or an employee or other agent of a client and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.~~

~~(2) the person may be required by law to refrain from disclosing the information.~~

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be ~~marshaled~~ marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. (See, e.g., Penal Code section 135; 18 United States Code section 1501-1520.) Falsifying evidence is also generally a criminal offense. (See, e.g., Penal Code section 132; 18 United States Code section 1519.) Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. Applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authorities, depending on the circumstances. (See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].)

[3] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule. Nor is this Rule intended to establish a standard that governs civil or criminal discovery disputes.

[4] Paragraph (e) permits a lawyer to pay a non-expert witness for the time spent preparing for a deposition or trial. Compensation for preparation time or for time spent testifying must be reasonable in light of all the circumstances and cannot be contingent upon the content of the witness's testimony or on the outcome of the matter. Possible bases upon which to determine reasonable compensation include the witness' normal rate of pay if currently employed, what the witness last earned if currently unemployed, or what others earn for comparable activity.

[5] Paragraph (h) permits a lawyer to request employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. (See also Rules 4.2 and 4.3.)

SCCBA COMMENTS

PROPOSED RULE 3.4, SCCBA EDITS

The SCCBA Professional Rules Revision Task Force makes the following recommendations regarding proposed Rule 3.4.

- 3.4(d): Recommendation is to delete "A lawyer shall not… ." This change is merely for parallel construction of the rule. "A lawyer shall not " is redundant since it is used as the introductory phrase for each of the rules subparts.

- 3.4(f): Recommendation is to make this subpart more specific and clear. At a minimum there should be a corresponding comment to explain it and/or give some examples and cite explanatory case law, if there is any.

- 3.4(h): Recommendation is to delete (h) entirely. The rationale is as follows:
  - Appears to conflict with subpart (a) of this rule;
  - Requires the attorney to assume an obligation to a non-client which may require the attorney to make an assessment for which the attorney may not have all the relevant facts, i.e. to determine whether the non-client's interests would be adversely affected;
  - Creates a situation where the attorney's obligation in protecting the best interests of the client may conflict with the obligation under (h)(1) to the non-client. For example, it could be very likely that it is in the best interest of the client for the relative, employee or agent of the client to refrain from giving information. At the same time, it may not be in the best interest of the client's relative, employee or agent to provide the information. Under those circumstances, (h)(1) elevates the attorney's duty to the non-client above the client. Thus, either eliminate the requirement that the attorney evaluate the best interests of the non-client or simply allow the attorney to ask a client's relative, employee or agent to refrain from giving information or prohibit the entirely from asking any class of individuals to refrain from giving information.
  - In settlement agreements, it is often part of the settlement that a settling party will not voluntarily provide information unless compelled to do so by law. Subpart (h) would prohibit this.

- Comment [2]: Recommendation is to keep this sentence, which is included in the original MR comment. Without this sentence added back in, the comment can be misleading, suggesting that the attorney does not have an obligation to turn over evidence at some point, in certain circumstances. This part of the obligation is included in *People v. Meredith*, which the comment cites. The complete rule set out in *Meredith* ought to be articulated.

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

THE STATE BAR
OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL

Scott J. Drexel, *Chief Trial Counsel*

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639 TELEPHONE: (415) 538-2063

August 26, 2008

Randall Difuntorum, Director
Office of Professional Competence & Planning
State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Comments of the Office of the Chief Trial Counsel to Proposed Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

Thank you for the opportunity to submit the comments of the Office of the Chief Trial Counsel to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in March 2008. I apologize that these comments have been submitted after the comment deadline but hope that they will nevertheless be considered by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

~~Proposed Rule 1.5 [Fees for Legal Services]~~

~~1. Unconscionable Fees~~

~~The Office of the Chief Trial Counsel is opposed to any attempt to specifically define the term "unconscionable" in subsection (b) of proposed rule 1.5. The phrase "unconscionable fee" is sufficiently defined by case law and has been found not to be unconstitutionally vague. (*In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 732.) In our view, any attempt to specifically define what constitutes an unconscionable fee is likely to be either overbroad or under inclusive. Sufficient guidance regarding the determination of whether a fee is unconscionable is provided by the list of facts set forth in subsection (c) of proposed rule 1.5. However, we urge the Commission to consider adding two additional factors to the list set forth in subsection (c). Those additional factors are: (1) whether the fee involves an element of fraud or overreaching on the attorney's part (see *Herrscher* v. *State Bar* (1935) 4 Cal.2d 399, 403; *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989); and (2) whether there was any failure on the attorney's part to disclose the true facts to the client (see *Herrscher* v. *State Bar*, *supra*, 4 Cal.2d at p. 403). In addition, the Commission may wish to more clearly state in the rule itself whether the factors set forth in subsection (c) are intended to be the exclusive factors to be considered in determining whether a fee is unconscionable. At least one~~

~~In subsection (a)(1), the Office of the Chief Trial Counsel believes that the word "substantially" was inadvertently omitted from between "makes" and "all of the geographic area" since that word was included in subsection (a)(2).~~

~~In subsection (c)(1), the language "the client has the right to retain other counsel or might have the right to act in his or her own behalf" is confusing because it implies that, in some instances (including instances in which the client has the right to retain counsel), the client might not have the right to act on his or her own behalf. In addition, while subsection (c)(1) uses the disjunctive word "or" between the above-referenced clauses, subsection (b)(1) uses the conjunctive "and." Is there a reason for use of the different words?~~

Proposed Rule 3.4 [Fairness to Opposing Party and Counsel]

Subsection (f) of proposed rule 3.4, which provides that a lawyer shall not knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based upon an assertion that no valid obligation exists, is vague and potentially overbroad. It is unclear whether "an obligation under the rules of a tribunal" includes, for example, local court rules; an individual judge's courtroom rules or procedures; a request from a judge made on the record in the case; or a judge's individualized preferences, such as a requirement regarding the type of binder into which exhibits must be placed or the number of copies to be provided to the court of any document or exhibit. Without additional clarification or definition, the intended meaning of "an obligation under the rules of a tribunal" will be a major source of debate and confusion.

The Office of the Chief Trial Counsel opposes the exceptions found in subsection (h) to the general rule that a lawyer shall not request a person other than a client to refrain from voluntarily giving relevant information to another party. The second exception is unnecessary. And the first exception is damaging both to the integrity of the profession and to the public's perception of lawyers. First, because the lawyer unilaterally decides whether the exception applies to his or her circumstances, it will be very difficult for the Office of the Chief Trial Counsel to enforce the rule. Second, the exception can be read as permitting lawyers to make it unnecessarily difficult for another party to obtain information relevant to the case without formal discovery or, worse, as permitting lawyers to hide the truth.

For example, in the context of a family law matter, such an exception would allow one party's lawyer to ask other family members to refrain from giving relevant information to the opposing party. This includes requesting that the children of a couple dissolving their marriage not speak to one of the lawyers in the case about highly relevant issues.

In the context of a personal injury matter, such an exception would permit a lawyer representing a party in an automobile accident case to ask family members who may have witnessed an accident or who were present in the automobile, but are not clients of the attorney, to refrain from disclosing relevant information to other parties.

Additionally, in the context of an employment discrimination matter, an attorney representing an employer accused of discriminating against an individual employee would be permitted to talk to all of the other employees in the company and request that none of them speak with the aggrieved employee's attorney.

For these reasons, the Office of the Chief Trial Counsel recommends deleting everything in subsection (h) after the word "party" and recommends deleting Comment 5, which we find more limited than the rule itself.

The Office of the Chief Trial Counsel suggests that an additional comment be added to proposed rule 3.4 that distinguishes between a lawyer requesting that a person refrain from giving relevant information to another party in a matter and a lawyer advising a person that he or she need not voluntarily speak with another party in the matter. The Office of the Chief Trial Counsel believes that advising a person that they are not required to speak with another party in a matter is appropriate and is very different from requesting that a person not speak with another party in the matter.

Proposed Rule 4.2 [Communication with Represented Party]

The proposed rule, as drafted, does not address the serious issue presented by *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Court Rptr. 798. In that case, a criminal defendant confessed to the police that he had set numerous fires, including a fire at an apartment building in San Francisco in which one of the occupants of the building died and several others were injured. Counsel was appointed for the defendant in the criminal matter. While the criminal matter was still pending, several residents of the apartment building asked respondent Dale to represent them in an action for personal injuries against the owner of the apartment building. The criminal defendant was not named as a defendant in this civil action but was a percipient witness to the condition of the building at the time he set fire to it. The criminal defendant ultimately pled guilty to six counts of arson and was found guilty, in a court trial, of second-degree murder in the death of the apartment occupant. In the plea agreement, the criminal defendant retained the right to appeal the homicide conviction on the grounds that his confession was illegal and should have been suppressed. After the conclusion of the criminal defendant's trial, but prior to sentencing, respondent Dale contacted the defendant's criminal attorney and asked for permission to interview the defendant. The attorney refused the request. Nevertheless, respondent Dale went to the jail on multiple occasions to make contact with and befriend the criminal defendant so that he could interview him about the fire and the condition of the apartment building.

After the criminal defendant was sentenced, his appointed trial counsel filed a notice of appeal on his behalf, listing the defendant as representing himself on appeal pending appointment of appellate counsel. Two days after the notice of appeal was filed, respondent Dale visited the defendant at San Quentin Prison and brought with him a letter agreement in which he promised to assist the defendant when he comes up for parole in the capacity of either his attorney or a witness and to tell how the defendant had taken responsibility for his actions. With this letter agreement as an inducement, the criminal defendant signed a proffered declaration from respondent Dale in which he admitted to starting

~~the fire and commented upon the fact that there was a large amount of paper and cardboard in the basement of the building to use as tinder for the fire.~~

~~The State Bar Court Review Department did not find respondent Dale culpable of a violation of current rule 2-100 of the Rules of Professional Conduct because the incarcerated arsonist was represented in his criminal proceeding, but not in the civil action in which respondent Dale solicited the information.~~

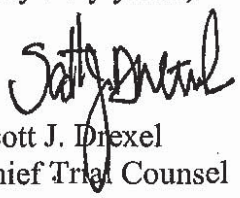
~~It is the Office of the Chief Trial Counsel's position that respondent Dale should have been found culpable of violating rule 2-100. As such, we recommend that subsection (a) of the proposed rule should read as follows:~~

> ~~In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation,~~ **~~or a related subject~~**~~, with a person the lawyer knows to be represented by another lawyer in the matter,~~ **~~or a related matter~~**~~, unless the lawyer has the consent of the other lawyer.~~

~~The Office of the Chief Trial Counsel does not have any comments to offer at this time with respect to proposed rules 1.16, 3.5, 3.10, 4.3 or 5.4.~~

Thank you again for the opportunity to comment upon these proposed amendments to the Rules of Professional Conduct.

Very truly yours,



Scott J. Drexel
Chief Trial Counsel

SJD:dim
~~Attachment~~

PUBLIC COMMENTS [3.5] ~ FILE LIST

C-2008-195 LACBA [3.5]

C-2008-213i SDCBA [3.5]

C-2008-229g SCCBA [3.5]

C-2008-230g OCBA [3.5]

C-2008-232g COPRAC [3.5]

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June 2, 2008

Audrey Hollins
The State Bar of California
Office of Professional Competence,
Planning and Development
180 Howard Street
San Francisco, CA 94105-1639

RE: Rule 3.5 - Impartiality and Decorum of the Tribunal [5-300, 5-320]

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) has the following comments on Proposed Rule 3.5.

Proposed Rule 3.5 is a compilation of existing Rules of Professional Conduct 5-300 and 5-320. In general, rule 5-300 prohibits the giving of gifts or anything else of value to judges and judicial officers and ex parte contacts upon the merits of a contested matter with those same people. Rule 5-320, generally, prohibits contacts with jurors both during and after their service.

A substantial change in rule 3.5, subd. (c), to existing 5-300, subd. (C), which concerns ex parte communications, is that lawyers shall also not, unless an exception applies, communicate "upon the merits of a contested matter" with arbitrators. PREC recommends that this improper contact be limited to "neutral" arbitrators and not "party" arbitrators, who are expected to have personal contact with the party who recommended their appointment. Accordingly, the word "neutral" should be inserted before "arbitrator" in proposed rule 3.5, subd. (c) and the comment to the rule should note that a lawyer may communicate with an arbitrator who has been appointed by that lawyer and, therefore, is not neutral, upon the merits of a contested matter.

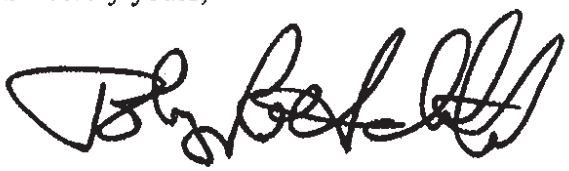
Existing rule 5-320, subd. (D), concerns contacts with jurors after their discharge. It provides that lawyers shall not "ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service." PREC agrees with the purpose of this policy which is to prevent embarrassment or future influence of a juror.

PREC notes that proposed rule 3,5, subdivision (e), prohibits lawyers who are "connected with the case" from "communicat(ing) directly or indirectly with any juror" and that subdivision (f) prohibits lawyers who are "not connected with the case" from "communicat(ing) directly or indirectly concerning the case with anyone the lawyer knows is a juror in the case." PREC finds the term "indirect," when it includes lawyer comments to the press, to be problematic because those comments are probably protected by the First Amendment, subject to certain limited exceptions, such as existing rule 1-400 (advertising and solicitation).[1] PREC, therefore, suggests that the comment to the proposed rule discuss this thorny issue.

Proposed rule 3.5, subd. (g), is wordier but has, with one exception, not changed the ambit of existing rule 5-320, subd. (D). It would forbid communications that are "prohibited by law or court order." (Subd. (g)(1).). Otherwise, the remaining three new subdivisions restricting communications with discharged jurors are mere elaborations of the existing rule: contacts are prohibited where the juror "has made known to the lawyer a desire not to communicate" (subd. (g)(2)); a "communication (shall not) involve misrepresentation, coercion, duress or harassment" (subd. (g)(3)) and a "communication is (not allowed where it is) intended to influence the juror's actions in future jury service." PREC has no objections to these proposals.

The second sentence in Comment [2] to rule 3.5 is ambiguous. It states that "A lawyer who is serving as a temporary judge, referee or court-appointed arbitrator may communicate ex parte with such persons in the performance of that service." Although "such persons" probably refers to the "persons serving in an official capacity" in the first sentence, PREC recommends, to clarify this ambiguity, that the second sentence read, instead, "A lawyer who is serving as a temporary judge, referee or court-appointed arbitrator may communicate ex parte with persons then serving in an official capacity in the performance of that service."

Sincerely yours,



Toby J. Rothschild, Chair
Professional Responsibility and Ethics Committee

cc: Gretchen M Nelson, President
LACBA PREC Members

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[1] See *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, which found a Nevada disciplinary rule that prohibited a lawyer from making extrajudicial statements to the press that he/she knows or reasonably should know will have a "substantial likelihood of materially prejudicing" an adjudicative proceeding, to be void for vagueness. More importantly, for the purposes of this discussion, *Gentile* also noted that:

> At the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law. See, *e.g., In re Primus,* 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978); *Bates v. State Bar of Arizona, supra.* We have not in recent years accepted our colleagues' apparent theory that the practice of law brings with it comprehensive restrictions, or that we will defer to professional bodies when those restrictions impinge upon First Amendment freedoms. And none of the justifications put forward by respondent suffice to sanction abandonment of our normal First Amendment principles in the case of speech by an attorney regarding pending cases. (At p. 1053.)

One may concede the proposition that an attorney's speech about pending cases may present dangers that could not arise from statements by a nonparticipant, and that an attorney's duty to cooperate in the judicial process may prevent him or her from taking actions with an intent to frustrate that process. The role of attorneys in the criminal justice system subjects them to fiduciary obligations to the court and the parties. An attorney's position may result in some added ability to obstruct the proceedings through well-timed statements to the press, though one can debate the extent of an attorney's ability to do so without violating other established duties. A court can require an attorney's cooperation to an extent not possible of nonparticipants. A proper weighing of dangers might consider the harm that occurs when speech about ongoing proceedings forces the court to take burdensome steps such as sequestration, continuance, or change of venue.

If as a regular matter speech by an attorney about pending cases raised real dangers of this kind, then a substantial governmental interest might support additional regulation of speech. But this case involves the sanction of speech so innocuous, and an application of Rule 177(3)'s safe harbor provision so begrudging, that it is difficult to determine the force these arguments would carry in a different setting. The instant case is a poor vehicle for defining with precision the outer limits under the Constitution of a court's ability to regulate an attorney's statements about ongoing adjudicative proceedings. At the very least, however, we can say that the Rule which punished petitioner's statements represents a limitation of First Amendment freedoms greater than is necessary or essential to the protection of the particular governmental interest, and does not protect against a danger of the necessary gravity, imminence, or likelihood.

The vigorous advocacy we demand of the legal profession is accepted because it takes place under the neutral, dispassionate control of the judicial system. Though cost and delays undermine it in all too many cases, the American judicial trial remains one of the purest, most rational forums for the lawful determination of disputes. A profession which takes just pride in these traditions may consider them disserved if lawyers use their skills and insight to make untested allegations in the press instead of in the courtroom. But constraints of professional responsibility and societal disapproval will act as sufficient safeguards in most cases. And in some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts. It cannot be said that petitioner's conduct demonstrated any real or specific threat to the legal process, and his statements have the full protection of the First Amendment. (At pp. 1057-1058.)

MEMORANDUM

Date: April 22, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subject: Proposed Rule 3.5 – Impartiality and Decorum of the Tribunal [Existing CRPC Rules 5-300, 5-320]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 3.5 with the following modification: Delete the requirement that lawyers be familiar with the Code of Judicial Ethics.

Rationale For Comment 1: Most lawyers are not familiar with the Code of Judicial Ethics and are not required to be familiar with them so the Comment should not impose that requirement on them.

Comment 2: Approve Proposed Rule 3.5 with the following modification: Add "confidential" after "ex parte" in section (b)(5).

Rationale for Comment 2: Addition will clarify existing CRPC Rule 5-300 since California recognizes "regular" ex parte proceedings where all counsel must be present.

PROPOSED RULE 3.5, SCCBA EDITS

SCCBA COMMENTS TO Rule 3.5: Impartiality and Decorum of the Tribunal

The SCCBA recommends the following regarding Rule 3.5.

3.5(l): Recommends that "removed" be added to the definition of "juror" and delete Comment [4]. Rationale: Comment [4] notes that an attorney may not contact a juror removed from an empaneled jury until the empaneled jury has been discharged. If an attorney does not read Comment [4], s/he may not realize that juror includes a "removed" juror and, thus, this category of juror needs to be identified in the text of the rule. "Excused" juror does not necessarily include a "removed" juror. "Excused" generally refers to a juror who is excused during voir dire. With "removed" added to 3.5(l), there is no need for Comment [4].

Rule 3.5: Impartiality and Decorum of the Tribunal

(a) Except as permitted by the Code of Judicial Ethics, a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the lawyer and the judge, official, or employee is such that gifts are customarily given and exchanged.This Rule shall not prohibit a lawyer from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.

(b) Unless authorized to do so by law, the Code of Judicial Ethics, a ruling of a tribunal, or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:

(1) in open court;

(2) with the consent of all other counsel in the matter;

(3) in the presence of all other counsel in the matter;

(4) in writing with a copy thereof furnished promptly to all other counsel; or

(5) in ex parte confidential matters as permitted by law.

(c) As used in this Rule, "judge" and "judicial officer" shall include law clerks, research attorneys, or other court personnel who participate in the decision making process, and arbitrators.

(d) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows to be a member of the venire from which the jury will be selected for trial of that case.

(e) During a trial a lawyer connected with the case shall not communicate directly or indirectly with any juror.

(f) During a trial a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows is a juror in the case.

(g) A lawyer shall not communicate directly or indirectly with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate;

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(4) the communication is intended to influence the juror's actions in future jury service.

(h) A lawyer shall not directly or indirectly conduct an out of court investigation of a person who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service.

(i) All restrictions imposed by this Rule also apply to communications with, or investigations of, members of the family of a person who is either a member of a venire or a juror.

(j) A lawyer shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.

(k) This Rule does not prohibit a lawyer from communicating with persons who are members of a venire or jurors as a part of the official proceedings.

(l) For the purposes of this Rule, "juror" means any empaneled, discharged, removed or excused juror.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Code of Judicial Ethics, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

PROPOSED RULE 3.5, SCCBA EDITS

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order. A lawyer who is serving as a temporary judge, referee or court-appointed arbitrator under Rule 2.4.1 may communicate ex parte with such persons in the performance of that service.

[3] For guidance on permissible communications with a juror or prospective juror after discharge of the jury, see Code of Civil Procedure, section 206.

~~[4] It is improper for a lawyer to communicate with a juror who has been removed from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.~~

RULES OF PROFESSIONAL CONDUCT OF STATE BAR OF CALIFORNIA

Please indicate which proposed rule you are commenting on:

Rule 3.5
Impartiality and Decorum of the Tribunal [5-300, 5-320]

Agree: Agree as Modified: **X** Disagree :

Comments: Modify subdivision "c" to clarify whether the reference to "arbitrators" means only court appointed/judicial arbitrators or whether private arbitrators are also within the purview of the Rule.

Name: Cathrine Castaldi **Title: President**

Organization: Orange County Bar Association

☑ **Commenting on behalf of an organization**

Address: P.O. Box 6130

City, State, Zip: Newport Beach, CA 92658

Please **write** or **fax** or **respond using the Internet** to:

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, CA 94105

Internet: http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=90842

DEADLINE FOR COMMENT: 5:00 P.M. Friday, June 6, 2008

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

PUBLIC COMMENTS [3.10] ~ FILE LIST

C-2008-188a Evan Jenness [3.10]

C-2008-213j SDCBA [3.10]

C-2008-229h SCCBA [3.10]

C-2008-230h OCBA [3.10]

C-2008-232h COPRAC [3.10]

C-2008-234b NACDL [3.10]

LAW OFFICES OF EVAN A. JENNESS

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May 30, 2008

Via Email (audrey.hollins@calbar.ca.gov)
and Federal Express

Ms. Audrey Hollins
Office of Professional Competence, Planning & Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Comments Regarding Proposed Revisions to the California Rules of Professional Conduct - Proposed Rules 3.10, 4.2 and 1.5

Dear Ms. Hollins:

I am writing to share with the Rules Revision Commission my comments on three of the pending proposed revisions to the California Rules of Professional Conduct. I write in an individual capacity and not on behalf of any group. By way of background, however, I am the Co-Chair of the National Association of Criminal Defense Lawyers' Ethics Advisory Committee; a long-standing member of the Los Angeles County Bar Association Professional Responsibility & Ethics Committee; and a Board Member of the Los Angeles Chapter of the Federal Bar Association. I regularly lecture and write on criminal defense ethics, professional responsibility and prosecutorial misconduct.

As a criminal defense lawyer, and member of the California Bar for the past two decades, I am particularly troubled by Proposed Rules **3.10**, Comment 2 (CRPC 5-100, Threatening Criminal, Administrative, or Disciplinary Charges, exemption for government lawyers), **4.2**, Comments 19-20 (CRPC 2-100, Communication With a Person Represented by Counsel,

"Communications Authorized by Law or Court Order," exemption for prosecutors), and **1.5(f)** & Comment 2 (CRPC 4-200, Fees for Legal Services, prohibition on nonrefundable retainers).

The first two Proposed Rules (**3.10, 4.2**) contain special exemptions for government lawyers, and would have the effect of holding prosecutors and other government lawyers to lower standards of professional conduct than those which apply to all other members of the California Bar. Such special-interest carve-outs from the Rules of Professional Conduct are unprincipled, may endorse conduct that is prohibited by the California Penal Code, would foster the kind of government misconduct intended to be addressed by Section 1983 of the Civil Rights Act (42 U.S.C. § 1983), and would create irrational disparities in the positions of government and other lawyers.

Special exemptions for government lawyers also are inconsistent with the Congressional intent reflected in 28 U.S.C. § 530B ("An attorney for the Government shall be subject to State laws and rules . . . governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State"). Our justice system relies heavily on government lawyers being held to the highest standards of ethics – not a lower standard effected by special exemptions from the Rules of Professional Conduct.

Proposed Rule **1.5(f)** also would have a particularly adverse effect on the criminal defense community. By making it unethical for lawyers to enter into nonrefundable fee retainer agreements, the rule would prohibit a common form of retention in criminal cases, and could result in many clients of limited means being unable to hire a lawyer. Although the revision appears motivated by concern about unscrupulous lawyers who over-charge their clients, eliminating a discrete form of retainer will not address that problem. It is not the form of the retainer but a lawyer's lack of integrity that causes client over-billing. Indeed, padded hourly billing by dishonest lawyers undoubtedly is a more serious problem in the aggregate than any problems arising from nonrefundable fee retainers. The "unconscionability" standard provides a suitable and uniform standard for the State Bar Attorney Discipline System to use in addressing client complaints about over-billing and appropriately applies regardless of the form of a retainer.

As requested, I have put my comments to these Proposed Rules on separate pages, which accompany this letter. I appreciate greatly the tremendous time and effort that members of the Rules Revision Commission have committed to their important work, and hope that my comments are helpful in preparing the final rules.

Very truly yours,

LAW OFFICES OF EVAN A. JENNESS

Evan A. Jenness

EAJ:dfm

Enclosures

Proposed Rule 3.10, Comment 2 (CRPC 5-100, Threatening Criminal, Administrative, or Disciplinary Charges, exemption for government lawyers)

Comment 2 to Proposed Rule 3.10 errs in exempting any "lawyer who represents a governmental agency." This exemption would allow only prosecutors and other government lawyers to threaten criminal proceedings in an effort to obtain a favorable settlement regarding civil claims that the government may have against an individual or entity or that an individual or entity may have against the government. There are good reasons why this special-interest carve-out is not present in Rule 5-100 of the current Rules of Professional Conduct.

The Government Lawyer Exemption Appears to Endorse the Crime of Extortion

Comment 2 states that a government lawyer who is negotiating with "a defendant in a civil action who has not yet been criminally charged," may "offer[] to pursue a settlement of all aspects of the defendant's case, including any potential criminal liability," in order to resolve the civil action on terms favorable to the government.

This exemption appears to authorize behavior by government lawyers that amounts to criminal extortion. *See Flatley v. Mauro*, 39 Cal.4th 299, 139 P.3d 2 (2006) ("'Extortion is the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear . . . .' (Pen. Code, § 518.) Fear, for purposes of extortion 'may be induced by a threat, either: . . . To accuse the individual threatened ... of any crime; or, . . . To expose, or impute to him ... any deformity, disgrace or crime[.]' (Pen. Code, § 519.) 'Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing . . . expressing or implying, or adapted to imply, any threat such as is specified in Section 519, is punishable in the same manner as if such money or property were actually obtained by means of such threat.' (Pen. Code, § 523.) Extortion has been characterized as a paradoxical crime in that it criminalizes the making of threats that, in and of themselves, may not be illegal. '[I]n many blackmail cases the threat is to do something in itself perfectly legal, but that threat nevertheless becomes illegal when coupled with a demand for money'.").[1]

Comment 2's "good faith" qualifier for government lawyers' actions does not remedy the problem with this exemption. *A*s stated in *Flatley*, it would be extortion to horse trade criminal exposure to obtain an advantage in civil proceedings even if the threat to pursue criminal proceedings was "itself perfectly legal." *Id.*

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[1] In *Flatley*, an entertainer sued a lawyer for civil extortion and other torts based on the attorney's demands for a seven-figure payment to settle claims that the plaintiff had raped the lawyer's client, and threats, among other things, to publicly accuse the entertainer of rape. The lawyer moved to strike the complaint as a SLAPP suit. The Supreme Court ruled the anti-SLAPP statute inapplicable because the lawyer's demands were criminal extortion as a matter of law and not protected by constitutional free speech guarantees.

The "good faith" qualifier also is specious – members of the Bar are required to act in good faith in *all* of their professional activities and thus adding the proviso to this exemption does not alter the nature of the exemption.

A Government Lawyer Exemption Would Promote Misconduct

The proposed exemption for government lawyers would encourage the type of government misconduct that gives rise to civil claims against the government, by giving the government a cost-free way to avoid liability for wrongdoing by its actors. For example, the exemption would permit a government lawyer to give a criminal defendant a "pass" on criminal charges in exchange for the defendant providing a release of his or her civil rights claims arising from the arrest leading to the charges. Or, allow a government lawyer to threaten to pursue criminal charges if a civil rights plaintiff does not drop his or her case against the government. This completely undermines the intent of 42 U.S.C. 1983 - to make governments liable for the civil rights violations of those acting under color of law. Potential civil liability is a pillar of the incentive behind government training, supervision and monitoring programs that are intended to promote proper conduct by government actors.

The Ninth Circuit's decision earlier this week in *Beck v. City of Upland*, __ F.3d __, No. 05-56901 (9th Cir., May 28, 2008) illustrates well why allowing government lawyers to "horse trade" civil and criminal liability would promote governmental misconduct. In that case, a civil rights plaintiff (Kenneth Beck) sued the City of Upland after its officers wrongfully arrested him for First Amendment-protected activities, and a Deputy District Attorney charged him with two felonies in reliance on nothing more than an officer's report of the incident (the prosecutor "conducted no additional investigation, factual or legal" *and* "asserted work product privilege when asked whether his decision to charge Beck with a felony had been 'swayed' by the fact that 'felony' was circled on the police report"). Eventually the criminal charges were thrown out of court on a defense motion.

If – as provided in Proposed Rule 3.10, Comment 2 – government lawyers were permitted to drop criminal charges in exchange for a release of the defendant's civil rights claims (or to threaten criminal charges if a target does not relinquish civil rights claims), the kind of governmental wrongdoing evidenced in the *Beck* decision would never come to light. Most clients in Mr. Beck's position probably would be forced to give the government a release of all civil rights claims in order to avoid the great expense and risk of standing trial on (bogus) criminal charges. Similarly, governmental agencies would have no incentive to train and supervise officers to prevent civil rights violations, because such violations would never be exposed.

Additionally, without the risk of civil or disciplinary consequences, prosecutors like the Deputy District Attorney in *Beck* would have much less incentive to avoid baseless, vindictive or malicious prosecutions (*e.g.*, charging an individual with crimes for First Amendment-protected activities based on the uncorroborated claims of a police officer) because the specter of civil

liability could ordinarily be avoided by dropping criminal charges in exchange for a release of civil claims. Few defendants would or could invest the resources required to fight a weak criminal charge/file a civil lawsuit, if the option of dismissal of the criminal case in exchange for a release of their civil claims were offered to them by a government lawyer.

The "good faith" qualifier does not remedy these defects in the proposed carve-out. First, few objective assessments of "good faith" would ever be made because the exemption could result in many relevant proceedings being disposed of without the litigation that brings governmental misconduct to light. Second, the exemption would allow an assessment of "good faith" to be made by the very government lawyers whose conduct appears highly questionable (like the Deputy D.A. in *Beck*).

A Government Lawyer Exemption Would Allow the Wealthy to "Buy Their Way Out of Jail"

The proposed exemption also would enable wealthy wrongdoers to "buy their way out of jail" by paying exorbitant civil settlements in exchange for assurances of a "free pass" on potential criminal charges. By contrast, those with less resources would remain vulnerable to the dual penalties of civil and criminal exposure.

While the principle of equal justice under the law may be undermined by various features of our justice system, we should strive to promote the concept and not undermine it with special exemptions like this one.

A Government Lawyer Exemption is Irrational and Reflects Unwarranted Bias

By treating government lawyers differently from the rest of us, the proposed exemption could create irrational disparities in settlement negotiations. For example, it appears that under the Proposed Rule, a government lawyer could threaten to pursue a criminal charge against an arrestee if s/he does not relinquish civil rights claims arising from the excessive force used in the arrest, *but* defense counsel could *not* threaten to seek the filing of criminal charges against the arresting officers who brutalized the client unless the government paid a reasonable settlement of the client's civil rights claims. This is just one example of the many nonsensical disparities that could be created by this special-interest carve-out.

I note that the Revision Commission's March, 2008 Discussion Draft regarding the proposed revised rules states that Comment 2 to Proposed Rule 3.10 "was developed with input from government lawyer stakeholders." *Id*. at p. 22. However, Comment 2 needs input from those with a commitment to civil and constitutional rights, criminal defense justice and plaintiffs' rights, among others. Input from "stakeholders" on all sides of this issue seems critical to avoiding a rule of professional conduct that promotes a special-interest agenda.

Rule 3.10: Threatening Criminal, Administrative, or Disciplinary Charges

(a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

(b) As used in paragraph (a) of this Rule, the term "administrative charges" means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasicriminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

(c) As used in this Rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

Comment

[1] This Rule prohibits a lawyer from threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute and does not apply to a threat to bring a civil action. It also does not prohibit actually presenting criminal, administrative, or disciplinary charges, even if doing so creates an advantage in a civil dispute. Whether a lawyer's statement violates this Rule depends on the specific facts. (See, e.g., *Crane v. State Bar* (1981) 30 Cal.3d 117 [177 Cal.Rptr 670].) A statement that the lawyer will pursue "all available legal remedies" by itself does not violate this Rule.

[2] This Rule does not apply to (i) a threat to initiate contempt proceedings for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code sections 1377-78. This Rule also does not apply to an offer made in good faith by a lawyer who represents a governmental agency to settle all, or a portion of, the civil, administrative, and criminal aspects of the case. For example, where there is a good faith basis for believing that a defendant in a civil action who has not yet been criminally charged might be criminally liable for his or her conduct, a lawyer representing a governmental agency would be acting in good faith if the lawyer offers to pursue a settlement of all aspects of the defendant's case, including any potential criminal liability, so as not to have the government incur the further expense of a criminal investigation. On the other hand, a lawyer representing a governmental agency would not be acting in good faith if, without a good faith basis for believing that criminal liability might be established, the lawyer were to offer not to seek the filing of criminal charges in return for the defendant's agreement not to file a claim for false arrest against law enforcement personnel or the government.

[3] Paragraph (b) exempts the threat of filing an administrative charge which is a prerequisite to filing a civil complaint on the same transaction or occurrence.

MEMORANDUM

Date: April 22, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subject: Proposed Rule 3.10 – Threatening Criminal, Administrative, or Disciplinary Charges
[Existing CRPC Rule 5-100]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 3.10 with the following modification: Change the standard in Proposed Rule 3.10 Comment 2 from "good faith" to "probable cause".

Rationale For Comment 1: The proposed standard is too subjective.

SCCBA COMMENTS TO Rule 3.10: Threatening Criminal, Administrative, or Disciplinary Charges

The SCCBA supports this rule as proposed and especially supports the additional comments added to this version of the rule. Rule 3.10 is based entirely on the existing California Rule. There is no comparable ABA Model Rule. The proposed version makes no substantive changes.

Rule 3.10: Threatening Criminal, Administrative, or Disciplinary Charges

(a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

(b) As used in paragraph (a) of this Rule, the term "administrative charges" means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

(c) As used in this Rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

Comment

[1] This Rule prohibits a lawyer from threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute and does not apply to a threat to bring a civil action. It also does not prohibit actually presenting criminal, administrative, or disciplinary charges, even if doing so creates an advantage in a civil dispute. Whether a lawyer's statement violates this Rule depends on the specific facts. (See, e.g., *Crane v. State Bar* (1981) 30 Cal.3d 117 [177 Cal.Rptr 670].) A statement that the lawyer will pursue "all available legal remedies" by itself does not violate this Rule.

[2] This Rule does not apply to (i) a threat to initiate contempt proceedings for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code sections 1377-78. This Rule also does not apply to an offer made in good faith by a lawyer who represents a governmental agency to settle all, or a portion of, the civil, administrative, and criminal aspects of the case. For example, where there is a good faith basis for believing that a defendant in a civil action

who has not yet been criminally charged might be criminally liable for his or her conduct, a lawyer representing a governmental agency would be acting in good faith if the lawyer offers to pursue a settlement of all aspects of the defendant's case, including any potential criminal liability, so as not to have the government incur the further expense of a criminal investigation. On the other hand, a lawyer representing a governmental agency would not be acting in good faith if, without a good faith basis for believing that criminal liability might be established, the lawyer were to offer not to seek the filing of criminal charges in return for the defendant's agreement not to file a claim for false arrest against law enforcement personnel or the government.

[3] Paragraph (b) exempts the threat of filing an administrative charge which is a prerequisite to filing a civil complaint on the same transaction or occurrence.

RULES OF PROFESSIONAL CONDUCT OF STATE BAR OF CALIFORNIA

Please indicate which proposed rule you are commenting on:

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

Agree: X Agree as Modified: Disagree :

Comments: _____

_____

_____

_____

_____

Name: **Cathrine Castaldi** **Title: President**

Organization: **Orange County Bar Association**

☑ **Commenting on behalf of an organization**

Address: **P.O. Box 6130**

City, State, Zip: **Newport Beach, CA 92658**

Please **write** or **fax** or **respond using the Internet** to:

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, CA 94105

Internet: http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=90842

DEADLINE FOR COMMENT: 5:00 P.M. Friday, June 6, 2008

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

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NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Reply to:
1311 Broadway
Little Rock, AR 72202

June 6, 2008

Ms. Audrey Hollins
Office of Professional Competence,
Planning & Development
State Bar of California
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by fax (415) 538-2171

Jeffrey Bleich, Esq.
State Bar President
Munger, Tolles & Olson
560 Mission Street, 27th Fl.
San Francisco, CA 94105
Jeff.bleich@mto.com

Re: NACDL Objections to Proposed Revisions to the California Rules of Professional Conduct, Proposed Rules 1.5, 3.10, & 4.2

Dear Ms. Hollins:

I write on behalf of the National Association of Criminal Defense Lawyers ("NACDL"), with over 1,300 members in California. NACDL is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's 12,800-plus direct members in 28 countries – and 90 state, provincial, local, and international criminal tribunal affiliate organizations totaling more than 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a

"LIBERTY'S LAST CHAMPION"

1150 18th Street, NW ◆ Suite 950 ◆ Washington, DC 20036
202-872-8600 Fax 202-872-8690 assist@nacdl.org www.nacdl.org

rational and humane criminal justice system.

I am former Chair of NACDL's Ethics Advisory Committee (1990-2005), and the author of numerous written ethics opinions for NACDL and about 800 informal opinions. I am also the author of PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE (2d ed. 2005) and one of two lawyer members of the International Criminal Court Disciplinary Appeals Tribunal (2007-10).

NACDL urges the State Bar of California **to not adopt and to reject** the following proposed revisions to the California Rules of Professional Conduct:

1. a prohibition of nonrefundable retainers set forth in proposed Rule 1.5(f) and Comment ¶ 2, fees for legal services; we also suggest that the use of "unreasonable fee" in Model Rules 1.5(a & b) is a better definition and should resolve any questions.

2. authorization for government lawyers to negotiate the disposition of criminal and civil liability as set forth in the Comment ¶ 2 to proposed Rule 3.10, threatening criminal, administrative, or disciplinary charges.

3. commentary providing prosecutors and those acting at their direction with the ability to communicate with represented persons without the consent of their counsel, as set forth in proposed Rule 4.2 and Comment ¶s 19-20, communication with a person represented by counsel, communications authorized by law or court order.

These proposed changes to Rules 3.10 and 4.2 are also of doubtful constitutionality because they grant special status to prosecutors in California that exists nowhere else in the United States, either in federal or state law. There is no justification for a separate rule in California putting prosecutors above the law that every other lawyer in America must abide by. Moreover, as to Rule 4.2, Congress requires that all federal prosecutors follow their state ethics rules, and it has for quite some time. There is no sign anywhere that there is any problem with that, but California now proposes to exempt California prosecutors from this statutory mandate through the back door.

We submit that these three proposed revisions to California's rules of professional conduct would have a negative impact on criminal defense lawyers and their clients, the rights of those accused of crimes, and the criminal justice system in general. Our general position is also ably stated to you already by two NACDL members: Barry Tarlow of Los Angeles and Evan Jenness of Santa Monica who are separately commenting. I hope I will not repeat what they say.

Rule 3.10: Exemption for government lawyers from rules prohibiting threats to pursue criminal proceedings to gain a civil advantage

Paragraph 2 to the Comments of proposed Rule 3.10 exempts government lawyers from the long-standing rule prohibiting all attorneys from threatening to initiate or seek the pursuit of criminal proceedings in an effort to settle a civil dispute on favorable terms. The comment states in ¶ 2 that a government lawyer who is negotiating with "a defendant in a civil action who has not yet been criminally charged," may "offer[] to pursue a settlement of all aspects of the defendant's case, including any potential criminal liability," in order to resolve the civil action on terms favorable to the government.

This exemption appears to authorize behavior by government lawyers that would amount to the crime of extortion or compounding a crime by seeking to obtain property through threats to accuse another individual of a crime. Ethics rules should not be an exemption to the criminal law; they sure are not as to criminal defense lawyers. The qualification that the government lawyer's actions be in "good faith" does not change this implication because the crime of extortion does not turn on whether or not the threatened action is or is not lawful. An individual may be guilty of extortion even if he or she threatens to pursue well-founded criminal charges. *See Flatley v. Mauro*, 39 Cal.4th 299 (2006). Additionally, lawyers must always act in "good faith." Thus, adding "good faith" adds nothing meaningful to the proposed rule.

Allowing government lawyers to resolve civil matters by agreeing not to pursue criminal matters (or threatening to pursue them absent a favorable resolution of civil claims) undermines the intent of civil rights laws. The civil rights laws are designed to make government actors liable for their wrongdoing. The proposed exemption could give those entities a cost-free way to resolve civil rights cases, thus defeating the intent of civil rights laws. Few defendants would afford to defend themselves in a criminal case (however unfounded they might be) in order to preserve well-founded civil rights claims if the option of dismissal of criminal charges in exchange for a release of civil rights claims were offered to them by a government lawyer. Indeed, inserting this proposed rule will extinguish many civil rights claims because any competent criminal defense lawyer would have to recommend settling a potential criminal matter by agreeing to the government's extortionate demands sanctioned by the State Bar. This should be flatly against public policy, and it has no place in ethics rules.

Moreover, the ultimate result of permitting government lawyers to exchange criminal and civil liability would be that much wrongdoing by government actors would never be exposed. It will also reduce the incentive of government agencies to supervise and train employees to conform their conduct to the law because civil claims can just be negotiated away with criminal charges.

The exemption would appear to allow a government lawyer to offer to drop criminal charges in exchange for the payment of a sufficiently large sum to persuade the government to settle civil proceedings. An individual who could not afford to settle civil proceedings on terms agreeable to the government, on the other hand, would continue to face the dual expose of both civil and criminal proceedings. NACDL opposes the adoption of any rules which would promote further inequities in the application of the law.

Finally, exemptions for the government in litigation not granted to the defense are unconstitutional. *Kirk v. State,* 526 So.2d 223 (La. 1988) (Louisiana surreptitious recording rule that permitted law enforcement to record but denied defense counsel the same opportunity was unconstitutional); *see also Wardius v. Oregon,* 412 U.S. 470, 474 & n. 6 (1973) (notice of alibi rule that was not reciprocal in criminal discovery was unconstitutional; "This Court has therefore been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial. *See, e. g., Washington v. Texas,* 388 U.S. 14, 22 (1967); *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963). *Cf.* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 Yale L. J. 1149, 1180-1192 (1960)."). Because the defense is not given the same right under Rule 3.10, we believe the proposal is unconstitutional and should be abandoned.

PUBLIC COMMENTS [4.2] ~ FILE LIST

C-2008-178 Walter K. Pyle [4.2]

C-2008-180 SDCBA Criminal Defense [4.2]

C-2008-181 Charles Sevilla [4.2]

C-2008-188b Evan Jenness [4.2]

C-2008-193 CACJ [4.2]

C-2008-197 David L. Kelly [4.2]

C-2008-206 Michael P. Judge [2-100]

C-2008-207 Janice Y Fukai [2-100]

C-2008-208 Thomas Orloff – DA [2-100]

C-2008-210 Bruce M Ramer [4.2]

C-2008-212 Leslie E. McMillan [2-100]

C-2008-213k SDCBA [4.2]

C-2008-219 AG DOJ Thomas Greene [4.2]

C-2008-222 M. Sue Talia [4.2]

C-2008-223 Steven K. Hazen [4.2]

C-2008-230i OCBA [4.2]

C-2008-232j COPRAC [4.2]

C-2008-234c NACDL [4.2]

C-2008-235 Mark Arnold Kern PD [4.2]

C-2008-237 Deborah Kwast OC PD [4.2]

C-2008-253h Chief Trial Counsel [4.2]

THE STATE BAR OF CALIFORNIA

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Your Information

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- ○ Yes
- ◉ No

*** Name** Walter K. Pyle

*** City** Berkeley

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) walt@wfkplaw.com

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 4.2 Communication With a Person Represented By Counsel [2-100]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

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This new rule would allow prosecutors to interview witnesses represented by counsel, but criminal defense lawyers could not.

That is unfair to defense lawyers and their clients, whom the federal Constitution guarantees a right to present a defense.,

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SAN DIEGO CRIMINAL DEFENSE BAR ASSOCIATION

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April 11, 2008

Audrey Hollins
State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule of Professional Conduct, Rule 4.2.

Dear Ms. Hollins,

As members of the criminal defense bar in San Diego, we would like to voice our objection to the proposed change to Rule 2-100. The rule change would first make it an ethical violation to communicate with a "person" known to be represented "in the matter" without permission of counsel. (Proposed Rules of Professional Conduct, Rule 4.2.)

Rule 2-100 now forbids communications with a represented "party" without permission of counsel. The Commentary to the new Rule would exempt law enforcement attorneys from the Rule. In sum, the new rule would impede criminal defense counsel's constitutional duty to investigate a case while not similarly restricting prosecutors. This is unfair, unwise, unnecessary and unconstitutional.

Rule 2-100 (formerly Rule 7-103 of the Rules of Professional Conduct) states that a member of the State Bar shall not communicate directly or indirectly

with a "party" known to be represented by counsel upon a subject of controversy, without the express consent of such counsel. The rule was designed to permit an attorney to function adequately in his or her role while preventing opposing attorney in the case from impeding his or her performance.

The first problem with the proposed change is the language "in the matter." Rule 2-100 leaves no room for doubt who may not be approached without the consent of counsel – a party. Under the new rule, lawyers must wonder if a non-party percipient witness, who should be interviewed, but is represented, is represented "in the matter," and thus cannot be interviewed without permission. As a practical matter such permission will rarely, if ever, be given once the attorney is told the interview concerns a criminal case.

How is counsel for a defendant, who learns a witness is represented, to know if it is "in the matter?" so that permission must be obtained. Defense counsel have an ethical and legal duty is to be competent in the representation of his/her clients. Strickland v. Washington, 466 U.S. 668 (1984). Part of that duty is, upon learning that a witness may have material evidence, to interview the witness. (People v. Shaw (1984) 35 Cal.3d 535, 541 (failure to interview witnesses deemed prejudicial ineffectiveness); *accord* People v. Bess (1984) 153 Cal.App.3d 1053, 1060; People v. Rodriguez (1977) 73 Cal.App.3d 1023, 1032).)

In People v. Pope, 23 Cal.3d 412 (1979), the California Supreme Court set forth the general standard of competency for California criminal defense attorneys: defense counsel must act in a manner expected of reasonably competent attorneys acting as diligent advocates. Pope specifically embraced as part of the state constitutional right to counsel the guidelines embodied in the American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Defense Function (Approved Draft, 1971). It held that certain of these standards are constitutional in scope, requiring the attorney to conduct careful investigations of all defenses of fact available to the defendant. (People v. Pope, *supra* at 23 Cal.3d 412). This duty, of course, includes interviewing available prosecution and potential defense witnesses if possible. It is part of the criminal defense lawyer's duty to "become thoroughly familiar with the factual and legal circumstances of the case ...." (Keenan v. Superior Court, 31 Cal.3d 424, 431 (1984)).

Defense counsel's duty is to the client and the client alone. In De Luca v. Whatley, 42 Cal.App.3d 574 (1972), the trial court sustained a demurrer to a complaint in a civil action against a criminal defense attorney. The plaintiff alleged the defense attorney, in representing his client in a murder case, called the plaintiff to the stand at the preliminary hearing without advising him of his potential jeopardy in testifying, and despite knowing, or chargeable with knowledge, that the witness would incriminate himself on the stand. As a result of his testimony at the preliminary hearing, the witness was charged with conspiracy, murder, and robbery, and, although he was ultimately acquitted of the charges at a trial, he sued the criminal defense attorney for failing to advise him of his rights. The Court of Appeal affirmed the trial court's order of dismissal of the complaint. Justice Otto Kaus found the question of whether the defense attorney owes a duty to the witness easily answered merely by posing it. "When an attorney defends a person accused of crime he has but one intended beneficiary – his client." (42 Cal.App.3d 576.)

The new rule would put defense counsel in a conflict: do I interview a percipient witness who is represented and risk State Bar discipline, or do I fulfill my constitutional duty to my client and investigate the case? *See* California Rules of Professional Conduct, Rule 3-300 (re avoiding adverse Interests), and Rule 3-310 (avoiding representation of adverse interests). Counsel cannot place a witness's interests above that of the client.

> Broadly speaking, conflicts of interest "`embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests.'" (People v. Bonin, supra, 47 Cal. 3d at p. 835, citing ABA, Model Rules. Prof. Conduct (1983) rule 1.7 and com.)" (People v. Castillo (1991) 233 Cal.App.3d 36, 59.)

Not only would there be a conflict of interest, but the rule sets up ineffective assistance of counsel in chilling defense counsel's resolve to investigate (interview) witnesses and thus depriving a client of potential defense witness.

The second problem with the new rule is the express exception language in proposed paragraph (c)(3), which permits "communications authorized by law or a court order." This is to be amplified by the Commentary to make certain the

prohibition on contact in the new rule will not apply to prosecutors – *i.e.*, communications "authorized by law or a court order" are exempt.

This raises two additional issues. First, if the exemption is truly to apply to contacts "authorized by law," then, in light of the legal duty to investigate, defense counsel should be added to the Commentary as also exempt from the rule (except for the limitation for contacts with represented "parties," which should remain as to all attorneys.)

Second, if the exemption is meant only for prosecutors, then the new rule will be tipping the scales of justice to insure prosecution ability to investigate the same witnesses denied to the defense. There are already too many convictions of the innocent and this change has the potential impact of adding to the number.

Inserting new confusion into the duties of counsel to represent clients would be most unfortunate and unwise:

> "Moreover, with regard to the ethical boundaries of an attorney's conduct, a bright line test is essential. As a practical matter, an attorney must be able to determine beforehand whether particular conduct is permissible; otherwise, an attorney would be uncertain whether the rules had been violated until ... he or she is disqualified. Unclear rules risk blunting an advocate's zealous representation of a client. [Citation]."

(Snider v. Superior Court (2003) 113 Cal. App. 4th 1187, 1197-1198.)

The existing rule has the distinction of being such a bright line and has served the profession well since the adoption of rules of professional conduct. The proposed change has vagaries that are bound to cause mischief while, at the same time, chilling the accused's right to effective counsel. We strongly urge a rejection of the proposed amendment.

Michael L. Crowley,
President, San Diego Criminal Defense Bar Association

Christopher J. Plourd
President, Criminal Defense Lawyer's Club of San Diego

THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation

Commenting on behalf of an organization
- ○ Yes
- ◉ No

*** Name** Charles Sevilla

*** City** San Diego

*** State** California

*** Email address** (You will receive a copy of your comment submission.) chuck@charlessevilla.com

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 4.2 Communication With a Person Represented By Counsel [2-100]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ○ AGREE with this proposed Rule
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The rule change is not needed and will only cause problems by changing the clarity of Rule 2-100 (no talking to represented parties without permission) to an obtuse rule stating no talking to persons represented in "the matter". With the current rule, we know who a party is, but there is no way to know whether someone is represented "in the matter". What if I'm defending a serious criminal case and my client tells me that Mr. Jones, then in jail for a DUI, actually did the crime? Is Jones' attorney representing him "in the matter?" To be sure, if I called his lawyer, the latter would say, "Yes" and deny me the right to talk to him. If I don't call the lawyer, then I run the risk of bar discipline when I take a statement and Jones' lawyer writes the Bar.

The exemption for prosecutors also is unfair allowing them unfettered access to witnesses like Jones, while denying it to defense counsel.

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May 30, 2008

Via Email (audrey.hollins@calbar.ca.gov)
and Federal Express

Ms. Audrey Hollins
Office of Professional Competence, Planning & Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Comments Regarding Proposed Revisions to the California Rules of Professional Conduct - Proposed Rules 3.10, 4.2 and 1.5

Dear Ms. Hollins:

I am writing to share with the Rules Revision Commission my comments on three of the pending proposed revisions to the California Rules of Professional Conduct. I write in an individual capacity and not on behalf of any group. By way of background, however, I am the Co-Chair of the National Association of Criminal Defense Lawyers' Ethics Advisory Committee; a long-standing member of the Los Angeles County Bar Association Professional Responsibility & Ethics Committee; and a Board Member of the Los Angeles Chapter of the Federal Bar Association. I regularly lecture and write on criminal defense ethics, professional responsibility and prosecutorial misconduct.

As a criminal defense lawyer, and member of the California Bar for the past two decades, I am particularly troubled by Proposed Rules **3.10**, Comment 2 (CRPC 5-100, Threatening Criminal, Administrative, or Disciplinary Charges, exemption for government lawyers), **4.2**, Comments 19-20 (CRPC 2-100, Communication With a Person Represented by Counsel,

"Communications Authorized by Law or Court Order," exemption for prosecutors), and **1.5(f)** & Comment 2 (CRPC 4-200, Fees for Legal Services, prohibition on nonrefundable retainers).

The first two Proposed Rules (**3.10, 4.2**) contain special exemptions for government lawyers, and would have the effect of holding prosecutors and other government lawyers to lower standards of professional conduct than those which apply to all other members of the California Bar. Such special-interest carve-outs from the Rules of Professional Conduct are unprincipled, may endorse conduct that is prohibited by the California Penal Code, would foster the kind of government misconduct intended to be addressed by Section 1983 of the Civil Rights Act (42 U.S.C. § 1983), and would create irrational disparities in the positions of government and other lawyers.

Special exemptions for government lawyers also are inconsistent with the Congressional intent reflected in 28 U.S.C. § 530B ("An attorney for the Government shall be subject to State laws and rules . . . governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State"). Our justice system relies heavily on government lawyers being held to the highest standards of ethics – not a lower standard effected by special exemptions from the Rules of Professional Conduct.

Proposed Rule **1.5(f)** also would have a particularly adverse effect on the criminal defense community. By making it unethical for lawyers to enter into nonrefundable fee retainer agreements, the rule would prohibit a common form of retention in criminal cases, and could result in many clients of limited means being unable to hire a lawyer. Although the revision appears motivated by concern about unscrupulous lawyers who over-charge their clients, eliminating a discrete form of retainer will not address that problem. It is not the form of the retainer but a lawyer's lack of integrity that causes client over-billing. Indeed, padded hourly billing by dishonest lawyers undoubtedly is a more serious problem in the aggregate than any problems arising from nonrefundable fee retainers. The "unconscionability" standard provides a suitable and uniform standard for the State Bar Attorney Discipline System to use in addressing client complaints about over-billing and appropriately applies regardless of the form of a retainer.

As requested, I have put my comments to these Proposed Rules on separate pages, which accompany this letter. I appreciate greatly the tremendous time and effort that members of the Rules Revision Commission have committed to their important work, and hope that my comments are helpful in preparing the final rules.

Very truly yours,

LAW OFFICES OF EVAN A. JENNESS

Evan A. Jenness

EAJ:dfm

Enclosures

Proposed Rule 4.2, Comments 19-20 (CRPC 2-100, Communication With a Person Represented by Counsel, "Communications Authorized by Law or Court Order," exemption for prosecutors)

Proposed Rule 4.2 would modify Rule 2-100 to make it unethical to communicate with a represented "person" as opposed to "party" (the language of current Rule 2-100). This would impact the investigation of criminal matters by expanding the class of persons with whom an attorney, or one acting at an attorney's direction, may not have *ex parte* communications.

The special-interest exemption for government lawyers in Comments 19-20 of Proposed Rule 4.2 appears to be an effort to revive the discredited Thornburgh Memorandum and end-run Congressional intent that government lawyers be held to the same ethical standards as all other members of the bar in the states in which they practice.

The relatively cryptic statements in Comments 19-20 are clear in only one regard: they describe carve-outs applicable only to prosecutors and those acting at their direction.[2] In material part, they state, that the "authorized by law or a court order" exemption in 4.2(c)(3) "recognizes that prosecutors . . . as authorized by relevant . . . law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. . . . [T]he 'authorized by law' exception . . . is necessary to promote legitimate law enforcement functions that would otherwise be impeded . . . . [The change from "party" to "person"] is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law."

This special exemption for prosecutors appears to be an effort to end-run the 1998 McDade Amendment, 28 U.S.C. 530B, by which Congress put an end to the infamous 1989 Thornburgh Memorandum.[3] In that 'proclamation,' then-Attorney General Richard Thornburgh contended that Justice Department attorneys were not required to comply with state rules of professional conduct where such rules conflicted with the government lawyers' "federal

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[2] The Comments to Proposed Rule 4.2 evidently address prosecutors' concerns that their ability to investigate criminal cases could be adversely impacted by the proposed change. I understand that Al Menaster, the Head Deputy for the Appellate Branch of the L.A. County Public Defender's Office, spoke before the Commission and voiced concerns about the one-sided nature of the exemption. I am troubled that the views of this learned and experienced lawyer, and a significant "stakeholder" regarding criminal justice, appear not to be reflected in the Proposed Rule.

[3] Title 28 U.S.C. § 530B provides: "An attorney for the Government shall be subject to State laws and rules . . . governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."

responsibilities, as determined by federal law and the Attorney General," because the Supremacy Clause would "forbid the states from regulating the attorneys' conduct" in such cases. *In re John Doe*, 801 F. Supp. 478, 492-93 (D.N.M. 1992) (quoting Thornburgh Memorandum). In relevant part, the Thornburgh Memorandum purported to authorize DOJ attorneys to communicate with represented individuals behind their lawyers' backs under various circumstances - a view rejected by courts even prior to Congress' intervention via the McDade Amendment. *See United States v. Lopez*, 4 F.3d 1455, 1458 (9th Cir. 1992) (affirming district court's "trenchant analysis of the inefficacy of the" Thornburgh Memorandum); *United States ex rel O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998) (Attorney General not authorized by law to exempt federal prosecutors from rules of professional conduct).

The exemption seems to be based on a fiction that the ethics of prosecutors are superior to that of other lawyers. In fact, there is no empirical evidence whatsoever supporting this fiction. Moreover, given the relatively greater damage that can be done by an unscrupulous prosecutor, it would make sense to hold them to higher – not lower – standards of professional conduct.

This type of special-interest exemption for prosecutors encourages misconduct by placing prosecutors "above the law," and undermines clear Congressional intent. It also is unnecessary. The general exemption for *all* lawyers with respect to communications that are "authorized by law or court order" (Proposed Rule 4.2(c)(3)) addresses the only legitimate concern expressed by these comments – that a lawyer not be subjected to discipline for engaging in conduct that is authorized by law or court order.

PROPOSED RULE (CLEAN VERSION)

Rule 4.2: Communication With a Person Represented By Counsel

(a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

(b) For purposes of this Rule, a "person" includes:

(1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization; or

(2) A current employee, member, agent or other constituent of a represented organization if the subject matter of the communication is any act or omission of the employee, member, agent or other constituent in connection with the matter, which may be binding upon or imputed to the organization for purposes of civil or criminal liability, or if the statement of such person may constitute an admission on the part of the organization.

(c) This Rule shall not prohibit:

(1) Communications with a public official, board, committee or body; or

(2) Communications initiated by a person seeking advice or representation from an independent lawyer of the person's choice; or

(3) Communications authorized by law or a court order.

(d) When communicating on behalf of a client with any person as permitted by this Rule, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(e) In any communication permitted by this Rule, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

(f) A lawyer for a corporation, partnership, association or other organization shall not represent that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true

(g) As used in this Rule, "public official" means a duly-appointed or elected public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization.

Comment

Overview and Purpose

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] As used in paragraph (a), "the subject of the representation," "matter," and "person" are not limited to a litigation context. This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[5] The prohibition against "indirect" communication with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent or investigator.

[6] This Rule does not prohibit communications with a represented person, or an employee, member, agent, or other constituent of a represented organization, concerning matters outside the representation. For example, the existence of a controversy, investigation or other matter between the government and a private person, or between two organizations, does not prohibit a lawyer for either from communicating with the other, or with nonlawyer representatives of the other, regarding a separate matter.

Communications Between Represented Persons

[7] This Rule does not prohibit represented persons from communicating directly with one another, and a lawyer is not prohibited from advising the lawyer's client that such communication may be made. A lawyer may advise a client about what to say or not to say to a represented person and may draft or edit the client's communications with a represented person, subject to paragraph (e).

[8] This Rule is not intended to prevent a lawyer who is a party to a matter from communicating directly or indirectly with a person who is represented in the matter. To avoid possible abuse in such situations, the lawyer for the represented person may advise his or her client (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Knowledge of Representation and Limited Scope Representation

[9] This Rule applies where the lawyer has actual knowledge that the person to be contacted is represented by another lawyer in the matter. However, knowledge may be inferred from the circumstances. (See Rule 1.0.1.)

[10] When a lawyer knows that a person is represented by another lawyer on a limited basis, the lawyer may communicate with that person with respect to matters outside the scope of the limited representation. (See Comment [6].) In addition, this Rule is not intended to prevent a lawyer from communicating with a person who is represented by another lawyer on a limited basis where the lawyer who seeks to communicate does not know about the other lawyer's limited representation because that representation has not been disclosed. In either event, a lawyer seeking to communicate with such person must comply with paragraphs (d) and (e) or with Rule 4.3.

Represented Organizations and Constituents of Organizations

[11] "Represented organization" as used in paragraph (b) includes all forms of private and governmental organizations, such as corporations, partnerships, limited liability companies, and unincorporated associations.

[12] As used in paragraph (b)(1) "managing agent" means an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.

[13] Paragraph (b)(2) applies to current employees, members, agents, and constituents of the organization, who, whether because of their rank or implicit or explicit conferred authority, are authorized to speak on behalf of the organization in connection with the subject matter of the representation, with the result that their statements may constitute an admission on the part of the organization under the applicable California laws of agency or evidence. (See Evidence Code §1222.)

[14] If an employee, member, agent, or other constituent of an organization is represented in the matter by his or her own counsel, the consent by that counsel is sufficient for purposes of this Rule.

[15] [*This Rule generally does not apply to communications with an organization's in-house lawyer who is acting as a legal representative of the organization where the organization is also represented by outside legal counsel in the matter that is the subject of the communication. However, this Rule does apply when the in-house lawyer is a "person" under paragraph b(2) with whom communications are prohibited by the Rule."*][***]

Represented Government Organizations

[16] Paragraph (c)(1) recognizes that when a lawyer communicates on behalf of a client with a governmental organization special considerations exist as a result of the rights conferred under the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution. A lawyer seeking to communicate on behalf of a client with a governmental organization must comply with paragraphs (d) and (e) when the lawyer knows the governmental organization is represented in the matter that is the subject of the communication, and otherwise must comply with Rule 4.3.

Represented Person Seeking Second Opinion

[17] Paragraph (c)(2) is intended to permit a lawyer who is not already representing another person in the matter to communicate with a person seeking to hire new counsel or to obtain a second opinion where the communication is initiated by that person. A lawyer contacted by such a person continues to be bound by other Rules of Professional Conduct. (See, e.g., Rules 7.3 and 1.7.)

Communications Authorized by Law or Court Order

[18] This Rule is intended to control communications between a lawyer and persons the lawyer knows to be represented by counsel unless a statutory scheme, court rule, case law, or court order overrides the Rule. There are a number of express statutory schemes which authorize communications that would otherwise be subject to this Rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity.

[19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations, as authorized by relevant federal and state, constitutional, decisional and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. Although the "authorized by law" exception in these circumstances may run counter to the broader policy that underlies this Rule, nevertheless, the exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that would otherwise be impeded. Communications under paragraph (c)(3) implicate other rights and policy

[***] The Commission has not yet adopted this comment, but desires public input before considering whether to adopt a comment of this type.

considerations, including a person's right to counsel under the 5th and 6th Amendments of the U.S. Constitution, and parallel provisions of the California Constitution (Cal. Const., Art. I, §15), that are beyond the scope of this Comment. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a government lawyer engages in misconduct or unlawful conduct.

[20] Former Rule 2-100 prohibited communications with a "party" represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a "person" represented by another lawyer. This change is not intended to preclude legitimate communications by or on behalf of prosecutors, or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations, that were recognized by the former Rule as authorized by law, or to expand or limit existing law that permits or prohibits communications under paragraph (c)(3). This change also is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law.

[21] A lawyer who is uncertain whether a communication with a represented person is permissible might be able to seek a court order. A lawyer also might be able to seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

Prohibited Objectives of Communications Permitted Under This Rule

[22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).

[23] In communicating with a current employee, member, agent, or other constituent of an organization as permitted under paragraph (b)(2), including a public official or employee of a governmental organization, a lawyer must comply with paragraphs (d) and (e). A lawyer must not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of the organization. (See [Rule 4.4.]) Obtaining information from a current or former employee, member, agent, or other constituent of an organization that the lawyer knows or reasonably should know is legally protected from disclosure may also violate Rules [4.4], 8.4(c) and 8.4(d).

[24] When a lawyer's communications with a person are not subject to this Rule because the lawyer does not know the person is represented by counsel in the matter, or because the lawyer knows the person is not represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

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June 2, 2008

Ms. Audrey Hollins
The State Bar of California
Office of Professional Competence,
Planning and Development
180 Howard Street
San Francisco, CA 94105

RE: OPPOSITION TO PROPOSED NEW STATE BAR RULE 2-100

Dear Ms. Hollins:

I write this letter on behalf of California Attorneys for Criminal Justice. Our organization serves the criminal defense bar of California. Upon reviewing Proposed New State Bar Rule 2-100, substantial concerns arise. The cumulative concerns lead us to conclude that this rule should be rejected by the State Bar.

Currently, Rule 2-100 of the Rules of Professional Conduct bars lawyers from communicating directly with a represented "party": "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a *party* the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." (Current Rules of Professional Conduct, Rule 2-100(A); emphasis added.)

The Commission for the Revision of the Rules of Professional Conduct (hereafter "Commission") has submitted to the State Bar a proposed rule change would change "party" in this rule to "person": "In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a *person* the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." (Proposed Rules of Professional Conduct, Rule 4.2; emphasis added.)

We oppose this proposed change. The Commission attempts to justify this change by asserting that the term "party" has actually always been understood to mean "person" in the Rule 2-100 context and that this change is merely a clarification as opposed to a change. Contrary to the claim of the Commission, it has always been the understanding of the legal community that "party" did *not* mean "person". (See *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798.) Moreover, there are good reasons to make this distinction in this context.

We fear that changing "party" to "person" in Rule 2-100 will substantially impair the ability of prosecutors to investigate criminal offenses. We also fear that this change will substantially impair the

ability of defense counsel to defend persons charged with criminal offenses.

The rule, as it currently reads and as it is currently understood, is clear. The proposed change would inject uncertainty into this area, and would risk impairing both the prosecution and the defense in criminal cases from being effective. For these reasons we oppose this proposed change. Since nothing here is broken, nothing should be fixed. Rule 2-100 should not be changed to insert "person" for "party."

Respectfully Submitted,



Rickard Santwier
President, Board of Governors
California Attorneys for Criminal Justice

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
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DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation On behalf of KERN COUNTY PUBLIC DEFENDER

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** DEPUTY PUBLIC DEFENDER DAVID L. KELLY

*** City** BAKERSFIELD

*** State** California

*** Email address** (You will receive a copy of your comment submission.) kellyd@co.kern.ca.us

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Other/Multiple Rules

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ( ) AGREE with this proposed Rule
- ( ) DISAGREE with this proposed Rule
- ( ) AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Please see attached comments, provided by Office of LA County Public Defender.

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You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the next to **Attachment**.

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OVERALL COMMENT

Overall, the Comments to the proposed rules are too long and too confusing. To the extent that they are necessary to explain the rule, the rule needs to be redrafted because it is too vague. Ethical rules are supposed to provide clear guidance.

> Moreover, with regard to the ethical boundaries of an attorney's conduct, a bright line test is essential. As a practical matter, an attorney must be able to determine beforehand whether particular conduct is permissible; otherwise, an attorney would be uncertain whether the rules had been violated until . . . he or she is disqualified. Unclear rules risk blunting an advocate's zealous representation of a client. (*Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1197-1198, quoting *Nalian Truck Lines, Inc. v. Nakano Warehouse & Transportation Corp.* (1992) 6 Cal.App.4th 1256, 1264.)

If the practitioner has to slog through endless commentary to interpret what the rule is supposedly saying, the drafters have failed in their efforts. The rules become a trap for the practitioner who is not an expert in ethics. Many of the Comments below present this very problem. The rules should be redrafted to ensure that the rule itself is as clear as is humanly possible.

RULE 1.7

This rule changes the terminology of conflicts from "actual" versus "potential" to "direct" versus "indirect." The Comments try to clarify the meaning of the rule, but at one point the Comments admit that there is no single definition of when a lawyer's actions are "directly" adverse to a client.

Moreover, sections 1(a) and (c) seem duplicative. David McGowan, a professor at the University of San Diego School of Law, has suggested the following rewrite combining sections 1(a) and (c) which we think is much clearer: "(a) Representation directly adverse to current client. A lawyer shall not accept or continue representation of a client if the lawyer's representation of that client will be directly adverse to another client the lawyer currently represents, without informed written consent from each client."

RULE 1.16

There is no real reason to change Rule 3-700. The changes found in proposed rule 1.16 add nothing except verbiage and complexity and do absolutely nothing to either help the client or aid the member. This seems to be change for the sake of change.

Even though the proposed changes are not overly substantive, there are some areas of concern. The existing rule states that a member shall withdraw from employment if:

"The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;"

The proposed rule omits this language. Although the "without probable cause" language is somewhat unclear, the rest of the rule is perfectly clear, reasonable, and proper. This language should not be omitted but should remain as a condition for mandatory withdrawal.

The proposed rule makes withdrawal permissive when the client is pursuing criminal conduct or has hired the lawyer to pursue criminal conduct. Although similar language has been in the permissive withdrawal section for years, it seems that this should be mandatory withdrawal. Seeking to pursue criminal conduct is much more serious a breach than engaging in conduct that violates the Bar rules, which requires mandatory withdrawal. A breach of the criminal rules is more serious and should require mandatory withdrawal.

The portion of the rule requiring the lawyer to release the client's papers and property to the client needs expanding. As the Comment suggests, there are times when a statute or protective order prohibits releasing certain documents or information to a client. The rule (subdivision (e)(1)) should be amended to state "shall release to the client, to the client's attorney, or to a court . . . etc."

The first Comment states that a "lawyer has the obligation or option to withdraw only in the circumstances and only in the manner described in this Rule." This is too restrictive. A rule cannot possibly contemplate every situation that may arise, and that sentence fails to anticipate those perhaps rare but difficult situations not squarely encompassed by the provisions of the rule. The sentence should be deleted.

Comment 7 needs to be rewritten. Comment 7 states, "If a tribunal denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order . . . This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest." While it is true that the lawyer cannot simply abandon the client if a court denies permission to withdraw, conflicts (particularly in criminal cases) present a dilemma that will result in the reversal of a criminal conviction. The lawyer's duty is ALWAYS to the client – not to the court and not to the Bar or its rules. An attorney faced with a conflict should be encouraged to file a writ petition to get off a case due to a conflict. It is NOT a violation of the Bar rules to continue to litigate the denial of a motion to withdraw. This Comment should reflect that reality.

RULE 3.4

This is a new rule that attempts to codify the *Meredith* line of cases and existing statutes which make it a crime to destroy evidence. However, it is much too vague about what the intent requirement for a violation is. It uses the term "unlawfully," but does not define it. Many things, such as an inadvertent violations, can be considered to be "unlawful." It also does not require that the lawyer knowingly or intentionally engage in the unlawful obstruction or destruction. The rule should be redrafted to include a specific intent requirement similar to that required for a misdemeanor violation for destroying evidence (see Pen. Code § 135), and to define what "unlawful" means.

Subsection (b) of the proposed rule states,

> A lawyer shall not: . . . (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;

In the subsequent Comment section of the rule, there is a Comment which reads,

> [3] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule. Nor is this Rule intended to establish a standard that governs civil or criminal discovery disputes.

This rule and Comment are entirely unclear. Are discovery violations violative of the new rule or not? If one cannot answer this question instantly, this is an unreasonably unclear standard.

It appears that the purpose of the rule is to exempt violations of the civil discovery rules and the criminal discovery statutes from being included in the ethical ban against a lawyer who acts to "suppress any evidence." However, the statement that a violation does not "by itself establish a violation of this Rule" simply ensures that every discovery dispute will be claimed by the opposing party to be *more* than mere violation of the statute or discovery rules.

There is a great danger that adoption of the rule as written will result in the State Bar being deluged with claims that the rule was violated by parties during discovery *in every civil and criminal case*. As everyone working in the judicial system knows, discovery disputes are endemic. In every dispute, one party claims a violation of the discovery rules and statutes. Surely, the State Bar should not be involved in resolving every such dispute.

It is the rare discovery violation that should rise to the level of an ethical violation. If the intent of the drafters were to permit some discovery violations to be included within the sweep of this rule, they have failed to articulate a clear line. Frankly, we doubt that any clear line can be drawn in this complex area.

We believe that the only viable resolution of this problem is to clearly and explicitly exempt statutory discovery violations from the scope of the suppression rule. Instead of burying that point in a Comment, we urge adoption of the rule with the exception written right into the rule itself, as follows, with the modification in italics:

> A lawyer shall not: . . . (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce; *this rule does not apply to violations of the criminal discovery statutes*;

In the alternative, if inclusion of this exception is not acceptable, we recommend that subsection (b) simply not be adopted at all, to avoid these problems.

Subsection (h) also is new, and also is too vague. Is telling a potential witness that he or she is not obligated to talk to the other side a violation? Unclear. Again, ethical rules should be crystal clear.

Subsection (f) of the proposed rule states,

> A lawyer shall not: . . . (f) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

This rule seems to be designed to prohibit willful disobedience of court rules. The stated exception, however, appears to provide a blanket exception when the lawyer openly refuses to follow the rule based solely on an assertion that the rule does not obligate the lawyer. The exception has no apparent requirement that the open refusal to follow the rule is based on any well-founded reason and therefore appears to provide a way to avoid the application of the rule simply by the lawyer stating openly that he or she is refusing to follow the rule.

RULE 3.5

We oppose the substantive changes to current rule 5-320 contained in paragraphs (d) through (i), delineating prohibited and improper conduct with jurors. Existing authority by the courts and the Legislature effectively protect jurors while simultaneously balancing and

maintaining an attorney's ability to investigate juror misconduct. The proposed changes do nothing to afford jurors any greater protection, however they compromise an attorney's ability to investigate juror misconduct.

The California Supreme Court has determined that the courts possess "inherent power to protect both juror safety and juror privacy." (*Townsend v. Superior Court* (1999) 20 Cal.4th 1084, 1091.) The California Supreme Court states, "Attorney contact with jurors is permissible, but subject to sanctions for nonconsensual or *unreasonable contact*." (*Id*. at 1087, emphasis added.) ". . . [T]win concerns of juror safety and juror privacy are prompted by varying circumstances . . . [such as when] the losing party to a lawsuit or criminal prosecution will initiate postrial contact with the jurors to discuss the case, in an effort to discover whether any juror committed misconduct." (*Id*. at p. 1091.) The California Supreme Court recognized that the concerns regarding intrusion upon discharged jurors "must be balanced with the equally weighty public policy that criminal defendants are entitled to jury verdicts untainted by prejudicial juror misconduct. (*Id.* at p. 1092.)

Code of Civil Procedure section 206 affords more than adequate protection to jurors' safety and privacy, giving jurors notice of their right not to discuss their deliberations or their verdict and provides that "any *unreasonable* contact with a juror by the defendant, his or her attorney or representative, or by the prosecutor, or his or her representative, without the juror's consent shall be immediately reported to the trial judge." (California Code of Civil Procedure section 206 (d), emphasis added.) Section 206 (e) provides that any violation of this section shall be considered a violation of a lawful court order.

Rule 5-320, as currently drafted, prohibits questions or Comments to a juror that are "intended to harass or embarrass the juror." Paragraph (g) of State Bar Rule 3.5 deletes this language and drafts four subsections, the first three taken verbatim from ABA Model Rule which govern: (1) communications prohibited by law or court order; (2) communications made when a juror has made known to the lawyer his or her desire not to communicate with the lawyer; (3) communications involving misrepresentation, coercion, duress or harassment; and (4) communications intended to influence a juror's action in future jury service.

These rules encourage capricious disciplinary actions because they set forth a bright-line standard for inappropriate communications instead of creating a "reasonableness" standard in assessing the propriety of communications between jurors and attorneys. The California Legislature and courts employ a "reasonable" standard in assessing the appropriateness of communication between a juror and an attorney. In states in which no legislation exists to regulate communication between jurors and attorneys, ABA Rules serve a useful purpose by filling a void in the law. In California, however, the State Bar should defer to the courts and existing rules and legislation rather than incorporate the ABA Model

Rules and risk creating vagaries that chill an attorney's ability to investigate juror misconduct. The proposed rule upsets the existing equilibrium created by the courts and Legislature and may motivate attorneys to abandon necessary investigation of juror misconduct to shield themselves from contact with jurors which could be misconstrued and subject them to discipline.

The State Bar should avoid superfluous rules which needlessly encumber attorneys. Juror misconduct is a much more prolific problem than inappropriate communication with jurors by attorneys. Attorneys must be able to investigate juror misconduct in a manner that does not subject them to capricious disciplinary proceedings. An attorney's ability to engage in legitimate investigation to determine whether juror misconduct compromised the integrity of a jury's verdict should not be sacrificed for the sake of expediency. The State Bar would more effectively accomplish its purpose to "protect the public and . . . promote respect and confidence in the legal profession" (www.calsb.org) by drafting a simple rule which incorporates existing legislation and the judiciary's "inherent power to protect both juror safety and juror privacy." (*Townsel v. Superior Court*, *supra*, 20 Cal.4th 1084, 1092.) Such a rule would provide the safeguards necessary to ensure jurors' privacy and safety without jeopardizing an attorney's ability to effectively investigate juror misconduct. We oppose the proposed changes to Rule 5-320 (d) since the changes are unnecessary and they convolute the existing authority of the courts and Legislature to regulate permissible communications between jurors and attorneys.

RULE 4.2

Currently, Rule 2-100 of the Rules of Professional Conduct bars lawyers from communicating directly with a represented "party": "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." (Current Rules of Professional Conduct, Rule 2-100(A).)

The Commission for the Revision of the Rules of Professional Conduct (hereafter "Commission") has submitted to the State Bar a proposed rule change that would change "party" in this rule to "person": "In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." (Proposed Rules of Professional Conduct, Rule 4.2.)

We oppose this change. The Commission attempts to justify this change by asserting that the term "party" has actually always been understood to mean "person" in the Rule 2-100

context and that this change is merely a clarification as opposed to a change. First, contrary to the claim of the Commission, it has always been the understanding of the legal community that "party" did *not* mean "person," and there are good reasons to make this distinction in this context. Second, the attempt by the Commission to exempt the prosecution from application of the amended rule raises serious reciprocity issues. Third, the language of the exception the Commission wrote to protect the prosecution would also permit the defense to interview persons represented by counsel, and thus would mean that the defense would not be restrained by the proposed rule change.

Here is the Commission's position, articulated in the explanation submitted to the State Bar on the proposed rule change:

> The current rule refers to communications with a represented "party." The proposed rule replaces the term "party" with the term "person." This change tracks the comparable ABA Model Rule, Model Rule 4.2. The Commission believes this is a clarifying change which makes clear that the client protection afforded by current rule 2-100 extends to a person who is represented by a lawyer in a matter, but who is not a party to a legal proceeding pending before a tribunal or a party represented in a transactional matter. One example of such a person would be a witness represented by a lawyer in connection with a civil litigation matter where the witness is not also one of the litigants. The Commission believes this historical interpretation of the rule was called into doubt by a recent decision by the State Bar Court. (See *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798 [no violation of rule 2-100 found where respondent lawyer, who represented plaintiffs in a negligence action against apartment owner defendant, communicated with an incarcerated person, who was not a party to the negligence action but was represented by defense counsel in criminal proceedings arising from the same facts as the negligence action].)

Notably, the Commission cites *nothing* in support of its assertion that historically "party" has always meant "person." We are unable to find anything supporting the Commission's position. Further, in every ethics training program we have ever seen, the speaker has emphasized the importance of the "party" versus "person" distinction, often with hypotheticals making the fact of a distinction clear.

Of course, the key decision on this topic is in fact the State Bar Court opinion cited by the Commission, *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798. The State Bar Court examined this precise question in considerable detail, citing many cases and secondary authorities. The State Bar Court stated, "We find scant authority in the

drafting history of rule 2-100, the rules of statutory construction, and the decisional law for construing rule 2-100 so as to prohibit contacts with a non-party." The State Bar Court stated, "Discipline has been imposed under rule 2-100 and its predecessors only in those instances when a member made an ex parte communication with an opposing party." The State Bar Court concluded, "Finding no rule of construction or persuasive legal precedent to support a broad interpretation, we conclude we are not at liberty to re-write rule 2-100, which by its plain language is limited to a represented "party." The State Bar Court then found Mr. Dale not culpable for his contact with a *person* who was represented by counsel, where that contact was without the counsel's permission.

An examination of *Dale* completely undermines the Commission's assertion that the "historical interpretation of the rule" is that "party" means "person." The legal profession uses terms of art, and the term "party" is such a term. It has always meant "party" and continues to do so today. The proposed rule change is not trivial or meaningless. It will in fact change the meaning of this rule.

Because the Commission claims that it is simply restating the rule as it has always been, the Commission does not attempt to defend the change it proposes. However, the proposed change will make a difference in the practice of criminal law, and that change will not be trivial.

The defense lawyer in a criminal case sometimes finds it necessary, on behalf of a client, to seek an interview with a person represented by counsel, where that person is not a party. Two situations arise where this becomes an issue. One is the "Amber Frey" situation. In the Scott Peterson murder trial, witness Amber Frey was represented by counsel. That representation was not unrelated to the murder trial; the representation was solely with respect to that trial. Obviously, both the prosecution and the defense wanted to interview Ms. Frey, a key witness. Under the rule as it is currently written, there would be no impediment to such an interview by either side, even in the absence of permission from Ms. Frey's counsel.

This situation more directly affects the prosecution when a prosecutor is investigating a criminal accusation to determine whether to file charges. At the Commission hearings, a prosecutor raised the following common situation: the prosecutor has a report that a defendant has molested his teenage step-daughter. The prosecutor goes to interview the daughter, for whom the defendant has hired counsel. Under the rule as it is currently written, there would be no impediment to such an interview.

A second situation which arises is when a defendant tells his lawyer that the person who really committed the offense is now in jail. When the lawyer checks on this other

person, the lawyer finds that the other person is in jail for his own unrelated case. The other person's lawyer will never agree to permit the first lawyer to interview the other person, given that the point of the interview is to obtain a confession to another crime. Yet this is often the only way in which the first lawyer can vigorously defend his own client and seek the truth that his client is in fact innocent. Under the rule as it is currently written, there is no impediment to such an interview. This is commonly done under the current rule.

The impact of the proposed rule change on these two situations is far from clear. Again, the new rule would read, "In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." (Proposed Rules of Professional Conduct, Rule 2-100(A).) The problem is the phrase "in the matter." Certainly, an argument can be made that Amber Frey was represented by another lawyer "in the matter," since the matter was the Scott Peterson murder trial. It can also be argued that the step-daughter in the above example is represented by a lawyer "in the matter."

However, is the jail inmate whom the lawyer reasonably believes is the actual guilty party represented by another lawyer "in the matter"? Certainly, the matter on which the jail inmate is pending trial is not the *same* matter as the one the lawyer is investigating. But the jail inmate's confession will surely have an impact on his own case. Even if he is not charged with the other crime, his sentence may be aggravated by the knowledge of the court and the prosecutor that the inmate has committed additional serious crimes.

This leaves counsel in the position of guessing whether an interview that counsel believes is necessary to prosecute or defend a criminal case is permitted under the proposed rule change. We believe it is imperative to ensure that ethical rules are crystal clear.

> Moreover, with regard to the ethical boundaries of an attorney's conduct, a bright line test is essential. As a practical matter, an attorney must be able to determine beforehand whether particular conduct is permissible; otherwise, an attorney would be uncertain whether the rules had been violated until . . . he or she is disqualified. Unclear rules risk blunting an advocate's zealous representation of a client. (*Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1197-1198, quoting *Nalian Truck Lines, Inc. v. Nakano Warehouse & Transportation Corp.* (1992) 6 Cal.App.4th 1256, 1264.)

We believe that it is essential that prosecutors and defense lawyers are able to investigate and present their cases as completely as possible, to further the goal of "facilitating the ascertainment of truth in connection with legal proceedings." (*Britt v.*

Superior Court (1978) 20 Cal.3d 844, 857.) We believe that the proposed rule change will inject uncertainty into an area where no uncertainty currently exists. If, as the Commission intends, the proposed rule change actually does change "party" to "person" and thereby does change the scope of the rule, the consequences will be damaging to both sides in criminal cases, and ultimately damaging to the goal of the ascertainment of truth. If changing "party" to "person" makes no change, then the term should not be changed.

LACK OF RECIPROCITY

The Commission recognizes the opposition of the prosecution to the proposed rule change. The Commission's solution is write an exception to permit the prosecution to interview persons represented by counsel in the matter. Here is the Commission's position, articulated in the explanation submitted to the State Bar on the proposed rule change:

> The Commission anticipates that the proposed change from "party" to "person"will be identified by public Commentators as a key policy issue for the State Bar. In connection with the Commission's open session deliberations on the Rule, representatives of the California Attorney General, the California District Attorneys Association and other interested persons expressed concerns that the amendment would be a major substantive change and would impair longstanding investigative and prosecutorial practices. The Commission considered these concerns and determined that the express exception language in proposed paragraph (c)(3), which permits "communications authorized by law or a court order" obviated the concerns. The Commission, however, also determined that paragraph (c)(3) should be amplified with new commentary to make clear that authorized investigative and prosecutorial practices are not intended to be affected by the change from "party" to "person."

If the proposed exception coupled with the commentary does in fact create an exception for prosecutors, permitting prosecutors to interview persons represented by counsel while denying the right of criminal defense lawyers to interview those very same persons, this would raise a serious constitutional issue of lack of reciprocity. "We hold that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants. Since the Oregon statute did not provide for reciprocal discovery, it was error for the court below to enforce it against petitioner, and his conviction must be reversed." (*Wardius v. Oregon* (1973) 412 U. S. 470, 472.) Due Process bars adoption of non-reciprocal rules which treat defendants differently from the prosecution.

If the proposed rule with its exception is adopted, the defense bar will challenge any case in which the prosecution relies on this change to interview a witness represented by counsel. The defense will move to suppress any statement obtained by a prosecutor who relied on the proposed rule change. The defense will further move to dismiss any case in which the prosecutor relied on the proposed rule change. The lack of reciprocity in the proposed rule change thus raises serious constitutional issues.

A way to avoid the lack of reciprocity in carving out an exception for the prosecution while denying one to the defense would be to carve out exceptions for both sides in criminal cases. The way to do this would be to promulgate two ethical rules, one applicable to criminal cases, one applicable to civil cases. Here is how the rules might read:

> In criminal actions, in representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a PARTY the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.
>
> In civil actions, in representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a PERSON the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

THE EXCEPTION ALSO APPLIES TO THE DEFENSE

As noted, the Commission purports to solve the problem of prosecutors being denied the right to interview persons represented by counsel by inclusion of an exception for "communications authorized by law or a court order." The Commission believes that the scope of this exception is made clear by the commentary, which mentions prosecutors.

However, the exception itself does not limit its own scope to prosecutors, nor can it, we think, given the reciprocity problem just discussed. But this means that *any* communication "authorized by law or a court order" is now exempt.

The Sixth Amendment to the United States Constitution affords criminal defendants the right to counsel. That constitutional right to counsel includes the duty to thoroughly investigate possible defenses. "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." (1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp., quoted in *Rompilla v. Beard* (2005) 545 U.S. 374, 387, 125 S.Ct. 2456, 2466.)

Defense counsel's Sixth Amendment duties include the duty to attempt to interview witnesses who might assist the defense of the case, even if those witnesses are represented by counsel who refuse to permit such interviews. Such interviews would thus be "authorized by law." In fact, the Sixth Amendment would justify interviewing an actual co-defendant who is literally a party to the action. Perhaps the Sixth Amendment can be reconciled with the current rule. However, if the rule is amended to specifically exempt "communications authorized by law," the rule will not permit such interviews. One assumes that this is not the intent of the Commission, but it is the result of the proposed changes.

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PUBLIC DEFENDER

EXECUTIVE OFFICE

May 27, 2008

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, CA 94105

Dear Ms. Hollins:

The two Public Defender agencies in the County of Los Angeles have collaborated in reviewing the proposed amended Rules of Professional Conduct of the State Bar of California developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. Our review was conducted by seven highly experienced trial and appellate counsel. Their comments are enclosed.

Our effort has been coordinated by Mr. Albert Menaster, the Head Deputy of the Appellate Branch of the Public Defender's Office. If you have any questions regarding our comments, please contact him at (213) 974-3058.

Very truly yours,

MICHAEL P. JUDGE
Public Defender
Los Angeles County

JANICE Y. FUKAI
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EXECUTIVE OFFICE

June 2, 2008

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, CA 94105

Dear Ms. Hollins:

Currently, Rule 2-100 of the Rules of Professional Conduct bars lawyers from communicating directly with a represented "party:" "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a *party* the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." (Current Rules of Professional Conduct, Rule 2-100(A); emphasis added.)

The Commission for the Revision of the Rules of Professional Conduct (hereafter "Commission") has submitted to the State Bar a proposed rule change would change "party" in this rule to "person:" "In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a *person* the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." (Proposed Rules of Professional Conduct, Rule Rule 4.2; emphasis added.)

We oppose this proposed change. The Commission attempts to justify this change by asserting that the term "party" has actually always been understood to mean "person" in the Rule 2-100 context and that this change is merely a clarification as opposed to a change. Contrary to the claim of the Commission, it has always been the understanding of the legal community that "party" did *not* mean "person." (See *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798.) Moreover, there are good reasons to make this distinction in this context.

We fear that changing "party" to "person" in Rule 2-100 will substantially impair the ability of prosecutors to investigate criminal offenses. We also fear that this change will substantially impair the ability of defense counsel to defend persons charged with criminal offenses.

The rule, as it currently reads and as it is currently understood, is clear. The proposed change would inject uncertainty into this area, and would risk impairing both the prosecution and the defense in criminal cases from being effective. For these reasons we oppose this proposed change. Since nothing here is broken, nothing should be fixed. Rule 2-100 should not be changed to insert "person" for "party."

Sincerely,

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

OVERALL COMMENT

Overall, the Comments to the proposed rules are too long and too confusing. To the extent that they are necessary to explain the rule, the rule needs to be redrafted because it is too vague. Ethical rules are supposed to provide clear guidance.

> Moreover, with regard to the ethical boundaries of an attorney's conduct, a bright line test is essential. As a practical matter, an attorney must be able to determine beforehand whether particular conduct is permissible; otherwise, an attorney would be uncertain whether the rules had been violated until . . . he or she is disqualified. Unclear rules risk blunting an advocate's zealous representation of a client. (*Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1197-1198, quoting *Nalian Truck Lines, Inc. v. Nakano Warehouse & Transportation Corp.* (1992) 6 Cal.App.4th 1256, 1264.)

If the practitioner has to slog through endless commentary to interpret what the rule is supposedly saying, the drafters have failed in their efforts. The rules become a trap for the practitioner who is not an expert in ethics. Many of the Comments below present this very problem. The rules should be redrafted to ensure that the rule itself is as clear as is humanly possible.

RULE 1.7

This rule changes the terminology of conflicts from "actual" versus "potential" to "direct" versus "indirect." The Comments try to clarify the meaning of the rule, but at one point the Comments admit that there is no single definition of when a lawyer's actions are "directly" adverse to a client.

Moreover, sections 1(a) and (c) seem duplicative. David McGowan, a professor at the University of San Diego School of Law, has suggested the following rewrite combining sections 1(a) and (c) which we think is much clearer: "(a) Representation directly adverse to current client. A lawyer shall not accept or continue representation of a client if the lawyer's representation of that client will be directly adverse to another client the lawyer currently represents, without informed written consent from each client."

RULE 1.16

There is no real reason to change Rule 3-700. The changes found in proposed rule 1.16 add nothing except verbiage and complexity and do absolutely nothing to either help the client or aid the member. This seems to be change for the sake of change.

Even though the proposed changes are not overly substantive, there are some areas of concern. The existing rule states that a member shall withdraw from employment if:

"The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;"

The proposed rule omits this language. Although the "without probable cause" language is somewhat unclear, the rest of the rule is perfectly clear, reasonable, and proper. This language should not be omitted but should remain as a condition for mandatory withdrawal.

The proposed rule makes withdrawal permissive when the client is pursuing criminal conduct or has hired the lawyer to pursue criminal conduct. Although similar language has been in the permissive withdrawal section for years, it seems that this should be mandatory withdrawal. Seeking to pursue criminal conduct is much more serious a breach than engaging in conduct that violates the Bar rules, which requires mandatory withdrawal. A breach of the criminal rules is more serious and should require mandatory withdrawal.

The portion of the rule requiring the lawyer to release the client's papers and property to the client needs expanding. As the Comment suggests, there are times when a statute or protective order prohibits releasing certain documents or information to a client. The rule (subdivision (e)(1)) should be amended to state "shall release to the client, to the client's attorney, or to a court . . . etc."

The first Comment states that a "lawyer has the obligation or option to withdraw only in the circumstances and only in the manner described in this Rule." This is too restrictive. A rule cannot possibly contemplate every situation that may arise, and that sentence fails to anticipate those perhaps rare but difficult situations not squarely encompassed by the provisions of the rule. The sentence should be deleted.

Comment 7 needs to be rewritten. Comment 7 states, "If a tribunal denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order . . . This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest." While it is true that the lawyer cannot simply abandon the client if a court denies permission to withdraw, conflicts (particularly in criminal cases) present a dilemma that will result in the reversal of a criminal conviction. The lawyer's duty is ALWAYS to the client – not to the court and not to the Bar or its rules. An attorney faced with a conflict should be encouraged to file a writ petition to get off a case due to a conflict. It is NOT a violation of the Bar rules to continue to litigate the denial of a motion to withdraw. This Comment should reflect that reality.

RULE 3.4

This is a new rule that attempts to codify the *Meredith* line of cases and existing statutes which make it a crime to destroy evidence. However, it is much too vague about what the intent requirement for a violation is. It uses the term "unlawfully," but does not define it. Many things, such as an inadvertent violations, can be considered to be "unlawful." It also does not require that the lawyer knowingly or intentionally engage in the unlawful obstruction or destruction. The rule should be redrafted to include a specific intent requirement similar to that required for a misdemeanor violation for destroying evidence (see Pen. Code § 135), and to define what "unlawful" means.

Subsection (b) of the proposed rule states,

> A lawyer shall not: . . . (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;

In the subsequent Comment section of the rule, there is a Comment which reads,

> [3] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule. Nor is this Rule intended to establish a standard that governs civil or criminal discovery disputes.

This rule and Comment are entirely unclear. Are discovery violations violative of the new rule or not? If one cannot answer this question instantly, this is an unreasonably unclear standard.

It appears that the purpose of the rule is to exempt violations of the civil discovery rules and the criminal discovery statutes from being included in the ethical ban against a lawyer who acts to "suppress any evidence." However, the statement that a violation does not "by itself establish a violation of this Rule" simply ensures that every discovery dispute will be claimed by the opposing party to be *more* than mere violation of the statute or discovery rules.

There is a great danger that adoption of the rule as written will result in the State Bar being deluged with claims that the rule was violated by parties during discovery *in every civil and criminal case*. As everyone working in the judicial system knows, discovery disputes are endemic. In every dispute, one party claims a violation of the discovery rules and statutes. Surely, the State Bar should not be involved in resolving every such dispute.

It is the rare discovery violation that should rise to the level of an ethical violation. If the intent of the drafters were to permit some discovery violations to be included within the sweep of this rule, they have failed to articulate a clear line. Frankly, we doubt that any clear line can be drawn in this complex area.

We believe that the only viable resolution of this problem is to clearly and explicitly exempt statutory discovery violations from the scope of the suppression rule. Instead of burying that point in a Comment, we urge adoption of the rule with the exception written right into the rule itself, as follows, with the modification in italics:

> A lawyer shall not: . . . (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce; *this rule does not apply to violations of the criminal discovery statutes*;

In the alternative, if inclusion of this exception is not acceptable, we recommend that subsection (b) simply not be adopted at all, to avoid these problems.

Subsection (h) also is new, and also is too vague. Is telling a potential witness that he or she is not obligated to talk to the other side a violation? Unclear. Again, ethical rules should be crystal clear.

Subsection (f) of the proposed rule states,

> A lawyer shall not: . . . (f) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

This rule seems to be designed to prohibit willful disobedience of court rules. The stated exception, however, appears to provide a blanket exception when the lawyer openly refuses to follow the rule based solely on an assertion that the rule does not obligate the lawyer. The exception has no apparent requirement that the open refusal to follow the rule is based on any well-founded reason and therefore appears to provide a way to avoid the application of the rule simply by the lawyer stating openly that he or she is refusing to follow the rule.

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We oppose the substantive changes to current rule 5-320 contained in paragraphs (d) through (i), delineating prohibited and improper conduct with jurors. Existing authority by the courts and the Legislature effectively protect jurors while simultaneously balancing and

maintaining an attorney's ability to investigate juror misconduct. The proposed changes do nothing to afford jurors any greater protection, however they compromise an attorney's ability to investigate juror misconduct.

The California Supreme Court has determined that the courts possess "inherent power to protect both juror safety and juror privacy." (*Townsend v. Superior Court* (1999) 20 Cal.4th 1084, 1091.) The California Supreme Court states, "Attorney contact with jurors is permissible, but subject to sanctions for nonconsensual or *unreasonable contact*." (*Id.* at 1087, emphasis added.) ". . . [T]win concerns of juror safety and juror privacy are prompted by varying circumstances . . . [such as when] the losing party to a lawsuit or criminal prosecution will initiate postrial contact with the jurors to discuss the case, in an effort to discover whether any juror committed misconduct." (*Id.* at p. 1091.) The California Supreme Court recognized that the concerns regarding intrusion upon discharged jurors "must be balanced with the equally weighty public policy that criminal defendants are entitled to jury verdicts untainted by prejudicial juror misconduct. (*Id.* at p. 1092.)

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These rules encourage capricious disciplinary actions because they set forth a bright-line standard for inappropriate communications instead of creating a "reasonableness" standard in assessing the propriety of communications between jurors and attorneys. The California Legislature and courts employ a "reasonable" standard in assessing the appropriateness of communication between a juror and an attorney. In states in which no legislation exists to regulate communication between jurors and attorneys, ABA Rules serve a useful purpose by filling a void in the law. In California, however, the State Bar should defer to the courts and existing rules and legislation rather than incorporate the ABA Model

Rules and risk creating vagaries that chill an attorney's ability to investigate juror misconduct. The proposed rule upsets the existing equilibrium created by the courts and Legislature and may motivate attorneys to abandon necessary investigation of juror misconduct to shield themselves from contact with jurors which could be misconstrued and subject them to discipline.

The State Bar should avoid superfluous rules which needlessly encumber attorneys. Juror misconduct is a much more prolific problem than inappropriate communication with jurors by attorneys. Attorneys must be able to investigate juror misconduct in a manner that does not subject them to capricious disciplinary proceedings. An attorney's ability to engage in legitimate investigation to determine whether juror misconduct compromised the integrity of a jury's verdict should not be sacrificed for the sake of expediency. The State Bar would more effectively accomplish its purpose to "protect the public and . . . promote respect and confidence in the legal profession" (www.calsb.org) by drafting a simple rule which incorporates existing legislation and the judiciary's "inherent power to protect both juror safety and juror privacy." (*Townsel v. Superior Court, supra*, 20 Cal.4th 1084, 1092.) Such a rule would provide the safeguards necessary to ensure jurors' privacy and safety without jeopardizing an attorney's ability to effectively investigate juror misconduct. We oppose the proposed changes to Rule 5-320 (d) since the changes are unnecessary and they convolute the existing authority of the courts and Legislature to regulate permissible communications between jurors and attorneys.

RULE 4.2

Currently, Rule 2-100 of the Rules of Professional Conduct bars lawyers from communicating directly with a represented "party": "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." (Current Rules of Professional Conduct, Rule 2-100(A).)

The Commission for the Revision of the Rules of Professional Conduct (hereafter "Commission") has submitted to the State Bar a proposed rule change that would change "party" in this rule to "person": "In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." (Proposed Rules of Professional Conduct, Rule 4.2.)

We oppose this change. The Commission attempts to justify this change by asserting that the term "party" has actually always been understood to mean "person" in the Rule 2-100

context and that this change is merely a clarification as opposed to a change. First, contrary to the claim of the Commission, it has always been the understanding of the legal community that "party" did *not* mean "person," and there are good reasons to make this distinction in this context. Second, the attempt by the Commission to exempt the prosecution from application of the amended rule raises serious reciprocity issues. Third, the language of the exception the Commission wrote to protect the prosecution would also permit the defense to interview persons represented by counsel, and thus would mean that the defense would not be restrained by the proposed rule change.

Here is the Commission's position, articulated in the explanation submitted to the State Bar on the proposed rule change:

> The current rule refers to communications with a represented "party." The proposed rule replaces the term "party" with the term "person." This change tracks the comparable ABA Model Rule, Model Rule 4.2. The Commission believes this is a clarifying change which makes clear that the client protection afforded by current rule 2-100 extends to a person who is represented by a lawyer in a matter, but who is not a party to a legal proceeding pending before a tribunal or a party represented in a transactional matter. One example of such a person would be a witness represented by a lawyer in connection with a civil litigation matter where the witness is not also one of the litigants. The Commission believes this historical interpretation of the rule was called into doubt by a recent decision by the State Bar Court. (See *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798 [no violation of rule 2-100 found where respondent lawyer, who represented plaintiffs in a negligence action against apartment owner defendant, communicated with an incarcerated person, who was not a party to the negligence action but was represented by defense counsel in criminal proceedings arising from the same facts as the negligence action].)

Notably, the Commission cites *nothing* in support of its assertion that historically "party" has always meant "person." We are unable to find anything supporting the Commission's position. Further, in every ethics training program we have ever seen, the speaker has emphasized the importance of the "party" versus "person" distinction, often with hypotheticals making the fact of a distinction clear.

Of course, the key decision on this topic is in fact the State Bar Court opinion cited by the Commission, *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798. The State Bar Court examined this precise question in considerable detail, citing many cases and secondary authorities. The State Bar Court stated, "We find scant authority in the

drafting history of rule 2-100, the rules of statutory construction, and the decisional law for construing rule 2-100 so as to prohibit contacts with a non-party." The State Bar Court stated, "Discipline has been imposed under rule 2-100 and its predecessors only in those instances when a member made an ex parte communication with an opposing party." The State Bar Court concluded, "Finding no rule of construction or persuasive legal precedent to support a broad interpretation, we conclude we are not at liberty to re-write rule 2-100, which by its plain language is limited to a represented "party." The State Bar Court then found Mr. Dale not culpable for his contact with a *person* who was represented by counsel, where that contact was without the counsel's permission.

An examination of *Dale* completely undermines the Commission's assertion that the "historical interpretation of the rule" is that "party" means "person." The legal profession uses terms of art, and the term "party" is such a term. It has always meant "party" and continues to do so today. The proposed rule change is not trivial or meaningless. It will in fact change the meaning of this rule.

Because the Commission claims that it is simply restating the rule as it has always been, the Commission does not attempt to defend the change it proposes. However, the proposed change will make a difference in the practice of criminal law, and that change will not be trivial.

The defense lawyer in a criminal case sometimes finds it necessary, on behalf of a client, to seek an interview with a person represented by counsel, where that person is not a party. Two situations arise where this becomes an issue. One is the "Amber Frey" situation. In the Scott Peterson murder trial, witness Amber Frey was represented by counsel. That representation was not unrelated to the murder trial; the representation was solely with respect to that trial. Obviously, both the prosecution and the defense wanted to interview Ms. Frey, a key witness. Under the rule as it is currently written, there would be no impediment to such an interview by either side, even in the absence of permission from Ms. Frey's counsel.

This situation more directly affects the prosecution when a prosecutor is investigating a criminal accusation to determine whether to file charges. At the Commission hearings, a prosecutor raised the following common situation: the prosecutor has a report that a defendant has molested his teenage step-daughter. The prosecutor goes to interview the daughter, for whom the defendant has hired counsel. Under the rule as it is currently written, there would be no impediment to such an interview.

A second situation which arises is when a defendant tells his lawyer that the person who really committed the offense is now in jail. When the lawyer checks on this other

person, the lawyer finds that the other person is in jail for his own unrelated case. The other person's lawyer will never agree to permit the first lawyer to interview the other person, given that the point of the interview is to obtain a confession to another crime. Yet this is often the only way in which the first lawyer can vigorously defend his own client and seek the truth that his client is in fact innocent. Under the rule as it is currently written, there is no impediment to such an interview. This is commonly done under the current rule.

The impact of the proposed rule change on these two situations is far from clear. Again, the new rule would read, "In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." (Proposed Rules of Professional Conduct, Rule 2-100(A).) The problem is the phrase "in the matter." Certainly, an argument can be made that Amber Frey was represented by another lawyer "in the matter," since the matter was the Scott Peterson murder trial. It can also be argued that the step-daughter in the above example is represented by a lawyer "in the matter."

However, is the jail inmate whom the lawyer reasonably believes is the actual guilty party represented by another lawyer "in the matter"? Certainly, the matter on which the jail inmate is pending trial is not the *same* matter as the one the lawyer is investigating. But the jail inmate's confession will surely have an impact on his own case. Even if he is not charged with the other crime, his sentence may be aggravated by the knowledge of the court and the prosecutor that the inmate has committed additional serious crimes.

This leaves counsel in the position of guessing whether an interview that counsel believes is necessary to prosecute or defend a criminal case is permitted under the proposed rule change. We believe it is imperative to ensure that ethical rules are crystal clear.

> Moreover, with regard to the ethical boundaries of an attorney's conduct, a bright line test is essential. As a practical matter, an attorney must be able to determine beforehand whether particular conduct is permissible; otherwise, an attorney would be uncertain whether the rules had been violated until . . . he or she is disqualified. Unclear rules risk blunting an advocate's zealous representation of a client. (*Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1197-1198, quoting *Nalian Truck Lines, Inc. v. Nakano Warehouse & Transportation Corp.* (1992) 6 Cal.App.4th 1256, 1264.)

We believe that it is essential that prosecutors and defense lawyers are able to investigate and present their cases as completely as possible, to further the goal of "facilitating the ascertainment of truth in connection with legal proceedings." (*Britt v.*

Superior Court (1978) 20 Cal.3d 844, 857.) We believe that the proposed rule change will inject uncertainty into an area where no uncertainty currently exists. If, as the Commission intends, the proposed rule change actually does change "party" to "person" and thereby does change the scope of the rule, the consequences will be damaging to both sides in criminal cases, and ultimately damaging to the goal of the ascertainment of truth. If changing "party" to "person" makes no change, then the term should not be changed.

LACK OF RECIPROCITY

The Commission recognizes the opposition of the prosecution to the proposed rule change. The Commission's solution is write an exception to permit the prosecution to interview persons represented by counsel in the matter. Here is the Commission's position, articulated in the explanation submitted to the State Bar on the proposed rule change:

> The Commission anticipates that the proposed change from "party" to "person"will be identified by public Commentators as a key policy issue for the State Bar. In connection with the Commission's open session deliberations on the Rule, representatives of the California Attorney General, the California District Attorneys Association and other interested persons expressed concerns that the amendment would be a major substantive change and would impair longstanding investigative and prosecutorial practices. The Commission considered these concerns and determined that the express exception language in proposed paragraph (c)(3), which permits "communications authorized by law or a court order" obviated the concerns. The Commission, however, also determined that paragraph (c)(3) should be amplified with new commentary to make clear that authorized investigative and prosecutorial practices are not intended to be affected by the change from "party" to "person."

If the proposed exception coupled with the commentary does in fact create an exception for prosecutors, permitting prosecutors to interview persons represented by counsel while denying the right of criminal defense lawyers to interview those very same persons, this would raise a serious constitutional issue of lack of reciprocity. "We hold that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants. Since the Oregon statute did not provide for reciprocal discovery, it was error for the court below to enforce it against petitioner, and his conviction must be reversed." (*Wardius v. Oregon* (1973) 412 U. S. 470, 472.) Due Process bars adoption of non-reciprocal rules which treat defendants differently from the prosecution.

If the proposed rule with its exception is adopted, the defense bar will challenge any case in which the prosecution relies on this change to interview a witness represented by counsel. The defense will move to suppress any statement obtained by a prosecutor who relied on the proposed rule change. The defense will further move to dismiss any case in which the prosecutor relied on the proposed rule change. The lack of reciprocity in the proposed rule change thus raises serious constitutional issues.

A way to avoid the lack of reciprocity in carving out an exception for the prosecution while denying one to the defense would be to carve out exceptions for both sides in criminal cases. The way to do this would be to promulgate two ethical rules, one applicable to criminal cases, one applicable to civil cases. Here is how the rules might read:

> In criminal actions, in representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a PARTY the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.
>
> In civil actions, in representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a PERSON the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

THE EXCEPTION ALSO APPLIES TO THE DEFENSE

As noted, the Commission purports to solve the problem of prosecutors being denied the right to interview persons represented by counsel by inclusion of an exception for "communications authorized by law or a court order." The Commission believes that the scope of this exception is made clear by the commentary, which mentions prosecutors.

However, the exception itself does not limit its own scope to prosecutors, nor can it, we think, given the reciprocity problem just discussed. But this means that *any* communication "authorized by law or a court order" is now exempt.

The Sixth Amendment to the United States Constitution affords criminal defendants the right to counsel. That constitutional right to counsel includes the duty to thoroughly investigate possible defenses. "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." (1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp., quoted in *Rompilla v. Beard* (2005) 545 U.S. 374, 387, 125 S.Ct. 2456, 2466.)

Defense counsel's Sixth Amendment duties include the duty to attempt to interview witnesses who might assist the defense of the case, even if those witnesses are represented by counsel who refuse to permit such interviews. Such interviews would thus be "authorized by law." In fact, the Sixth Amendment would justify interviewing an actual co-defendant who is literally a party to the action. Perhaps the Sixth Amendment can be reconciled with the current rule. However, if the rule is amended to specifically exempt "communications authorized by law," the rule will not permit such interviews. One assumes that this is not the intent of the Commission, but it is the result of the proposed changes.

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EXECUTIVE OFFICE

May 27, 2008

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, CA 94105

Dear Ms. Hollins:

The two Public Defender agencies in the County of Los Angeles have collaborated in reviewing the proposed amended Rules of Professional Conduct of the State Bar of California developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. Our review was conducted by seven highly experienced trial and appellate counsel. Their comments are enclosed.

Our effort has been coordinated by Mr. Albert Menaster, the Head Deputy of the Appellate Branch of the Public Defender's Office. If you have any questions regarding our comments, please contact him at (213) 974-3058.

Very truly yours,

MICHAEL P. JUDGE
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April 25, 2008

Audrey Hollins
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Currently, Rule 2-100 of the Rules of Professional Conduct bars lawyers from communicating directly with a represented "party:" "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." (Current Rules of Professional Conduct, Rule 2-100(A); emphasis added.)

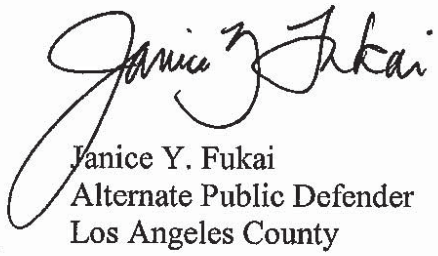
The Commission for the Revision of the Rules of Professional Conduct (hereafter "Commission") has submitted to the State Bar a proposed rule change would change "party" in this rule to "person:" "In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." (Proposed Rules of Professional Conduct, Rule Rule 4.2; emphasis added.)

We oppose this proposed change. The Commission attempts to justify this change by asserting that the term "party" has actually always been understood to mean "person" in the Rule 2-100 context and that this change is merely a clarification as opposed to a change. Contrary to the claim of the Commission, it has always been the understanding of the legal community that "party" did not mean "person." (See In the Matter of Dale (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798.) Moreover, there are good reasons to make this distinction in this context.

We fear that changing "party" to "person" in Rule 2-100 will substantially impair the ability of prosecutors to investigate criminal offenses. We also fear that this change will substantially impair the ability of defense counsel to defend persons charged with criminal offenses.

The rule, as it currently reads and as it is currently understood, is clear. The proposed change would inject uncertainty into this area, and would risk impairing both the prosecution and the defense in criminal cases from being effective. For these reasons we oppose this proposed change. Since nothing here is broken, nothing should be fixed. Rule 2-100 should not be changed to insert "person" for "party."

Sincerely,



Janice Y. Fukai
Alternate Public Defender
Los Angeles County

OVERALL COMMENT

Overall, the Comments to the proposed rules are too long and too confusing. To the extent that they are necessary to explain the rule, the rule needs to be redrafted because it is too vague. Ethical rules are supposed to provide clear guidance.

> Moreover, with regard to the ethical boundaries of an attorney's conduct, a bright line test is essential. As a practical matter, an attorney must be able to determine beforehand whether particular conduct is permissible; otherwise, an attorney would be uncertain whether the rules had been violated until . . . he or she is disqualified. Unclear rules risk blunting an advocate's zealous representation of a client. (*Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1197-1198, quoting *Nalian Truck Lines, Inc. v. Nakano Warehouse & Transportation Corp.* (1992) 6 Cal.App.4th 1256, 1264.)

If the practitioner has to slog through endless commentary to interpret what the rule is supposedly saying, the drafters have failed in their efforts. The rules become a trap for the practitioner who is not an expert in ethics. Many of the Comments below present this very problem. The rules should be redrafted to ensure that the rule itself is as clear as is humanly possible.

RULE 1.7

This rule changes the terminology of conflicts from "actual" versus "potential" to "direct" versus "indirect." The Comments try to clarify the meaning of the rule, but at one point the Comments admit that there is no single definition of when a lawyer's actions are "directly" adverse to a client.

Moreover, sections 1(a) and (c) seem duplicative. David McGowan, a professor at the University of San Diego School of Law, has suggested the following rewrite combining sections 1(a) and (c) which we think is much clearer: "(a) Representation directly adverse to current client. A lawyer shall not accept or continue representation of a client if the lawyer's representation of that client will be directly adverse to another client the lawyer currently represents, without informed written consent from each client."

RULE 1.16

There is no real reason to change Rule 3-700. The changes found in proposed rule 1.16 add nothing except verbiage and complexity and do absolutely nothing to either help the client or aid the member. This seems to be change for the sake of change.

Even though the proposed changes are not overly substantive, there are some areas of concern. The existing rule states that a member shall withdraw from employment if:

"The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;"

The proposed rule omits this language. Although the "without probable cause" language is somewhat unclear, the rest of the rule is perfectly clear, reasonable, and proper. This language should not be omitted but should remain as a condition for mandatory withdrawal.

The proposed rule makes withdrawal permissive when the client is pursuing criminal conduct or has hired the lawyer to pursue criminal conduct. Although similar language has been in the permissive withdrawal section for years, it seems that this should be mandatory withdrawal. Seeking to pursue criminal conduct is much more serious a breach than engaging in conduct that violates the Bar rules, which requires mandatory withdrawal. A breach of the criminal rules is more serious and should require mandatory withdrawal.

The portion of the rule requiring the lawyer to release the client's papers and property to the client needs expanding. As the Comment suggests, there are times when a statute or protective order prohibits releasing certain documents or information to a client. The rule (subdivision (e)(1)) should be amended to state "shall release to the client, to the client's attorney, or to a court . . . etc."

The first Comment states that a "lawyer has the obligation or option to withdraw only in the circumstances and only in the manner described in this Rule." This is too restrictive. A rule cannot possibly contemplate every situation that may arise, and that sentence fails to anticipate those perhaps rare but difficult situations not squarely encompassed by the provisions of the rule. The sentence should be deleted.

Comment 7 needs to be rewritten. Comment 7 states, "If a tribunal denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order . . . This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest." While it is true that the lawyer cannot simply abandon the client if a court denies permission to withdraw, conflicts (particularly in criminal cases) present a dilemma that will result in the reversal of a criminal conviction. The lawyer's duty is ALWAYS to the client – not to the court and not to the Bar or its rules. An attorney faced with a conflict should be encouraged to file a writ petition to get off a case due to a conflict. It is NOT a violation of the Bar rules to continue to litigate the denial of a motion to withdraw. This Comment should reflect that reality.

RULE 3.4

This is a new rule that attempts to codify the *Meredith* line of cases and existing statutes which make it a crime to destroy evidence. However, it is much too vague about what the intent requirement for a violation is. It uses the term "unlawfully," but does not define it. Many things, such as an inadvertent violations, can be considered to be "unlawful." It also does not require that the lawyer knowingly or intentionally engage in the unlawful obstruction or destruction. The rule should be redrafted to include a specific intent requirement similar to that required for a misdemeanor violation for destroying evidence (see Pen. Code § 135), and to define what "unlawful" means.

Subsection (b) of the proposed rule states,

> A lawyer shall not: . . . (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;

In the subsequent Comment section of the rule, there is a Comment which reads,

> [3] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule. Nor is this Rule intended to establish a standard that governs civil or criminal discovery disputes.

This rule and Comment are entirely unclear. Are discovery violations violative of the new rule or not? If one cannot answer this question instantly, this is an unreasonably unclear standard.

It appears that the purpose of the rule is to exempt violations of the civil discovery rules and the criminal discovery statutes from being included in the ethical ban against a lawyer who acts to "suppress any evidence." However, the statement that a violation does not "by itself establish a violation of this Rule" simply ensures that every discovery dispute will be claimed by the opposing party to be *more* than mere violation of the statute or discovery rules.

There is a great danger that adoption of the rule as written will result in the State Bar being deluged with claims that the rule was violated by parties during discovery *in every civil and criminal case*. As everyone working in the judicial system knows, discovery disputes are endemic. In every dispute, one party claims a violation of the discovery rules and statutes. Surely, the State Bar should not be involved in resolving every such dispute.

It is the rare discovery violation that should rise to the level of an ethical violation. If the intent of the drafters were to permit some discovery violations to be included within the sweep of this rule, they have failed to articulate a clear line. Frankly, we doubt that any clear line can be drawn in this complex area.

We believe that the only viable resolution of this problem is to clearly and explicitly exempt statutory discovery violations from the scope of the suppression rule. Instead of burying that point in a Comment, we urge adoption of the rule with the exception written right into the rule itself, as follows, with the modification in italics:

> A lawyer shall not: . . . (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce; *this rule does not apply to violations of the criminal discovery statutes*;

In the alternative, if inclusion of this exception is not acceptable, we recommend that subsection (b) simply not be adopted at all, to avoid these problems.

Subsection (h) also is new, and also is too vague. Is telling a potential witness that he or she is not obligated to talk to the other side a violation? Unclear. Again, ethical rules should be crystal clear.

Subsection (f) of the proposed rule states,

> A lawyer shall not: . . . (f) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

This rule seems to be designed to prohibit willful disobedience of court rules. The stated exception, however, appears to provide a blanket exception when the lawyer openly refuses to follow the rule based solely on an assertion that the rule does not obligate the lawyer. The exception has no apparent requirement that the open refusal to follow the rule is based on any well-founded reason and therefore appears to provide a way to avoid the application of the rule simply by the lawyer stating openly that he or she is refusing to follow the rule.

RULE 3.5

We oppose the substantive changes to current rule 5-320 contained in paragraphs (d) through (i), delineating prohibited and improper conduct with jurors. Existing authority by the courts and the Legislature effectively protect jurors while simultaneously balancing and

maintaining an attorney's ability to investigate juror misconduct. The proposed changes do nothing to afford jurors any greater protection, however they compromise an attorney's ability to investigate juror misconduct.

The California Supreme Court has determined that the courts possess "inherent power to protect both juror safety and juror privacy." (*Townsend v. Superior Court* (1999) 20 Cal.4th 1084, 1091.) The California Supreme Court states, "Attorney contact with jurors is permissible, but subject to sanctions for nonconsensual or *unreasonable contact*." (*Id.* at 1087, emphasis added.) ". . . [T]win concerns of juror safety and juror privacy are prompted by varying circumstances . . . [such as when] the losing party to a lawsuit or criminal prosecution will initiate postrial contact with the jurors to discuss the case, in an effort to discover whether any juror committed misconduct." (*Id.* at p. 1091.) The California Supreme Court recognized that the concerns regarding intrusion upon discharged jurors "must be balanced with the equally weighty public policy that criminal defendants are entitled to jury verdicts untainted by prejudicial juror misconduct. (*Id.* at p. 1092.)

Code of Civil Procedure section 206 affords more than adequate protection to jurors' safety and privacy, giving jurors notice of their right not to discuss their deliberations or their verdict and provides that "any *unreasonable* contact with a juror by the defendant, his or her attorney or representative, or by the prosecutor, or his or her representative, without the juror's consent shall be immediately reported to the trial judge." (California Code of Civil Procedure section 206 (d), emphasis added.) Section 206 (e) provides that any violation of this section shall be considered a violation of a lawful court order.

Rule 5-320, as currently drafted, prohibits questions or Comments to a juror that are "intended to harass or embarrass the juror." Paragraph (g) of State Bar Rule 3.5 deletes this language and drafts four subsections, the first three taken verbatim from ABA Model Rule which govern: (1) communications prohibited by law or court order; (2) communications made when a juror has made known to the lawyer his or her desire not to communicate with the lawyer; (3) communications involving misrepresentation, coercion, duress or harassment; and (4) communications intended to influence a juror's action in future jury service.

These rules encourage capricious disciplinary actions because they set forth a bright-line standard for inappropriate communications instead of creating a "reasonableness" standard in assessing the propriety of communications between jurors and attorneys. The California Legislature and courts employ a "reasonable" standard in assessing the appropriateness of communication between a juror and an attorney. In states in which no legislation exists to regulate communication between jurors and attorneys, ABA Rules serve a useful purpose by filling a void in the law. In California, however, the State Bar should defer to the courts and existing rules and legislation rather than incorporate the ABA Model

Rules and risk creating vagaries that chill an attorney's ability to investigate juror misconduct. The proposed rule upsets the existing equilibrium created by the courts and Legislature and may motivate attorneys to abandon necessary investigation of juror misconduct to shield themselves from contact with jurors which could be misconstrued and subject them to discipline.

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RULE 4.2

Currently, Rule 2-100 of the Rules of Professional Conduct bars lawyers from communicating directly with a represented "party": "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." (Current Rules of Professional Conduct, Rule 2-100(A).)

The Commission for the Revision of the Rules of Professional Conduct (hereafter "Commission") has submitted to the State Bar a proposed rule change that would change "party" in this rule to "person": "In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." (Proposed Rules of Professional Conduct, Rule 4.2.)

We oppose this change. The Commission attempts to justify this change by asserting that the term "party" has actually always been understood to mean "person" in the Rule 2-100

context and that this change is merely a clarification as opposed to a change. First, contrary to the claim of the Commission, it has always been the understanding of the legal community that "party" did *not* mean "person," and there are good reasons to make this distinction in this context. Second, the attempt by the Commission to exempt the prosecution from application of the amended rule raises serious reciprocity issues. Third, the language of the exception the Commission wrote to protect the prosecution would also permit the defense to interview persons represented by counsel, and thus would mean that the defense would not be restrained by the proposed rule change.

Here is the Commission's position, articulated in the explanation submitted to the State Bar on the proposed rule change:

> The current rule refers to communications with a represented "party." The proposed rule replaces the term "party" with the term "person." This change tracks the comparable ABA Model Rule, Model Rule 4.2. The Commission believes this is a clarifying change which makes clear that the client protection afforded by current rule 2-100 extends to a person who is represented by a lawyer in a matter, but who is not a party to a legal proceeding pending before a tribunal or a party represented in a transactional matter. One example of such a person would be a witness represented by a lawyer in connection with a civil litigation matter where the witness is not also one of the litigants. The Commission believes this historical interpretation of the rule was called into doubt by a recent decision by the State Bar Court. (See *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798 [no violation of rule 2-100 found where respondent lawyer, who represented plaintiffs in a negligence action against apartment owner defendant, communicated with an incarcerated person, who was not a party to the negligence action but was represented by defense counsel in criminal proceedings arising from the same facts as the negligence action].)

Notably, the Commission cites *nothing* in support of its assertion that historically "party" has always meant "person." We are unable to find anything supporting the Commission's position. Further, in every ethics training program we have ever seen, the speaker has emphasized the importance of the "party" versus "person" distinction, often with hypotheticals making the fact of a distinction clear.

Of course, the key decision on this topic is in fact the State Bar Court opinion cited by the Commission, *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798. The State Bar Court examined this precise question in considerable detail, citing many cases and secondary authorities. The State Bar Court stated, "We find scant authority in the

drafting history of rule 2-100, the rules of statutory construction, and the decisional law for construing rule 2-100 so as to prohibit contacts with a non-party." The State Bar Court stated, "Discipline has been imposed under rule 2-100 and its predecessors only in those instances when a member made an ex parte communication with an opposing party." The State Bar Court concluded, "Finding no rule of construction or persuasive legal precedent to support a broad interpretation, we conclude we are not at liberty to re-write rule 2-100, which by its plain language is limited to a represented "party." The State Bar Court then found Mr. Dale not culpable for his contact with a *person* who was represented by counsel, where that contact was without the counsel's permission.

An examination of *Dale* completely undermines the Commission's assertion that the "historical interpretation of the rule" is that "party" means "person." The legal profession uses terms of art, and the term "party" is such a term. It has always meant "party" and continues to do so today. The proposed rule change is not trivial or meaningless. It will in fact change the meaning of this rule.

Because the Commission claims that it is simply restating the rule as it has always been, the Commission does not attempt to defend the change it proposes. However, the proposed change will make a difference in the practice of criminal law, and that change will not be trivial.

The defense lawyer in a criminal case sometimes finds it necessary, on behalf of a client, to seek an interview with a person represented by counsel, where that person is not a party. Two situations arise where this becomes an issue. One is the "Amber Frey" situation. In the Scott Peterson murder trial, witness Amber Frey was represented by counsel. That representation was not unrelated to the murder trial; the representation was solely with respect to that trial. Obviously, both the prosecution and the defense wanted to interview Ms. Frey, a key witness. Under the rule as it is currently written, there would be no impediment to such an interview by either side, even in the absence of permission from Ms. Frey's counsel.

This situation more directly affects the prosecution when a prosecutor is investigating a criminal accusation to determine whether to file charges. At the Commission hearings, a prosecutor raised the following common situation: the prosecutor has a report that a defendant has molested his teenage step-daughter. The prosecutor goes to interview the daughter, for whom the defendant has hired counsel. Under the rule as it is currently written, there would be no impediment to such an interview.

A second situation which arises is when a defendant tells his lawyer that the person who really committed the offense is now in jail. When the lawyer checks on this other

person, the lawyer finds that the other person is in jail for his own unrelated case. The other person's lawyer will never agree to permit the first lawyer to interview the other person, given that the point of the interview is to obtain a confession to another crime. Yet this is often the only way in which the first lawyer can vigorously defend his own client and seek the truth that his client is in fact innocent. Under the rule as it is currently written, there is no impediment to such an interview. This is commonly done under the current rule.

The impact of the proposed rule change on these two situations is far from clear. Again, the new rule would read, "In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." (Proposed Rules of Professional Conduct, Rule 2-100(A).) The problem is the phrase "in the matter." Certainly, an argument can be made that Amber Frey was represented by another lawyer "in the matter," since the matter was the Scott Peterson murder trial. It can also be argued that the step-daughter in the above example is represented by a lawyer "in the matter."

However, is the jail inmate whom the lawyer reasonably believes is the actual guilty party represented by another lawyer "in the matter"? Certainly, the matter on which the jail inmate is pending trial is not the *same* matter as the one the lawyer is investigating. But the jail inmate's confession will surely have an impact on his own case. Even if he is not charged with the other crime, his sentence may be aggravated by the knowledge of the court and the prosecutor that the inmate has committed additional serious crimes.

This leaves counsel in the position of guessing whether an interview that counsel believes is necessary to prosecute or defend a criminal case is permitted under the proposed rule change. We believe it is imperative to ensure that ethical rules are crystal clear.

> Moreover, with regard to the ethical boundaries of an attorney's conduct, a bright line test is essential. As a practical matter, an attorney must be able to determine beforehand whether particular conduct is permissible; otherwise, an attorney would be uncertain whether the rules had been violated until . . . he or she is disqualified. Unclear rules risk blunting an advocate's zealous representation of a client. (*Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1197-1198, quoting *Nalian Truck Lines, Inc. v. Nakano Warehouse & Transportation Corp.* (1992) 6 Cal.App.4th 1256, 1264.)

We believe that it is essential that prosecutors and defense lawyers are able to investigate and present their cases as completely as possible, to further the goal of "facilitating the ascertainment of truth in connection with legal proceedings." (*Britt v.*

Superior Court (1978) 20 Cal.3d 844, 857.) We believe that the proposed rule change will inject uncertainty into an area where no uncertainty currently exists. If, as the Commission intends, the proposed rule change actually does change "party" to "person" and thereby does change the scope of the rule, the consequences will be damaging to both sides in criminal cases, and ultimately damaging to the goal of the ascertainment of truth. If changing "party" to "person" makes no change, then the term should not be changed.

LACK OF RECIPROCITY

The Commission recognizes the opposition of the prosecution to the proposed rule change. The Commission's solution is write an exception to permit the prosecution to interview persons represented by counsel in the matter. Here is the Commission's position, articulated in the explanation submitted to the State Bar on the proposed rule change:

> The Commission anticipates that the proposed change from "party" to "person"will be identified by public Commentators as a key policy issue for the State Bar. In connection with the Commission's open session deliberations on the Rule, representatives of the California Attorney General, the California District Attorneys Association and other interested persons expressed concerns that the amendment would be a major substantive change and would impair longstanding investigative and prosecutorial practices. The Commission considered these concerns and determined that the express exception language in proposed paragraph (c)(3), which permits "communications authorized by law or a court order" obviated the concerns. The Commission, however, also determined that paragraph (c)(3) should be amplified with new commentary to make clear that authorized investigative and prosecutorial practices are not intended to be affected by the change from "party" to "person."

If the proposed exception coupled with the commentary does in fact create an exception for prosecutors, permitting prosecutors to interview persons represented by counsel while denying the right of criminal defense lawyers to interview those very same persons, this would raise a serious constitutional issue of lack of reciprocity. "We hold that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants. Since the Oregon statute did not provide for reciprocal discovery, it was error for the court below to enforce it against petitioner, and his conviction must be reversed." (*Wardius v. Oregon* (1973) 412 U. S. 470, 472.) Due Process bars adoption of non-reciprocal rules which treat defendants differently from the prosecution.

If the proposed rule with its exception is adopted, the defense bar will challenge any case in which the prosecution relies on this change to interview a witness represented by counsel. The defense will move to suppress any statement obtained by a prosecutor who relied on the proposed rule change. The defense will further move to dismiss any case in which the prosecutor relied on the proposed rule change. The lack of reciprocity in the proposed rule change thus raises serious constitutional issues.

A way to avoid the lack of reciprocity in carving out an exception for the prosecution while denying one to the defense would be to carve out exceptions for both sides in criminal cases. The way to do this would be to promulgate two ethical rules, one applicable to criminal cases, one applicable to civil cases. Here is how the rules might read:

> In criminal actions, in representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a PARTY the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.
>
> In civil actions, in representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a PERSON the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

THE EXCEPTION ALSO APPLIES TO THE DEFENSE

As noted, the Commission purports to solve the problem of prosecutors being denied the right to interview persons represented by counsel by inclusion of an exception for "communications authorized by law or a court order." The Commission believes that the scope of this exception is made clear by the commentary, which mentions prosecutors.

However, the exception itself does not limit its own scope to prosecutors, nor can it, we think, given the reciprocity problem just discussed. But this means that *any* communication "authorized by law or a court order" is now exempt.

The Sixth Amendment to the United States Constitution affords criminal defendants the right to counsel. That constitutional right to counsel includes the duty to thoroughly investigate possible defenses. "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." (1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp., quoted in *Rompilla v. Beard* (2005) 545 U.S. 374, 387, 125 S.Ct. 2456, 2466.)

Defense counsel's Sixth Amendment duties include the duty to attempt to interview witnesses who might assist the defense of the case, even if those witnesses are represented by counsel who refuse to permit such interviews. Such interviews would thus be "authorized by law." In fact, the Sixth Amendment would justify interviewing an actual co-defendant who is literally a party to the action. Perhaps the Sixth Amendment can be reconciled with the current rule. However, if the rule is amended to specifically exempt "communications authorized by law," the rule will not permit such interviews. One assumes that this is not the intent of the Commission, but it is the result of the proposed changes.

Alameda County
District Attorney's Office
Thomas J. Orloff, District Attorney

June 3, 2008

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Objection to Proposed Revision to State Bar Rule 2-100

Dear Ms. Hollins:

As the District Attorney of Alameda County and the Chairman of the Ethics Committee of the California District Attorneys Association ("CDAA"), I am writing to urge the Board of Governors to refrain from approving the proposed changes to State Bar Rule 2-100 (which currently prohibits an attorney from contacting a "party" represented by counsel). The proposed change which would substitute the word "person" for "party," is unnecessary and will have an unfortunate and widespread affect on law enforcement investigations in California.

Current law suggests those law enforcement agents acting at the direction of, or in concert with, district attorneys, can contact and talk with persons who have not been sued or charged with a crime, whether they are represented by counsel or not. (*See, e.g.*, 75 Ops.Cal.Atty.Gen 223.) We take our ethical responsibilities quite seriously and believe that in the vast majority of investigations involving California district attorneys, this authority has been used ethically and professionally.

The proposed change, which appears as though it would preclude our even approaching someone who has retained an attorney while we are investigating a case, would result in a great many inhibitions to techniques that have historically and substantially enhanced public protection. In evaluating this assertion, it is useful to keep in mind that district attorneys in California have taken on more and more "civil" public protection responsibilities, with members of our offices coordinating the investigations as well as ultimately prosecuting the cases.

Examples of the huge issues that will beset investigations include:

1) Many narcotics investigations are conducted by task forces that include representatives of the local district attorney's office. A street level drug dealer is contacted

Courthouse, 1225 Fallon Street, 9th Floor, Oakland, CA 94612 (510) 272-6222

by investigators who wish to ask him questions about others in his "gang." Gang members have retained an attorney for the purpose of handling any contact with its members by the police. Would this be an ethical violation under the proposed rule? It will certainly be argued by defense attorneys if any case is charged based on any bit of information gathered during the interview.

2) What if, rather than a street gang, the organization being investigated is an apparently respectable corporation? We recently were faced with a situation during an investigation involving an escrow company assisting mortgage brokers in defrauding homeowners, in which an attorney called our office and said, "I represent the company and all its employees. You can't talk to any of them." Wholly aside from conflict of interest issues, it turned out that this lawyer did not in fact represent individual employees. Under current rules, we could contact the employees and try and learn more about what the company was doing. If they were in fact represented by counsel and did not therefore wish to speak with us, they could simply say that and that would be the end of the matter. Under the proposed revision, could we approach employees to ask questions about what the company was doing? Probably not. Could we even inquire of the individual employees whether or not they were represented by counsel? Possibly not. In other words, by the simple expedient of retaining a lawyer for future use, an organization violating the law could apparently insulate itself from anyone associated with a district attorney's office from even asking questions of an employee about what was occurring.

3) What if an employee of a company *wants* to talk to district attorney investigators about illegal activities at the business and initiates contact with them (actual examples include a nursing home facility that is neglecting and abusing the residents and a grocery store that is selling adulterated meat)? Under current law, if an attorney hired by a company has indicated that he represents all of the employees, it would not preclude our listening to what the employee has to say. Would the same be true under the proposed revision? Arguably it would not, and it will be argued over.

4) One of the most valuable tools for investigating crimes associated with sales is the "undercover buy." This exists not only in the world of drug dealing but also in the realm of consumer fraud, an area in which district attorneys play a prominent role. In recent so called "predatory lending" cases in which lenders or mortgage brokers misrepresent loan terms to gullible and unsophisticated homeowners, our office has had success in finding volunteers to solicit loans and then surreptitiously tape record the false representations by the salesmen. This assists a great deal in putting to rest the company's later assertion that our victims do not accurately remember what was said or are simply making things up. Assuming that the company has an attorney on retainer, would such a technique be allowed under the proposed revision? Arguably it would not, and it will certainly be argued over. How about if we wished to simply check on the pricing of items in a store accused of overpricing its products?

5) District attorneys also play a leading role in the enforcement of California environmental laws, often through task forces which include a variety of regulatory and law enforcement agencies. Facilities that are suspected of not complying with environmental laws are often discussed at task force meetings, and it is often decided by the agencies present to conduct an inspection and ask standard questions of the employees who are operating the facility. This is an effective and valuable tool in insuring compliance with our laws. Assuming the facility has a lawyer on retainer, would this simple technique be available in the future? Apparently it would not.

6) An even more grim possibility, again based on actual experience, is this: a criminal defendant charged with having sexually abused his minor daughter hires an attorney for the family who then refuses to allow district attorney representatives to speak with her about what happened before she is scheduled to testify. Would he be able to use the proposed revision as such a shield? Apparently he would.

If the answer to the question posed in any of these typical situations is unknown or even equivocal, this fact alone indicates that 1) the revision would be inappropriate, because it would violate the Commission's responsibility to "Facilitate compliance with and enforcement of the rules by eliminating ambiguities and uncertainties in the rules" (Commission Discussion Draft), and 2) it would at the very least create a "chilling affect" on dedicated law enforcement officers endeavoring to protect the public.

Some have argued that including an exception within the proposed rule for actions "authorized by law" will ameliorate law enforcement concerns. We do not understand how that can be possible because many current law enforcement techniques are legally acceptable simply because they are not prohibited. If the rules change it will certainly be argued that what is prohibited has changed as well. On the other hand, is it being suggested that the revised rule will create some sort of jurisprudence in which courts will be taking evidence years from now regarding what was legally acceptable in 2008 in an effort to divine the "original intent" of the rulemakers? If that is true, it will obviously cause a great deal of ambiguity and litigation that will take years to sort out.

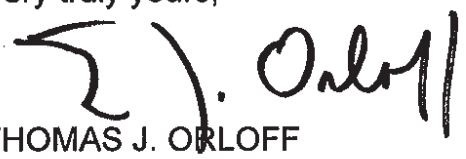
If there really are important concerns driving the proposed revision but the Board of Governors seriously wishes to accommodate and preserve current legitimate law enforcement investigative techniques, it does not seem difficult to simply create an unambiguous exception saying exactly that. An example would be: "This rule shall not apply to public prosecutors except to the extent that a represented person has become a party in a civil or criminal case filed by the prosecutor." Such a narrow exception would allow the revision to proceed while preserving the investigative techniques that would otherwise be placed at risk.

I again ask that you reconsider this unnecessary revision which will inevitably disrupt

and throw into disarray a variety of longstanding investigative practices that have been utilized for years to protect the public and the environment from illegal conduct. The examples illustrating our concerns are not obscure and occasional events, but common "real world" situations. I and my deputies and everyone in law enforcement with whom I have spoken about this firmly believe that if Rule 2-100 is revised in the proposed manner, those who violate the law will use it as a shield to avoid responsibility for unlawful conduct in a way currently unavailable to them, with public health and safety suffering in an entirely predictable way.

If you have any questions, please do not hesitate to call me.

Very truly yours,



THOMAS J. ORLOFF
District Attorney

c: Scott Thorpe

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June 5, 2008

Via Fax - 415-538-2171

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Comments on Proposed Rule Changes

Dear Ms. Hollins:

Please permit us to submit a comment upon Proposed Rule 4.2 Communication With a Person Represented by Counsel.

The comment is directed to Paragraph 5 of the Comments to the Proposed Rule.

This law firm is generally engaged in representing parties in or involved with the entertainment industry.

In the entertainment business, the talent, particularly in the motion picture, television, music and new media industries, is represented in virtually every instance by a talent or literary agent and/or personal manager (collectively, "agents"), as well as a lawyer. Traditionally and as a matter of custom, other than in the context of litigation, many communications from counsel for one party are delivered to and through agents for the other party even though such other party is represented by counsel.

However, Paragraph 5 of the Comments would appear to prohibit an indirect communication with a person represented by counsel, stating that Paragraph 4.2(a) "is intended to address situation where lawyer seeks to communicate with a represented person through an intermediary such as an agent or investigator".

It would seem that the agents, as defined above, are not what is contemplated by the comment, since it bridges agent or investigator, sounding as though it is directed toward some other type of agent. In any event, we would deeply appreciate clarification that the proposed rule does not apply to agents, as defined herein, in the entertainment industry.

Sincerely,

GANG, TYRE, RAMER & BROWN, INC.

By

Bruce M Ramer

CPDA

A Statewide Association of Public Defenders and Criminal Defense Counsel

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Barry Melton, 2006-2007
Kathleen Cannon, 2007-2008

June 4, 2008

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning Development
180 Howard Street
San Francisco, CA 94105

Dear Ms. Hollins:

Currently, Rule 2-100 of the Rules of Professional Conduct bars lawyers from communicating directly with a represented "party:" "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a *party* the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." (Current Rules of Professional Conduct, Rule 2-100(A); emphasis added.)

The Commission for the Revision of the Rules of Professional Conduct (hereafter "Commission") has submitted to the State Bar a proposed rule change which would change "party" in this rule to "person:" "In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a *person* the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." (Proposed Rules of Professional Conduct, Rule Rule 4.2; emphasis added.)

We oppose this proposed change. The Commission attempts to justify this change by asserting that the term "party" has actually always been understood to mean "person" in the Rule 2-100 context and that this change is merely a clarification as opposed to a change. Contrary to the claim of the Commission, it has always been the understanding of the legal community that "party" did *not* mean "person." (See *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798.) Moreover, there are good reasons to make this distinction in this context.

We fear that changing "party" to "person" in Rule 2-100 will substantially impair the ability of prosecutors to investigate criminal offenses. We also fear that this change will substantially impair the ability of defense counsel to defend persons charged with criminal offenses.

CPDA

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The rule, as it currently reads and as it is currently understood, is clear. The proposed change would inject uncertainty into this area, and would risk impairing both the prosecution and the defense in criminal cases from being effective. For these reasons we oppose this proposed change. Since nothing here is broken, nothing should be fixed. Rule 2-100 should not be changed to insert "person" for "party."

Thank you for your consideration.

Sincerely,

Leslie E. McMillan

LESLIE E. MC MILLAN, President
California Public Defender's Association

MEMORANDUM

Date: April 22, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subject: Proposed Rule 4.2 – Communications with a Person Represented by Counsel
[Existing CRPC Rule 2-100]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Disapprove Proposed Rule 4.2 and keep existing rule 2-100

Rationale For Comment 1: The new rule changes an attorney's duty to avoid communicating ex parte with a represented "party" to a rule barring ex parte communications with a represented "person." The new rule is designed to protect an attorney's relationship with a client who is represented in a matter, but who is not formally a party in the matter. The rule also is designed to keep a lawyer from taking advantage of an unrepresented person outside of the presence of the person's lawyer, who would be able to protect that person from the attorney's wiles.

The Committee claims this is "a clarifying change." It isn't. The recent State Bar Court opinion *In the matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798 makes that clear. The existing rule uses the term "party" deliberately to limit the scope of an attorney's duty to avoid talking to people who may be represented, broadly speaking, "in the matter" (whatever that means) in which he or she represents a client, but who is not a party in the matter, with all of the legal risk that comes with being a party to a lawsuit or criminal proceeding. No authority is cited for the Bar's conclusion that the revision conforms to the "historical interpretation of the rule." The Committee's interpretation ends up restoring an interpretive "history" without a past.

Beyond that, the Committee does not give adequate weight to the countervailing policy considerations for allowing an attorney to talk to party represented in some capacity in a matter (whatever that means) in pursuit of his or her client's interest in the case in which the client is a party and to the tools at the represented "person's" disposal. A lawyer's duty is to his or her client. That duty is first and foremost; it is not first among equal duties to other constituencies, other than the duty as an officer of the court. There may be legitimate reasons, in both the civil and criminal areas, where a lawyer would prefer to talk to a person outside of the presence of the person's attorney. This broadening of an attorney's duty counsels a timidity that is unwarranted and unwise. The tools at the disposal of the represented person? They can just say no . . . or call their own attorney. The power of an attorney to overwhelm these tools of a person savvy enough to have retained a lawyer even though they are not a party may be overstated.

We must remember that the very first sentence of the rules of professional conduct announce that the purpose and function of the rules is "to regulate professional conduct of members of the State Bar *through discipline*." (RPC 1-100(A), emphasis added.) Nothing more and nothing less. (See *Ibid.*: "Nothing in these rules is intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.") Putting lawyers at risk of discipline where it is, at best, unclear where the ultimate public interest is best served would be unfair.

The comments play too great a role in setting the parameters of the rule and its exception.

This proposed change would expand a lawyer's duties to non-clients, increase the risk of discipline, and distract the lawyer from their overarching duty to their client for reasons not compelled by the lawyer's broader duty as an officer of the court. No evidence is cited that the current rule is broken; that is evidence enough that it needn't be fixed.

Comment 2: Disapprove Proposed Rule 4.2 and keep existing CRPC Rule 2-100 modified to add a new sub-section "(C)(4) Communications with an investigative officer in civil or criminal case".

Rationale for Comment 2: Investigative officers should be included in the scope of both the existing CRPC Rule 2-100 and in ABA Rule 4.2.g. since it is required for the proper functioning of an adversary system.

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

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DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation Attorney Generals Office, Dept. of Justice

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** Thomas Greene

*** City** Sacramento

*** State** California

*** Email address** (You will receive a copy of your comment submission.) Tom.Greene@doj.ca.gov

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 4.2 Communication With a Person Represented By Counsel [2-100]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

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6/6/2008	PC	C-2008-219 AG DOJ Thomas Greene [4.2]	Entire Rule	4.2	Online

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Close Update

EDMUND G. BROWN JR.
Attorney General

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June 6, 2008

Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

RE: Proposed Rule 4.2 of the March 2008 Proposed Amendment to the Rules of Professional Conduct of the State Bar of California

Dear Ms. Hollins:

The California Attorney General's Office thanks the Commission for the Revision of the Rules of Professional Conduct for its continued consideration of our concerns regarding proposed Rule 4.2 of the California Rules of Professional Conduct. Our comments on the most current draft follow:

A. The Proposed Changes are Not Necessary.

The rationales for revised Rule 4.2 are two-fold: (1) the *Dale* decision requires a revision in the current rule, and (2) adoption of a presumptively national standard contained in an ABA model rule is good policy. Neither of these rationales survive careful scrutiny.

First, *Dale* is a case in which a civil practitioner representing the owner of a building that had been the subject of an arson euchred the incarcerated arsonist into providing a statement that helped the civil practitioner's clients but hurt the incarcerated arsonist. (*Matter of Dale* (2005) 4 Cal.Bar Ct.Rptr. 798.) The civil practitioner did this by misleading the arsonist into believing that he was either the arsonist's lawyer or about to become his lawyer. The Bar Court decided that this communication did not violate current Rule 2-100 because the arsonist was not a "party" to the civil action but that the misrepresentations made to the prisoner violated broader ethical

standards, and Attorney Dale was punished. Justice was done in this case and the attorney punished for the truly egregious aspects of his conduct, his misrepresentations to the prisoner. Given these facts, *Dale* is not a reason to change settled California law on contact with represented parties.

Second, the ABA rule that was the origin of the proposed Rule 4.2 is now only a distant ancestor of the proposed rule. Although proposed Rule 4.2 effectuates a change from "party" to "person", the language of the ABA rule and Rule 4.2 are not identical. In addition, Rule 4.2 explains its language in 24 comments, putting important glosses on all of the operational terms in the rule. This has been true across the nation. Many states have either changed the language of the ABA proposal or added significant comments. The consequence of both the California changes and the changes in other states is that adoption of Rule 4.2 will not bring California ethical standards into conformity with those in other states. The bottom line is that while some of the words are the same, the meaning of the rules adopted in other states and proposed Rule 4.2 are not uniform.

B. The Proposed Change from "Party" to "Person" Upsets Well Settled State and Federal Law.

Current California law on the ethical norms applicable to contacts with represented parties, and who those parties are is well settled. Starting with the 1989 decision in *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131, California appellate courts have interpreted current Rule 2-100 itself and its interaction with other statutes and rules. *(See, e.g., Snider v. Superior Court* (2003) 113 Cal.App.4th 1187.) And the Ninth Circuit has provided important perspectives on how Rule 2-100 applies to whistleblowers in criminal cases. (*United States v. Talao* (9th Cir.2000) 222 F.3d 1133; *United States v. Lopez* (9th Cir. 1993) 4 F.3d 1455.)

If Rule 4.2 is adopted, the thoughtful case authority developed for current Rule 2-100 will be lost. Just as important, adoption of the proposed rule will touch off a wave of challenges to what are now ordinary practices which, in turn, will lead to at least a decade of appellate work to provide some finality to the meaning of the new rule. Unless there are very compelling reasons for these changes, this is simply not worth the costs.

C. The Exception for Contact With Any "Public Official" Is Overly Broad.

Comment 1 explains that the purpose of the new rule is to protect "a person who has chosen to be represented by a lawyer...from possible overreaching by other lawyers." A major exception to this policy is "[c]ommunications with a public official, board, committee or body." For an agency that represents public agencies and public officers and employees, creating a "free fire zone" for public clients, this is extremely disturbing. Comment 16 grounds this exception on First Amendment principles but does not even advert to the fact that free speech rights can be properly limited by reasonable time, place and manner rules. From our perspective, having a public official's lawyer present when speaking to a lawyer with an adverse interest is an eminently reasonable limit on speech rights.

One approach to solving this problem is to follow the lead of the ABA and not include an exception for public clients. In the alternative, the Commission may wish to consider limiting the applicability of this exception to only elected or very senior executives in government agencies. This could be effectuated by substituting the word "officer" for the word "official", and cross referencing to Government Code section 87200 in either the text or in a comment. This section defines the universe of officers required to file financial statements by statute. These include:

> ...elected state officers, judges and commissioners of courts of the judicial branch of government, members of the Public Utilities Commission, members of the State Energy Resources Conservation and Development Commission, members of the Fair Political Practices Commission, members of the California Coastal Commission, members of planning commissions, members of the board of supervisors, district attorneys, county counsels, county treasurers, and chief administrative officers of counties, mayors, city managers, city attorneys, city treasurers, chief administrative officers and members of city councils of cities, and other public officials who manage public investments, and to candidates for any of these offices at any election.

While even this narrower exception is problematic, it does at least limit the exception to the most senior elected and appointed officers of state and local government. Since this section only references state and local officials, any comment might suggest that "'officer' includes only those state and local officials referenced in Gov. Code section 87200 or analogous federal officers." Because the word "officer" in Rule 2-100 has been argued improperly to include police

officers, the Commission may want to add a statement that: "The word 'officer' is not intended to include police officers."

D. The New Rule Arguably Overturns *Talao* and *Lopez*, And Should be Modified.

Two federal decisions illuminate the applicability of current Rule 2-100 and situations in which an arguably represented party wants to talk to law enforcement about illegal conduct in an organization. (*United States v. Talao* (9th Cir.2000) 222 F.3d 1133; *United States v. Lopez* (9th Cir. 1993) 4 F.3d 1455.) Under the current rule, a whistleblower can contact government investigators without forcing the government lawyer to get the permission of organizational counsel. This certainly makes sense when dealing with illegal conduct. However, comment 3 to the new rule states categorically that a lawyer "must immediately terminate communication" if the person is represented, even if that person initiates or consents to the conversation.

The Commission should consider two alternate changes. First, the Commission could add an additional exception to Rule 4.2(c) to include consensual conversations between a represented party and law enforcement to report illegal conduct. Second, the Commission should make clear in Comment 3 that (a) this limit does not apply to consensual conversations between a consenting individual and law enforcement to report potentially illegal conduct, and (b) this limit specifically does not include situations like those in *Talao* or *Lopez*.

We commend to the attention of the Commission the suggested language changes on this issue suggested by Assistant United States Attorney George S. Cardona.

E. Any Exception for Law Enforcement Should Be in the Text of the New Rule.

We strongly prefer that 4.2 not replace existing Rule 2-100 for the reasons stated above. However, if the Commission wants to address the problems created by the switch from "party" to "person" by way of an exception for law enforcement, that exception should be in the text of the rule. For example, Utah modified 4.2(c) to allow a "government lawyer engaged in a criminal or civil law enforcement matter" under multiple circumstances with getting permission from the person's counsel. Likewise, Tennessee modified the ABA rule to allow, "a government lawyer engaged in a criminal or civil law enforcement investigation to communicate with or direct

investigative agents to communicate with a represented person prior to the represented person being arrested, indicted, charged, or named as a defendant in a criminal or law enforcement proceeding against the represented person." Either of these formulations would protect the People's interests in effective law enforcement.

F. Comment 20 Concerning Law Enforcement Should Be Clarified.

The Commission has indicated that the concerns of law enforcement have been addressed in Comments 19 - 21, but particularly in Comment 20. While we certainly applaud the Commission's recognition of the fact that Rule 4.2 would have a potentially devastating effect on law enforcement and the people our work protects, it is essential that the Commission's perspective be unequivocally reflected in the text of these comments. The stated policy of the Commission is better captured from our perspective if Comment 20 is amended as follows:

> [20] Former Rule 2-100 prohibited communications with a "party" represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a "person" represented by another lawyer. This change is not intended to ~~preclude legitimate~~ extend this prohibition, or change existing law, in regard to communications by or on behalf of prosecutors, or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations~~, that were recognized by the former Rule as authorized by law, or to expand or limit existing law that permits or prohibits communications under paragraph (c)(3). This change also is not intended to preclude the development of the law with respect towhich criminal and civil law enforcement communications are authorized by law~~ and actions.

In suggesting this change to Comment 20, the Attorney General is fully mindful of the work and progress that the Committee has already achieved in its laudable effort to improve California's Rules of Professional Conduct. However, given the need for effective law enforcement, clarity is crucial if law enforcement is not to be hobbled by the proposed rule.

Conclusion

While this office continues to believe that the current rule is better for the public than proposed Rule 4.2, I do want to thank the Commission and its members for their hard work in addressing these complex and controversial topics.

Sincerely,

THOMAS GREENE
Special Assistant Attorney General

For EDMUND G. BROWN JR.
Attorney General

2-100 letter to RRC 6-6-08.wpd

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
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DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation

Commenting on behalf of an organization

- ○ Yes
- ◉ No

*** Name** M. Sue Talia

*** City** Danville

*** State** California

*** Email address** (You will receive a copy of your comment submission.) sue@privatefamilylawjudge.com

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 4.2 Communication With a Person Represented By Counsel [2-100]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ◉ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I would like to second comment 10. As a national expert on limited scope representation, I am glad the commission added these comments to clarify and underscore the fact that this rule does not prohibit a lawyer from contacting a limited scope client on matters which are outside the scope of the limited representation. Whether from caution or ignorance, many lawyers are uncomfortable dealing with a limited scope client directly. This clarifies the rule. Since limited representation has been the official policy of the state Bar since 7/01, it is important that the rules comments encourage this important delivery system. Further, some attorneys will deliberately attempt to undercut the limitations on the scope of representation on the other side of the case, and attempt to use Rule 4.2 as an excuse not to contact the client directly on issues outside the attorney's scope, usually with the intent of running up the client's fees (remember, he probably chose limited scope because he COULDN'T afford to hire the lawyer for full service representation) and thereby force him/her to accept an unfavorable settlement offer to stop the fees from accumulating. This comment is [SEE ATTACHMENT FOR FULL TEXT]

Attachments

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6/8/2008	Post-PC	C-2008-222 M. Sue Talia [4.2]	Entire Rule	4.2	Online

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FULL TEXT OF COMMENTS SUBMITTED BY M. SUE TALIA

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I would like to second comment 10. As a national expert on limited scope representation, I am glad the commission added these comments to clarify and underscore the fact that this rule does not prohibit a lawyer from contacting a limited scope client on matters which are outside the scope of the limited representation. Whether from caution or ignorance, many lawyers are uncomfortable dealing with a limited scope client directly. This clarifies the rule. Since limited representation has been the official policy of the state Bar since 7/01, it is important that the rules comments encourage this important delivery system. Further, some attorneys will deliberately attempt to undercut the limitations on the scope of representation on the other side of the case, and attempt to use Rule 4.2 as an excuse not to contact the client directly on issues outside the attorney's scope, usually with the intent of running up the client's fees (remember, he probably chose limited scope because he COULDN'T afford to hire the lawyer for full service representation) and thereby force him/her to accept an unfavorable settlement offer to stop the fees from accumulating. This comment is important ammunition for the attorney who is dealing with a recalcitrant or obstreperous opposing counsel who refuses to respect the limitation on scope. I strongly support the addition of this comment.

Submitted on 2008-06-08

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
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DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation

Commenting on behalf of an organization

- ○ Yes
- ◉ No

*** Name** Steven K. Hazen

*** City** Los Angeles

*** State** California

*** Email address** (You will receive a copy of your comment submission.) SKHazen@sbcglobal.net

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 4.2 Communication With a Person Represented By Counsel [2-100]

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On its own, this proposal is remarkably poorly considered. If continued in this form, it will encouter broad objections as the process moves to later stages,

As part of an effort to transition from the historic Rules of Professional Conduct to rules modeled on the ABA's Model Rules of Professional Conduct, this is a very poor use of resources. The MRPC has not had anywhere near the robustness and precision of our own RPC.

Attachments

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SKHazen@sbcglobal.net

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6/7/2008	Post-PC	C-2008-223 Steven K. Hazen [4.2]	Entire Rule	4.2	Online

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RULES OF PROFESSIONAL CONDUCT OF STATE BAR OF CALIFORNIA

Please indicate which proposed rule you are commenting on:

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

Agree: Agree as Modified: **X** Disagree :

Comments: As effected by subdivisions (a) and (b), the substitution of "party" for "person" could arguably be construed as broadening the scope of the Rule without reasonable proffered justification for the change. Accordingly, the Rule should be modified to delete this change. Subdivisions (c) through (g) of the Rule are acceptable as proposed.

Name: **Cathrine Castaldi** **Title: President**

Organization: **Orange County Bar Association**

☑ **Commenting on behalf of an organization**

Address: **P.O. Box 6130**

City, State, Zip: **Newport Beach, CA 92658**

Please **write** or **fax** or **respond using the Internet** to:

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, CA 94105

Internet: http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=90842

DEADLINE FOR COMMENT: 5:00 P.M. Friday, June 6, 2008

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 4.2

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

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EXECUTIVE DIRECTOR
Norman L. Reimer

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Reply to:
1311 Broadway
Little Rock, AR 72202

June 6, 2008

Ms. Audrey Hollins
Office of Professional Competence,
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State Bar of California
180 Howard Street
San Francisco, CA 94105-1639
by fax (415) 538-2171

Jeffrey Bleich, Esq.
State Bar President
Munger, Tolles & Olson
560 Mission Street, 27th Fl.
San Francisco, CA 94105
Jeff.bleich@mto.com

Re: NACDL Objections to Proposed Revisions to the California Rules of Professional Conduct, Proposed Rules 1.5, 3.10, & 4.2

Dear Ms. Hollins:

I write on behalf of the National Association of Criminal Defense Lawyers ("NACDL"), with over 1,300 members in California. NACDL is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's 12,800-plus direct members in 28 countries – and 90 state, provincial, local, and international criminal tribunal affiliate organizations totaling more than 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a

"LIBERTY'S LAST CHAMPION"

1150 18th Street, NW ◆ Suite 950 ◆ Washington, DC 20036
202-872-8600 Fax 202-872-8690 assist@nacdl.org www.nacdl.org

rational and humane criminal justice system.

I am former Chair of NACDL's Ethics Advisory Committee (1990-2005), and the author of numerous written ethics opinions for NACDL and about 800 informal opinions. I am also the author of PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE (2d ed. 2005) and one of two lawyer members of the International Criminal Court Disciplinary Appeals Tribunal (2007-10).

NACDL urges the State Bar of California **to not adopt and to reject** the following proposed revisions to the California Rules of Professional Conduct:

1. a prohibition of nonrefundable retainers set forth in proposed Rule 1.5(f) and Comment ¶ 2, fees for legal services; we also suggest that the use of "unreasonable fee" in Model Rules 1.5(a & b) is a better definition and should resolve any questions.

2. authorization for government lawyers to negotiate the disposition of criminal and civil liability as set forth in the Comment ¶ 2 to proposed Rule 3.10, threatening criminal, administrative, or disciplinary charges.

3. commentary providing prosecutors and those acting at their direction with the ability to communicate with represented persons without the consent of their counsel, as set forth in proposed Rule 4.2 and Comment ¶s 19-20, communication with a person represented by counsel, communications authorized by law or court order.

These proposed changes to Rules 3.10 and 4.2 are also of doubtful constitutionality because they grant special status to prosecutors in California that exists nowhere else in the United States, either in federal or state law. There is no justification for a separate rule in California putting prosecutors above the law that every other lawyer in America must abide by. Moreover, as to Rule 4.2, Congress requires that all federal prosecutors follow their state ethics rules, and it has for quite some time. There is no sign anywhere that there is any problem with that, but California now proposes to exempt California prosecutors from this statutory mandate through the back door.

We submit that these three proposed revisions to California's rules of professional conduct would have a negative impact on criminal defense lawyers and their clients, the rights of those accused of crimes, and the criminal justice system in general. Our general position is also ably stated to you already by two NACDL members: Barry Tarlow of Los Angeles and Evan Jenness of Santa Monica who are separately commenting. I hope I will not repeat what they say.

Rule 4.2, Comment ¶s 19-20: Exemptions for prosecutors and agents to anti-contact rules, contrary to 28 U.S.C. § 530B for federal prosecutors

NACDL urges the State Bar to reject Comment ¶s 19-20 to proposed Rule 4.2. These comments, which are not included in Rule 4.2 of the ABA Model Rules of Professional Conduct or existing Rule 2-100 of the California Rules of Professional Conduct, will undermine confidentiality in the attorney-client relationship between criminal defense attorneys and their clients, encourage prosecutors to violate the Sixth Amendment right to counsel, place the State Bar in the position of promoting partisanship on behalf of prosecutors and other government lawyers, and undermine Congress' intent that federal prosecutors be held to the same ethical standards as those applicable to other lawyers. No other state has such a rule.

Existing Rule 2-100 of the California Rules of Professional Conduct and other state "anti-contact" rules are intended to protect the attorney-client relationship, and to prevent lawyers and those acting at their direction from taking advantage of individuals by speaking with them without their lawyers' present. It is presumed the lawyer has not given the other candid advice. *See Mitton v. State Bar of California*, 71 Cal. 2d 525, 534 (1969) ("If a party's counsel is present when an opposing attorney communicates with a party, counsel can easily correct any element of error in the communication or correct the effect of the communication by calling attention to counteracting elements which may exist."); *Continental Insurance Co. v. Superior Court of Los Angeles County*, 32 Cal. App. 4th 94, 112 (1995) ("[O]ne of the reasons for the ethical rule barring *ex parte* communication is to prevent injurious disclosures."); *United States v. Ryans*, 903 F.2d 731, 739 (10th Cir. 1990) ("The rule appears to be intended 'to protect a defendant from the danger of being 'tricked' into giving his case away by opposing counsel's artfully crafted questions.") (citations omitted). As the Ninth Circuit stated in *United States v. Tala*, 222 F.3d 1133, 1138 (9th Cir. 2000) (citations, quotations omitted): "In determining the applicability of Rule 2-100, we must be mindful of the fundamental reasons behind the venerable rule in legal ethics prohibiting *ex parte* contacts with represented parties. The rule exists in order to "preserv[e] . . . the attorney-client relationship and the proper functioning of the administration of justice." . . . Its objective is to establish ethical standards that foster the internal integrity of and public confidence in the judicial system."

If prosecutors and those acting at their direction were given special exemptions from California's anti-contact rule, the effectiveness of criminal defense lawyers in California would be unfairly denigrated. Comment ¶s 19-20 to proposed Rule 4.2 would give prosecutors carte blanch to take advantage of uncounseled disclosures by the other lawyer's clients.

Comments ¶s 19-20 also could encourage violations of the Sixth Amendment right to counsel. The Sixth Amendment right to counsel precludes prosecutors from directly or indirectly communicating with represented persons, other than through counsel, following the initiation of adversarial judicial proceedings "whether by way of formal charge, preliminary hearing, indictment, information or arraignment." *Kirby v. Illinois*, 406 U.S. 682, (1972) (plurality opinion); *see Massiah v. United States*, 377 U.S. 201, 206-07 (1964) (Sixth Amendment violated where government used statements made by accused to co-defendant following indictment, where co-defendant was cooperating with prosecutors and accused's counsel was not present). By suggesting that government lawyers and their agents are exempt from anti-contact rules, ¶s 19-20 could

encourage prosecutors to disregard this fundamental constitutional right.

The adoption of ¶s 19-20 also would place the State Bar in the position of promoting a highly partisan position on behalf of prosecutors where Congress already requires federal prosecutors and government lawyers to adhere to state ethics rules. The McDade Amendment, 28 U.S.C. § 530B, was adopted a decade ago in 1998[1] to cure complaints over the former federal practice actually attempting to permit federal prosecutors to violate state law under a concept of federal preemption and supremacy, just as this rule was permit. NACDL fought federal prosecutors on their efforts to violate state anti-contact rules until Congress stepped in and passed the McDade Amendment to not grant federal prosecutors special status under state ethics rules. California now seeks to change all that when there is no need to do so at all.

The implications of these comments recently summarized by a Federal District Court in Santa Ana, California, which concluded that federal prosecutors violated Rule 2-100 in a pending high-profile case involving local officials. That court described Comment ¶ 19 of proposed Rule 4.2 as "appearing to be more forgiving of government investigations" than existing Rule 2-100. *United States v. Corona,* 2008 U.S. Dist. LEXIS 37392 *21 (C.D. Cal. May 2, 2008). The substantial interests at stake in criminal matters – liberty and life – warrant the highest level of protection for the attorney-client relationship, not lesser protection for the convenience of prosecutors and only in California. There is no reason why prosecutors in California should be exempt from the rules that all other prosecutors must live with – there is no justification to make them a favored class of lawyers.

Finally, exemptions for the government in litigation not granted to the defense are unconstitutional. *Kirk v. State,* 526 So.2d 223 (La. 1988) (Louisiana surreptitious recording rule that permitted law enforcement to record but denied defense counsel the same opportunity was unconstitutional); *see also Wardius v. Oregon,* 412 U.S. 470, 474 & n. 6 (1973) (notice of alibi rule that was not reciprocal in criminal discovery was unconstitutional; "This Court has therefore been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial. *See, e. g., Washington v. Texas,* 388 U.S. 14, 22 (1967); *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963). *Cf.* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 Yale L. J. 1149, 1180-1192 (1960)."). Because the defense is not given the same right under ¶s 19-20, we believe the proposal is unconstitutional and should be abandoned.

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[1] Congress adopted the McDade Amendment, 28 U.S.C. § 530B, where it demonstrated intent that federal prosecutors be held to the same standards of professional conduct as all other lawyers in the states in which they practice or are licensed. The McDade Amendment was enacted in response to the Thornburgh Memorandum by which the Department of Justice took the position that its lawyers were not subject to states' rules of professional conduct. We submit that ¶s 19-20 attempt to undermine § 530B by including a government-lawyer exemption within the rule where the federal government does not even have a right to ask for it.

For the defense,

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June 3, 2008

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In response to your request for public comment on the thirteen proposed amendments to the Rules of Professional Conduct, we have submitted comments on-line at your web address. However, one rule merits particular consideration. At present, Rule 2-100 of the Rules of Professional Conduct bars lawyers from communicating directly with a represented "party:"

> While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a **party** the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." (Current Rules of Professional Conduct, Rule 2-100(A); emphasis added.)

The Commission for the Revision of the Rules of Professional Conduct has submitted a proposed rule change which would change "party" in this rule to "person:"

> In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a **person** the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." (Proposed Rules of Professional Conduct, Rule 4.2; emphasis added.)

We oppose this change. The Commission attempts to justify this change by asserting that the term "party" has actually always been understood to mean "person, "and that this change is merely a clarification as opposed to a change. Not so. It has always been the understanding of the legal community that "party" did *not* mean "person." (See *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798; see also *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398, 1401 [Rule 2-100 must be given narrow construction].)

Further, changing "party" to "person"will substantially impair the ability of prosecutors to investigate criminal offenses. (See Attorney General Terry Goddard, *Con Argument - Submitted Prosecutors Should Be Precluded From contacting Parties Ex Parte When those Parties Are Represented by counsel And Not charged With Criminal Offenses*, 41 Az.Att. 43, 43, 47 [June 2005] copy attached.) Likewise, the change will impair the ability of defense counsel to defend persons charged with criminal offenses. A defense attorney in a criminal case often finds it necessary to seek an interview with a person represented by counsel, where that person is **not** a party to the same case. For example, defense counsel may obtain information that another person actually committed the offense for which his client is charged. That person is now in jail for his own **unrelated** case. The lawyer in the unrelated case will never agree to permit the first lawyer to interview his client, given that the point of the interview is to obtain a confession to **another** crime. Yet this is often the only way in which the first lawyer can vigorously defend his own client and seek the truth that his client is in fact innocent. Under the rule as it is currently written, there is no impediment to such an interview. In fact, such interviews are commonplace under the current rule.

The impact of the proposed rule change on these two situations is far from clear. Again, the new rule would read, "In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a **person** the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." (Proposed Rules of Professional Conduct, Rule4.2(A).) What does "in the matter" mean in this context? Is the jail inmate (whom the lawyer reasonably believes is the actual guilty party) represented by another lawyer "in the matter?" Certainly, the matter on which the jail inmate is pending trial is not the *same* matter as the one the lawyer is investigating. But the jail inmate's confession will surely have an impact on his own case. Even if he is not charged with the other crime, his sentence may be aggravated by the knowledge of the court and the prosecutor that the inmate has committed additional serious crimes.

Counsel cannot be left to guess whether an interview that counsel believes is necessary to prosecute or defend a criminal case is permitted under the proposed rule change. Ethical rules must be crystal clear.

> ... [W]ith regard to the ethical boundaries of an attorney's conduct, a bright line test is essential. As a practical matter, an attorney must be able to determine beforehand whether particular conduct is permissible; otherwise, an attorney would be uncertain whether the rules had been violated until . . . he or she is disqualified. Unclear rules risk blunting an advocate's zealous representation of a client. (*Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1197-1198, quoting *Nalian Truck Lines, Inc. v. Nakano Warehouse & Transportation Corp.* (1992) 6 Cal.App.4th 1256, 1264.)

It is essential that prosecutors and defense lawyers be able to investigate and present their cases as completely as possible, to further the goal of "facilitating the ascertainment of truth in connection with legal proceedings." (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 857.) The proposed rule change will inject uncertainty where no uncertainty currently exists. The proposed rule change will damage both sides in criminal cases, and will ultimately frustrate the ascertainment of truth. For these reasons we oppose this proposed change.

Sincerely,

Mark Arnold

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Public Defender

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Arizona Attorney
June, 2005

Feature

*43 SUBMITTED PROSECUTORS SHOULD BE PRECLUDED FROM CONTACTING PARTIES EX PARTE WHEN THOSE PARTIES ARE REPRESENTED BY COUNSEL AND NOT CHARGED WITH CRIMINAL OFFENSES

Con

Attorney General Terry Goddard [FNa1]

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Ethical Rule 4.2 has withstood periodic assaults, and it was re-adopted recently by the Arizona Supreme Court, for good reason: It represents an intelligent balance between two dynamic legal principles--the legitimate protection of the attorney-client relationship and the search for truth.

The foundation for the Attorney General's policy on this rule is both legal and practical. It is rooted in case law and common sense. The policy acknowledges important differences in civil and criminal practices, as well as the legal and ethical responsibilities of prosecutors, plaintiffs' attorneys, defense counsel and transactional lawyers.

I believe the rule fairly takes into account competing interests. My Office applies the rule in a manner that promotes full investigation of the facts before civil or criminal proceedings are initiated, a process that serves the administration of justice and the public interest. The rule properly allows us to analyze the facts before making accusations of wrongdoing.

The Attorney General's Challenge

I want to address Rule 4.2 in the context of the realities that civil and criminal prosecutors face.

We routinely receive letters from counsel who claim to represent a corporation and all of its employees. [FN1] We are admonished not to interview or investigate without the approval or presence of the corporation's lawyer. Although we understand that corporate counsel is doing corporate counsel's job in our adversary system, we have a job to do as well. When pondering the appropriate application of ER 4.2, consider those corporate employees who have had the courage to blow the whistle on the toxic chemicals dumped into water supplies, pension fund raids, accounting practices that rob stockholders, and fraudulent representations about the tobacco product research. But for their *independent* disclosures, important public safety interests would have been de- feated.

The Attorney General's policy on ER 4.2, consistent with the language of Arizona's ER 4.2 and case law, in-

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terprets the no-contact rule in the context of civil and criminal enforcement proceedings as applying when adverse proceedings have formally commenced. [FN2]

The law practice at the Attorney General's Office covers a multitude of situations. The Attorney General represents the State--a large and diverse client managed by the Governor, and other elected and appointed public officials. These individuals manage the state's work through agencies, boards and commissions. From a purely civil lawsuit defense perspective, sound legal reason would support limiting contacts between public officials and opposing counsel to confine liability and financial exposure. However, in the interest of maximizing public information, I do not apply ER 4.2 to limit contact between public officials and opposing counsel until adverse proceedings actually begin.

The Attorney General also serves as a criminal and civil prosecutor. In that capacity, I am responsible to determine facts before initiating criminal or civil proceedings. My Office must investigate and analyze the facts before making accusations of criminal or civil wrongdoing. ER 4.2 allows us such wide-ranging investigation before taking action. As prosecutors, the burden of proof and probable cause thresholds require nothing less; more important, the citizens of Arizona expect us to find the truth on their behalf. For an undercover investigator or a monitor of a covert wiretap to worry about who among their contacts is represented by counsel would be patently absurd; equally so is the investigator trying to make sense of a complex financial fraud or environmental crime by widespread interviews. Early in the investigation, when there may not be a clear theory of the wrongdoing committed or the crimes to be charged, there are definitely not any "parties" to a litigation.

Although the author of the counter piece alleges that we fail "to address the issues ***45** head on" and "avoid the essence of the problem," neither our policy nor our practice overlooks the issue of fairness, as he claims. We make our decisions on Rule 4.2 by applying the language of the rule, the facts, and case law, and considering our responsibilities to the courts and the public. The stakes are too high for Assistant Attorneys General to be careless with our responsibilities. Our resources are too valuable to waste on irresponsible action. The State's lawyers must make critical assessments of ER 4.2 daily. In these decisions, theory and reality intersect; we are charged to protect the State's cases, its limited resources, and the need to quickly and accurately determine who, if anyone, should be prosecuted. We respect the attorney-client relationship, but we recognize how it, and the protections that it carries, can be expanded beyond its intended coverage.

Historical Perspective

The American Bar Association first adopted the predecessor to ER 4.2 in 1908. It was referred to as Professional Canon of Ethics 9 and used the term "party," not "person," in defining its boundaries. It was not until 1995 that the ABA expanded the application of ER 4.2 to "person," first through opinion and then through rule change. [FN3]

Arizona adopted the ABA 1983 Model Rule in 1985 in applying ER 4.2 to "parties" not "persons." The states who use the term "party" have generally recognized that a party is protected from the point that formal adversarial proceedings begin. The logic of this view is borne out by extensive case law, both criminal and civil, which maintains the delicate balance between protecting the attorney-client relationship and the search for the truth.

During the last decade, many attempts have been made to expand the protections of Arizona's ER 4.2 from "parties" to "persons." Most recently, in 2003, our Supreme Court was urged to make that expansion but de-

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clined to do so. My predecessor, along with all 15 County Attorneys and many civil trial lawyers, opposed the change. Our Supreme Court has continued to establish and maintain the formal protections of the no-contact rule at the point when pleadings ***47** are filed, when a "person" becomes a "party." The distinction is made for good reason.

ER 4.2 and Criminal and Civil Enforcement Practice

Consistency in Application

In the criminal arena, it has been the law in Arizona since 1976 that ER 4.2 (then DR 7-104) does not prohibit the questioning of a prospective criminal defendant prior to the defendant's initial appearance or arraignment as long as the requirements of the Constitution are followed. [FN4]

In *State v. Richmond*, the Arizona Supreme Court found no violation of DR 7-104 where law enforcement officers complied with the requirements of *Miranda v. Arizona* and obtained a voluntary statement from the defendant outside the presence of his counsel prior to indictment for the offense at issue. [FN5] *Richmond* indicated that DR 7-104 imposed no greater limits on contacts with a represented suspect than are imposed by the Fifth and Sixth Amendments to the U.S. Constitution. [FN6] Although this statement was arguably dicta, *Richmond* is the Arizona Supreme Court's most direct guidance on how the ethical rules apply to investigative contacts with represented persons. *Richmond* and other cases interpreting DR 7-104 remain relevant because the requirements of the former rule are "substantially similar" to those of ER 4.2. [FN7]

Consistent with *Richmond*, courts in several other jurisdictions have recognized that investigative contacts are permissible before the formal commencement of enforcement proceedings. These holdings rest on two alternative rationales: Either Rule 4.2 (or its predecessor DR 7-104) does not apply where the person contacted is not yet a "party," or the contacts are "authorized by law." [FN8]

ER 4.2 does not allow persons to frustrate legitimate investigative activities merely by retaining counsel. [FN9] Many courts have recognized that the ethical rule prohibiting contact with represented persons takes effect only after the commencement of adversarial criminal enforcement proceedings, such as a formal charge, preliminary hearing, indictment, information or arraignment. [FN10]

The Attorney General represents most State entities. Our policy recognizes that State clients are different. For example, we recognize that the civil notice of claim statute effectively commences a case against a public body. According to statute, the claim must set forth facts identifying the basis of the claimed liability, the amount for which the claim can be settled, and the facts supporting that amount. I believe our policy conforms to the general practice in the Arizona legal community and prohibits us from contacting a represented claimant. In other words, the protections of ER 4.2 apply to claimants who file a notice of claim against the State. The criticism that our policy is inconsistent because we protect our employees once a notice of claim is filed yet engage in *ex parte* contacts with represented targets in a criminal investigation is not well founded and does not reflect our practice or policy.

This Office recognizes that under some limited circumstances, ER 4.2 may prevent contact with a represented person after arrest but before an indictment has been returned. No Arizona case addresses this issue under ER 4.2. Several federal courts of appeal, however, have applied no-contact rules from other states in a pre-

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indictment, custodial setting. [FN11] For example, in *United States v. Talao*, [FN12] the Ninth Circuit determined that although no indictments had been issued, the government and San Luis Gonzaga Construction ("SLGC") had clearly taken adversarial positions concerning payments of prevailing wages, kickbacks and alleged false statements made to the government. The Department of Labor was investigating civil violations of SLGC's wage practices, the Asian Law Caucus had filed a *qui tam* action, and SLGC's lawyer had initiated settlement discussions with the government on its civil and criminal investigations. The court held that under these circumstances, involving fully defined adversarial roles, impending grand jury proceedings and the government's awareness of SLGC's ongoing legal representation, California's no-contact rule governed the United States Attorney's pre-indictment, non-custodial communications with SLGC's bookkeeper, a key witness to the issues in dispute. [FN13] Nonetheless, the court held that:

> We deem manifest that when an employee/party of a defendant corporation initiates communications with an attorney for the government for the purpose of disclosing that corporate officers are attempting to suborn perjury and obstruct justice, Rule 2-100 does not bar discussions between the employee and the attorney. Indeed, under these circumstances, an automatic, uncritical application of Rule 2-100 would effectively defeat its goal of protecting the administration of justice. It decidedly would not add meaningfully to the protection of the attorney-client relationship if subornation of perjury, or the attempt thereof, is imminent or probable. [FN14]

In civil enforcement, it has been law since 1978 that investigative contacts are authorized before proceedings are formally commenced. [FN15] A variety of attorneys in different practice areas conduct pre-filing investigations and interviews in a search for the truth and to meet their ethical obligations before they file an action. Examples include personal injury lawyers investigating a product's defective design; lawyers in civil and administrative enforcement of health and safety, public welfare, and environmental laws; and ***50** criminal defense attorneys who conduct pre-indictment interviews of witnesses and other suspects once their own clients come under suspicion.

Consistent with the ethical rules, these attorneys and their agents may interview witnesses and suspects before formal charges are filed. Whether potential violations are criminal or civil in nature, a person or entity should not be allowed to thwart the investigation of possible civil rights, consumer fraud, environmental or similar violations by the general retention of a lawyer. Many, indeed most, of the persons contacted in the investigative phase will never be charged. Moreover, as such investigations progress, they may change from criminal to civil, or vice versa, or they may involve parallel proceedings. Until formal proceedings commence, appropriate investigative contact must be permitted under ER 4.2.

Responsible Application of ER 4.2

Protecting a "party" from communications with opposing counsel or counsel's agents supports consistent, established case law and policy that have been in effect in Arizona and applied with few problems for decades. ER 4.2 prevents wrongdoers from erecting strategic roadblocks to pre-filing investigations and needless wrangling with persons who will never be charged. Because the burden of proof is squarely on prosecutors, government entities and private plaintiffs in vindicating important societal principles, attorneys must be able to conduct pre-filing investigations to meet probable cause thresholds or the Civil Rule 11 reasonable inquiry criterion.

Recently in *Texas v. Cobb,* [FN16] the United States Supreme Court, in holding that the Sixth Amendment right to counsel is offense-specific, noted:

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> It is critical to recognize that the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses. "Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser. Admissions of guilt resulting from valid *Miranda* waivers are more than merely 'desirable'; they 'are essential to society's compelling interest in finding, convicting and punishing those who violate the law.'" [FN17]

The same policy concerns articulated by the Supreme Court in the Sixth Amendment arena are present in the debate over ER 4.2. Indeed, legal commentators have noted the adverse consequences of a broader ER 4.2 no-contact rule. "A broad interpretation of the no-contact rule would provide a powerful incentive for criminal actors to seek relational representation because having an ongoing relationship with an attorney could insulate them from several of the most effective law enforcement techniques for investigating complex crime." [FN18]

One commentator on legal ethics noted some of the adverse effects of a broad nocontact rule in civil prac- tice:

> First, ... the discovery process, formal or informal, should not be unnecessarily inhibited. Second, ... methods that assist in reducing discovery costs and providing reasonable alternatives should be supported. Third, ... contemporary litigation is costly and often the "little guy," plaintiff or defendant, is at a distinct disadvantage in the process. Fourth, in certain types of litigation against a corporation a pattern of treatment of employees may be critical to proof of a claim. ... Fifth, private litigation is an important means of controlling abuses of corporate power and restraining abuses of law. ... [Sixth], an unwise extension of confidentiality restricts access to information and prevents courts from being fully effective in ferreting out the truth of a disputed claim. [Seventh], witnesses may be more willing to discuss a matter informally than in the adversarial context of formal discovery. [FN19]

ER 4.2 requires that a realistic balance be struck--a balance that my Office diligently works to ensure.

Conclusion

The ER 4.2 policy of the Attorney General's Office is based on the rule, case law and ethical legal practice. Our policy does not seek or provide benefits to the State as a civil defendant that it withholds from criminal defendants. Those who shoulder the burden of proof must have the ability to investigate the facts legitimately before filing formal charges, no more and no less. We seek to safeguard the right of our State's lawyers and investigators to search for the truth, prior to filing a criminal or civil action. That right, that ability to ferret out wrongdoing, is a critical piece of the justice system's ability to protect the public. It must be preserved.

[FNa1]. **Terry Goddard** is the Attorney General for the State of Arizona.

[FN1]. Of course, this practice does not comport with Arizona law. In the case of a represented organization, ER 4.2 does not limit *ex parte* communications with all employees of the organization. Rather, only communications with employees with managerial responsibility, employees whose acts or omissions in connection with the matter may be imputed to the organization, and employees whose statement may constitute an admission on the part of the organization are restricted. *See Lang v. Superior Court*, 826 P.2d 1228, 1230-31 (Ariz. Ct. App. 1992). With respect to former employees of a represented organization, the court in *Lang* held that *ex parte* communications are permissible unless the acts or omissions of the former employee gave rise to the underlying lit-

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igation or the former employee has an ongoing relationship with the former employer in connection with the litigation. *Id.* at 1233.

[FN2]. This interpretation is consistent with the rule set forth in *Lang*. That case involved a matter in litigation, and the court's holding did not extend ER 4.2's prohibition against *ex parte* communications beyond parties to a formal proceeding.

[FN3]. In July 1995, the American Bar Association issued Opinion 95-396, which determined that the term "party" in ER 4.2 really meant "person." The ABA amended ER 4.2 later in 1995 to substitute the word "person" for "party." Arizona's rule has not been similarly amended.

[FN4]. *State v. Richmond*, 560 P.2d 41, 46 (Ariz. 1976), *abrogated on other grounds by State v. Salazar*, 844 P.2d 566 (Ariz. 1992).

[FN5]. *Richmond*, 560 P.2d at 46.

[FN6]. *Id.*

[FN7]. *See Lang*, 826 P.2d at 1231 n.3 (recognizing substantial similarity between DR 7-104 and ER 4.2).

[FN8]. *See, e.g., United States v. Powe*, 9 F.3d 68, 69 (9th Cir. 1993) (holding that California's RPC 2-100 does not apply to pre-indictment, non custodial conversations with a suspect); *United States v. Ryans*, 903 F.2d 731, 740 (10th Cir. 1990) (relying, in part, on the use of the term "party" in DR 7-104(A)(1) to hold that the ethical rule does "not attach during the investigative process before the initiation of criminal proceedings"); *United States v. Kenny*, 645 F.2d 1323, 1339 (9th Cir. 1981) (interpreting California's DR 7-104); *United States v. Lemonakis*, 485 F.2d 941, 955-56 (D.C. Cir. 1973) (ruling that DR 7-104 does not apply before indictment).

[FN9]. *See Ryans*, 903 F.2d at 740; *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir. 1983) (interpreting DR 7-104).

[FN10]. *Ryans*, 903 F.2d at 740; *but see United States v. Talao*, 222 F.3d 1133, 1138-39 (9th Cir. 2000) (recognizing that, under certain circumstances, the rule may be applied to pre-indictment, non-custodial communications.)

[FN11]. *See United States v. Killian*, 639 F.2d 206, 210 (5th Cir. 1981); *United States v. Durham*, 475 F.2d 208, 211 (7th Cir. 1973); *United States v. Thomas*, 474 F.2d 110 (10th Cir. 1973).

[FN12]. 222 F. 3d at 1139-40.

[FN13]. *Id.* at 1139.

[FN14]. *Id.* at 1140 (Rule 2-100 is California's version of ER 4.2).

[FN15]. *See Flieger v. Reeb*, 583 P.2d 1351, 1353 (Ariz. Ct. App. 1978) (observing that DR 7-104 did not apply to a private investigator's contact before a civil complaint was filed); *see also Johnson v. Cadillac Plastic Group, Inc.*, 930 F. Supp. 1437, 1441 (D. Colo. 1996) (barring informal discovery during investigatory stages of civil litigation would be fundamentally unfair and would frustrate the purposes of Rule 11); *Weider Sports Equip. Co., Ltd. v. Fitness First, Inc.* 912 F. Supp. 502, 507-08 (D. Utah 1996) (noting that Rule 4.2 should not

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be applied to block investigation of such matters as civil rights violations, age discrimination, or other improper corporate or labor practices); *Jorgensen v. Taco Bell Corp.*, 58 Cal. Rptr. 2d 178 (Ct. App. 1996) (declining to apply California Rule 12-100 to bar pre-litigation investigative contacts of corporate employees in a sexual harassment lawsuit).

[FN16]. 532 U.S. 162 (2001).

[FN17]. *Id.* at 171-72 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991) and *Moran v. Burbine*, 475 U.S. 412, 426 (1986)).

[FN18]. Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REVV. 670, 701 (1992).

[FN19]. Sherman L. Cohn, *The Organizational Client: Attorney Client Privilege and the No Contact Rule*, 10 GEO. J. LEGAL ETHICS 739, 773 (1997) (citing *Bouge v. Smith's Management Corp.*, 132 F.R.D. 560, 565 (D. Utah)).
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LAW OFFICES

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June 4, 2008

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, CA 94105

RE: Proposed changes to Rule 2-100 of the Rules of Professional Conduct

Dear Ms. Hollins:

Our analysis indicates that the proposal to change Rule 2-100 barring lawyers from communicating with a represented "party" to represented "person" (proposed Rule 4.2) is ill-advised for a variety of reasons, particularly in criminal cases. The current rule prohibits communicating with co-defendants or with defendants charged in separate cases arising from a common incident (i.e. an adult defendant charged in a criminal court and a minor charged by petition in a juvenile delinquency court). The current rule does *not* prohibit contacting witnesses to those events, as long as they are not a party, even if they have counsel. The proposed rule is at best ambiguous, and would "chill" access to any witness who has counsel (i.e. Amber Frey in the Scott Peterson homicide case). This directly infringes upon a criminal defendant's constitutional right to counsel, and to the fundamental fairness (due process) of the entire proceedings. Defense counsel should fully investigate the case and that means interviewing all available witnesses. No rule should be altered that reduces the number of available witnesses, or that creates ambiguities that cause defense lawyers to hesitate to interview witnesses who are not parties to the action.

The state bar response to objections from prosecutors exacerbates the problem for defense counsel. The rule change and the proposal to amplify it with a "new commentary to make clear that authorized investigative and prosecutorial practices are not intended to be affected..." creates an imbalance and possible constitutional infirmity. Prosecutors, their investigators and police would presumably operate as they are allowed to under the current rule, while the defense is denied access to the very same people in the absence of permission from their lawyers (unlikely to be given), or a court order. The lack of reciprocity between the prosecution and

defense would violate due process of law under *Wardius v. Oregon* (1973) 412 U.S. 470. And in the real world it would inhibit addressing the injustice of wrongful convictions. We know from recent history, fueled primarily by advances in the science of DNA, that many innocent people have been convicted of crimes – some of whom find themselves on death row. Restricting defense access to witnesses is unwise.

The rule should be left alone. Represented parties remain subject to the protections of the rule, and witnesses remain available for both prosecutors and defense lawyers to fully investigate their cases.

Sincerely,

Deborah A. Kwast

DEBORAH A. KWAST
Public Defender

THE STATE BAR
OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL

Scott J. Drexel, *Chief Trial Counsel*

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639 TELEPHONE: (415) 538-2063

August 26, 2008

Randall Difuntorum, Director
Office of Professional Competence & Planning
State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Comments of the Office of the Chief Trial Counsel to Proposed Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

Thank you for the opportunity to submit the comments of the Office of the Chief Trial Counsel to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in March 2008. I apologize that these comments have been submitted after the comment deadline but hope that they will nevertheless be considered by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

~~Proposed Rule 1.5 [Fees for Legal Services]~~

~~1. Unconscionable Fees~~

~~The Office of the Chief Trial Counsel is opposed to any attempt to specifically define the term "unconscionable" in subsection (b) of proposed rule 1.5. The phrase "unconscionable fee" is sufficiently defined by case law and has been found not to be unconstitutionally vague. (*In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 732.) In our view, any attempt to specifically define what constitutes an unconscionable fee is likely to be either overbroad or under inclusive. Sufficient guidance regarding the determination of whether a fee is unconscionable is provided by the list of facts set forth in subsection (c) of proposed rule 1.5. However, we urge the Commission to consider adding two additional factors to the list set forth in subsection (c). Those additional factors are: (1) whether the fee involves an element of fraud or overreaching on the attorney's part (see *Herrscher* v. *State Bar* (1935) 4 Cal.2d 399, 403; *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989); and (2) whether there was any failure on the attorney's part to disclose the true facts to the client (see *Herrscher* v. *State Bar*, *supra*, 4 Cal.2d at p. 403). In addition, the Commission may wish to more clearly state in the rule itself whether the factors set forth in subsection (c) are intended to be the exclusive factors to be considered in determining whether a fee is unconscionable. At least one~~

~~Additionally, in the context of an employment discrimination matter, an attorney representing an employer accused of discriminating against an individual employee would be permitted to talk to all of the other employees in the company and request that none of them speak with the aggrieved employee's attorney.~~

~~For these reasons, the Office of the Chief Trial Counsel recommends deleting everything in subsection (h) after the word "party" and recommends deleting Comment 5, which we find more limited than the rule itself.~~

~~The Office of the Chief Trial Counsel suggests that an additional comment be added to proposed rule 3.4 that distinguishes between a lawyer requesting that a person refrain from giving relevant information to another party in a matter and a lawyer advising a person that he or she need not voluntarily speak with another party in the matter. The Office of the Chief Trial Counsel believes that advising a person that they are not required to speak with another party in a matter is appropriate and is very different from requesting that a person not speak with another party in the matter.~~

Proposed Rule 4.2 [Communication with Represented Party]

The proposed rule, as drafted, does not address the serious issue presented by *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Court Rptr. 798. In that case, a criminal defendant confessed to the police that he had set numerous fires, including a fire at an apartment building in San Francisco in which one of the occupants of the building died and several others were injured. Counsel was appointed for the defendant in the criminal matter. While the criminal matter was still pending, several residents of the apartment building asked respondent Dale to represent them in an action for personal injuries against the owner of the apartment building. The criminal defendant was not named as a defendant in this civil action but was a percipient witness to the condition of the building at the time he set fire to it. The criminal defendant ultimately pled guilty to six counts of arson and was found guilty, in a court trial, of second-degree murder in the death of the apartment occupant. In the plea agreement, the criminal defendant retained the right to appeal the homicide conviction on the grounds that his confession was illegal and should have been suppressed. After the conclusion of the criminal defendant's trial, but prior to sentencing, respondent Dale contacted the defendant's criminal attorney and asked for permission to interview the defendant. The attorney refused the request. Nevertheless, respondent Dale went to the jail on multiple occasions to make contact with and befriend the criminal defendant so that he could interview him about the fire and the condition of the apartment building.

After the criminal defendant was sentenced, his appointed trial counsel filed a notice of appeal on his behalf, listing the defendant as representing himself on appeal pending appointment of appellate counsel. Two days after the notice of appeal was filed, respondent Dale visited the defendant at San Quentin Prison and brought with him a letter agreement in which he promised to assist the defendant when he comes up for parole in the capacity of either his attorney or a witness and to tell how the defendant had taken responsibility for his actions. With this letter agreement as an inducement, the criminal defendant signed a proffered declaration from respondent Dale in which he admitted to starting

the fire and commented upon the fact that there was a large amount of paper and cardboard in the basement of the building to use as tinder for the fire.

The State Bar Court Review Department did not find respondent Dale culpable of a violation of current rule 2-100 of the Rules of Professional Conduct because the incarcerated arsonist was represented in his criminal proceeding, but not in the civil action in which respondent Dale solicited the information.

It is the Office of the Chief Trial Counsel's position that respondent Dale should have been found culpable of violating rule 2-100. As such, we recommend that subsection (a) of the proposed rule should read as follows:

> In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation, **or a related subject**, with a person the lawyer knows to be represented by another lawyer in the matter, **or a related matter**, unless the lawyer has the consent of the other lawyer.

The Office of the Chief Trial Counsel does not have any comments to offer at this time with respect to proposed rules 1.16, 3.5, 3.10, 4.3 or 5.4.

Thank you again for the opportunity to comment upon these proposed amendments to the Rules of Professional Conduct.

Very truly yours,

Scott J. Drexel
Chief Trial Counsel

SJD:dim
~~Attachment~~

PUBLIC COMMENTS [4.3] ~ FILE LIST

C-2008-190b Matthew Lombard [4.3]

C-2008-213l SDCBA [4.3]

C-2008-230j OCBA [4.3]

C-2008-232k COPRAC [4.3]

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation Law Office of Matthew Lombard

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** Matthew Lombard

*** City** Los Angeles

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) mlombard@lombardlaw.net

*** Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 4.3 Dealing with Unrepresented Person

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ( ) AGREE with this proposed Rule
- (•) DISAGREE with this proposed Rule
- ( ) AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Attachments

You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the next to **Attachment**.

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Receive Mass Email?

To receive e-mail notifications regarding the rules revision project, check the box indicating that you would like to be added to the Commission's e-mail list and enter your email address below. Email addresses will be used only to deliver the requested information. We will not use it for any other purpose or share it with others.

Contact Support

MEMORANDUM

Date: April 22, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subject: Proposed Rule 4.3 – Dealing with Unrepresented Person
[Existing CRPC Rule: None]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Disapprove Proposed Rule 4.3.

Rationale For Comment 1: Proposed Rule 4.3 imposes new duties on an attorney with respect to unrepresented persons. Beyond diluting the duty a lawyer has to his or client, it takes little imagination to see this being used as a weapon by those who have unpleasant encounters with lawyers. The common law provides sufficient protection against the abuses of lawyers toward the unrepresented without adding a rule of discipline that may ultimately compromise, in addition to a lawyer's duty toward his or her client, the protections of the litigation privilege. (Civil Code section 47.)

The Proposed Rule 4.3 Comments play too great a role in setting the parameters of the rule and its exception. For example, Proposed Rule 4.3 Comments 4 and 5 state exceptions not found in the Proposed Rule itself.

The Proposed Rule 4.3 requires a lawyer to avoid giving legal advice if the person to whom he is speaking has interests that "have a reasonable possibility of being in conflict" with the interests of the client. It is unclear what this means and even whether it is limited to the present or to the foreseeable future.

RULES OF PROFESSIONAL CONDUCT OF STATE BAR OF CALIFORNIA

Please indicate which proposed rule you are commenting on:

Rule 4.3
Dealing with Unrepresented Person [n/a]

Agree: **X** Agree as Modified: Disagree :

Comments: _____

Name: **Cathrine Castaldi** **Title: President**

Organization: **Orange County Bar Association**

☑ **Commenting on behalf of an organization**

Address: **P.O. Box 6130**

City, State, Zip: **Newport Beach, CA 92658**

Please **write** or **fax** or **respond using the Internet** to:

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, CA 94105

Internet: http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=90842

DEADLINE FOR COMMENT: 5:00 P.M. Friday, June 6, 2008

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

PUBLIC COMMENTS [5.4] ~ FILE LIST

C-2008-213m SDCBA [5.4]

C-2008-229a SCCBA [5.4]

C-2008-230k OCBA [5.4]

C-2008-232i COPRAC [5.4]

MEMORANDUM

Date: April 22, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

Subject: Proposed Rule 5.4 – Duty to Avoid Interference with a Lawyer's Professional Independence
[Existing CRPC Rule 1-310, 1-320, 1-600]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 5.4.

Rationale For Comment 1: The proposal tracks ABA Model Rule 5.4 and is similar to existing CRPC rules on the subject. It should be adopted in the interest of uniformity.

PROPOSED RULE 5.4, SCCBA EDITS

SCCBA COMMENTS TO RULE 5.4: Duty to Avoid Interference with a Lawyer's Professional Independence

The SCCBA recommends adopting this rule as proposed with the following additions, deletions and comments.

Subsection (a)(4) and Comment [4]: The SCCBA recommends adding to Comment [4] language to alert attorneys about the existence of numerous internet based "lawyer referral" services as well as internet sites that are only marketing sites. The comment should point out that this rule may apply to internet based "lawyer referral" services to which a lawyer may be paying a fee for referrals. The comment should delineate between an internet based site that simply requires the attorney to pay a fee to post a "marketing" profile where the client searches the site and chooses the attorney based on the information posted by the attorney (a marketing/advertising site) as opposed to an internet service that requires the attorney to pay a fee to the internet service which does the screening of clients and where the clients contacts the service directly, not the attorney (a referral service). If the attorney is participating in the latter, it is only either is the internet based service is certified by the State Bar.

Subsection (e): The SCCBA recommends that this subsection be deleted. This subsection is confusing in that attorneys are not subject to the State Bar Rules and Regulations Pertaining to Lawyer Referral Services; lawyer referral services are subject to the Rules and Regulations. This subsection would seem to suggest that all lawyers are subject to the rules.

Rule 5.4: Duty to Avoid Interference with a Lawyer's Professional Independence

(a) A lawyer or law firm shall not share legal fees directly or indirectly with a person who is not a lawyer or with an organization that is not authorized to practice law. This paragraph is not intended to prohibit:

(1) the payment of money or other consideration at once or over a reasonable period of time after the lawyer's death to the lawyer's estate or to one or more specified persons pursuant to an agreement between a lawyer and either the lawyer's law firm or another lawyer in the firm.

(2) any payment authorized by Rules [1.17.1 or 1.17.2] [Rule 2-300].

(3) a lawyer or law firm including non-lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not violate these Rules or the California State Bar Act.

(4) the payment of a prescribed registration, referral, or other fee by a lawyer to a lawyer referral service established, sponsored and operated in accordance

with the State Bar of California's minimum standards for a lawyer referral service in California.

(b) A lawyer shall not form a partnership or other organization with a person who is not a lawyer if any of the activities of the partnership or other organization consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct, regulate or interfere with the lawyer's independence of professional judgment, or with the client-lawyer relationship, in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or organization authorized to practice law for a profit if:

(1) a person who is not a lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a person who is not a lawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of organization other than a corporation; or

(3) a person who is not a lawyer has the right or authority to direct, influence or control the professional judgment of a lawyer.

~~(e) A lawyer shall comply with the Rules and Regulations Pertaining to Lawyer Referral Services as adopted by the Board of Governors of the State Bar.~~

Comment

[1] A lawyer is required to maintain professional independence of judgment in rendering legal services. The provisions of this Rule protect the lawyer's independence of professional judgment by restricting the sharing of fees with a person or organization that is not authorized to practice law and by prohibiting a non-lawyer from directing or controlling the lawyer's professional judgment when rendering legal services to another.

[2] Other rules also protect the lawyer's professional independence of judgment. (See, e.g., Rule 1.5(e) [Rule 2-200], Rule 1.8(f) [Rule 3-310(F)], and Rule 5.1.)

[3] A lawyer's shares of stock in a professional law corporation may be held by the lawyer trustee of a revocable living trust for estate planning purposes during the lawyer's life, provided that the corporation does not permit any non-lawyer trustee to direct or control the activities of the professional law corporation.

[4] A lawyer's participation in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of this Rule.

[5] This Rule is intended to apply to group, prepaid, and voluntary legal service programs, activities and organizations and to non-profit legal aid, mutual benefit and advocacy groups but nothing in this Rule shall be deemed to authorize the practice of law by any program, organization or group. This Rule is not intended to prohibit the payment of court-awarded legal fees to non-profit legal aid, mutual benefit and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221].) (See also Rule [6.3].)

[6] This Rule is not intended to abrogate case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)

MEMORANDUM

Date: June 6, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct The State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 5.4 – Duty to Avoid Interference with a Lawyer's Professional Independence**

Founded over 100 years ago, the Orange County Bar Association has over 9,800 members, making it the second largest voluntary bar association in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this Comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following concerning the subject proposed Rule:

*****

Comment:

The exception set forth in paragraph (a)(1) of the proposed Rule is ambiguous. The rule needs clarification as to whether or not it is intended to prohibit the payment of a Rule 1.5.1 (2-200) referral fee to the estate (or named beneficiary) of a deceased lawyer pursuant to an otherwise valid referral fee arrangement (which necessarily is made with an outside firm, or a lawyer from an outside firm.) As drafted, because subsection (a)(1) limits the payments to those coming from the deceased lawyer's firm or another lawyer within the firm, it would preclude the deceased lawyer's estate or designated beneficiary from receiving the proceeds of an otherwise lawful referral fee from a different lawyer or firm. Why should such an earned payment of a referral fee be treated any differently than the retirement of a lawyer's partnership interest or stock in his or her law firm?

If referral fees for the bare referral are still to be permitted, then the Committee should consider whether there should be an exception in Rule 5.4 to allow payment of a referral fee to the estate or beneficiary of a deceased lawyer who, but for his or her death, would have been entitled to receive that fee pursuant to an agreement with another lawyer or law firm, appropriately approved by the client. This scenario needs to be addressed either here in Rule 5.4(a) or in Rule 1.5.1 which addresses fee sharing.

It is also uncertain as to what the nature of the "agreement" referred to in Rule 5.4(a)(1) might be, and whether such an agreement is just one that covers "a lawyer's" death, or could also be an agreement that is triggered during the lawyer's lifetime. A helpful clarification would be to change the words "pursuant to an agreement between a lawyer

and either the lawyer's law firm or another lawyer in the firm" to clarify who the lawyer is, and that it is referring to the deceased lawyer, not to an agreement permitting payment to some other strangers.

It needs clarification that the nature of the agreement is one that limits payment to a class of persons who would be the deceased lawyer's estate, trust or heirs.

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 vendors[1] 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.

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

Dennis Peter Maio, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

PUBLIC COMMENTS [Other/Multiple Rules] ~ FILE LIST

C-2008-241 ABA [ext]

C-2008-244 Phillip Feldman [conflicts]

Hollins, Audrey

From: Nicholson, Bruce [NicholsonB@staff.abanet.org]
Sent: Friday, June 06, 2008 12:52 PM
To: Hollins, Audrey
Cc: Susman, Thomas
Subject: Request for Extension of Time to File Comments: Proposed Rules of Professional Conduct

June 6, 2008

Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, CA 94105

Dear Ms. Hollins:

I am writing on behalf of the American Bar Association (ABA) to request an extension of time for filing comments regarding the Proposed Rules of Professional Conduct, due today. The ABA needs additional time to review the proposed revisions regarding Rule 3.10 and 4.2 in particular. This additional time will permit our Association to fully consider what comments, if any, would assist the State Bar in its important work. We understand that the Board Committee will not be meeting to consider submissions until its July meeting and we are working to meet its meeting schedule. Please call me at 202 -662-1769 or contact me by email at nicholsonb@staff.abanet.org if you have any questions. Thank you.

Sincerely,

E. Bruce
Nicholson

E. Bruce Nicholson
Legislative Counsel
American Bar Association
740 15th Street, NW
Washington, DC 20005
Tel: 202/662-1769
Fax: 202/662-1762
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LAW OFFICES OF PHILLIP FELDMAN
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Phillip Feldman *

Of Counsel
Robert S. Ackrich
James Wesly Smith, Jr.

June 11, 2008

William H. Neukom, Esq.
President American Bar Association
321 N. Clark Street
Chicago, Il 60610

Dennis P. Maio, Esq.
Chair, Committee on Rules of Professional Conduct
American Bar Association
Reed Smith, LLP
The Embarcadero Center, Suite 2000
San Francisco, CA 94111

Jeffrey Bleich, Esq.
President, California State Bar
560 Mission Street 27th Floor
San Francisco, CA 941-6-1639

Audrey Hollins for Board of Bar Governors & its RAD Committee
California State Bar
180 Howard Street
San Francisco, CA 94105 by fax as well to 415-538-2171

Responsible Planners:

RE: Rule Changes Required to Keep up with Changing Times: Independent Professional Judgment

ANY POTENTIAL CONFLICT OF INTEREST TAKES INDEPENDENCE OUT OF PROFESSIONAL JUDGMENT SINCE THE PROFESSIONAL'S VIEW IS ALWAYS TAINTED BY SOME ASPECT OF SELF-INTEREST.

In good times, insuring avoidance of radical changes and premature reaction to changing times is necessary since time balances the pendulum of economic variations. "Bad times" have major effects on society which flow down to its professional segment, including lawyers. Often, however, in tight, changing times, methodologies which best balance the long range fall short of present needs.

It has always been axiomatic that any two persons, entities or combinations thereof are entitled to the independent professional judgment of their legal counsel. Today, perhaps, with massive unemployment, tremendous increase in private home foreclosures, substantial commercial, market and real estate down-turns, the public's increased need for INDEPENDENT COUNSEL requires temporarily modifying old ways.

A depressed economy appears to make people and business entities more inclined to seek redress under the law in all areas. This phenomena increases the burden of ensuring that solicited counsel is unfettered by anything other than a single client's best interest. The exclusive purpose of such re-emphasis is to PROTECT THE PUBLIC by highlighting justified reliance on client's self-interest. There are ancillary benefits to refining and re-emphasizing the avoidance of even appearance of professional conflicts. It re-instills public confidence in the rule of law and also incidentally requires two lawyers in many situations presently served by a single attorney/firm.

ABA

ABA Rules of Professional Conduct involving "serving two masters" aspects of conflicts of interest generally have built in safeguards to flexibly serve changing times. Rules 1.7, 1.10 and 1.13 disenable such conflicts in the absence of informed consent. Since Ethics 2000, "informed consent" fairly follows the risk-benefit requirements originally outlined by Justice Cardozo in his famous Schloendorff decision. The only legitimate criticism might perhaps be 1.7's unrealistic requirement that incompetent lawyers may, nonetheless opine as to their own competence and 1.13 (g)'s omitting that all such communications must be written.

The "Self-dealing" aspects of conflicts of interest, on the other hand, suffer a major flaw IN TODAY'S TIMES. Rule 1.8 (e) restricts law firms from subsidizing their client's needs outside of court costs etc. The rule's rationale is avoidance of "bidding wars" and was and is well founded. If (contingency) lawyers could bid for clients, such "free-enterprise" would place attorneys on the same sub-professional plane as commercial merchants. As always, contingency clients are often without means. A lawyer's subsidy of litigation costs does not feed injured breadwinner's children while awaiting compensation from the injuring tortfeasor. Since lawyers are prohibited from such subsidies, commercial merchants have filled the void by financing injured parties who have meritorious claims in a manner similar to subsidizing heirs awaiting their expectancies. Such patent champerty fills existing voids by charging exorbitant and unrestricted fees for their loan services.

Relaxing 1.8(e)by permitting lawyers ready, willing and able to cover client needs without reliance on the prolific "case-financing" money lenders whose "interest" rates would

make organized crime blush, needs broader flexibility for the benefit of the public.

CALIFORNIA

Once again California is looking at how the rest of the country deals with attorney's professional liability. Once again, as we did before, we spend more time creating safe-harbors, "loop-holes", ambiguities and reliance on subjective factors than endeavoring to protect the public. This time our proposed revisions to past rules appear to create enough exceptions to the rules to swallow the rule. It's sad that after being admonished to bring California in line with the rest of the country by either staying close to ABA Rules or the majority legal views found in the Restatement of the Law, The Law Governing Lawyers, California continues to view professional responsibility as a disciplinary tool to monitor lawyers too unsophisticated to deal with the safe-harbors ,while overtly enabling lawyers to engage persons to eavesdrop on their adversary's telephone conversations or get paid for assisting in class action rip-offs.

Very Truly Yours,

LAW OFFICES OF PHILLIP FELDMAN

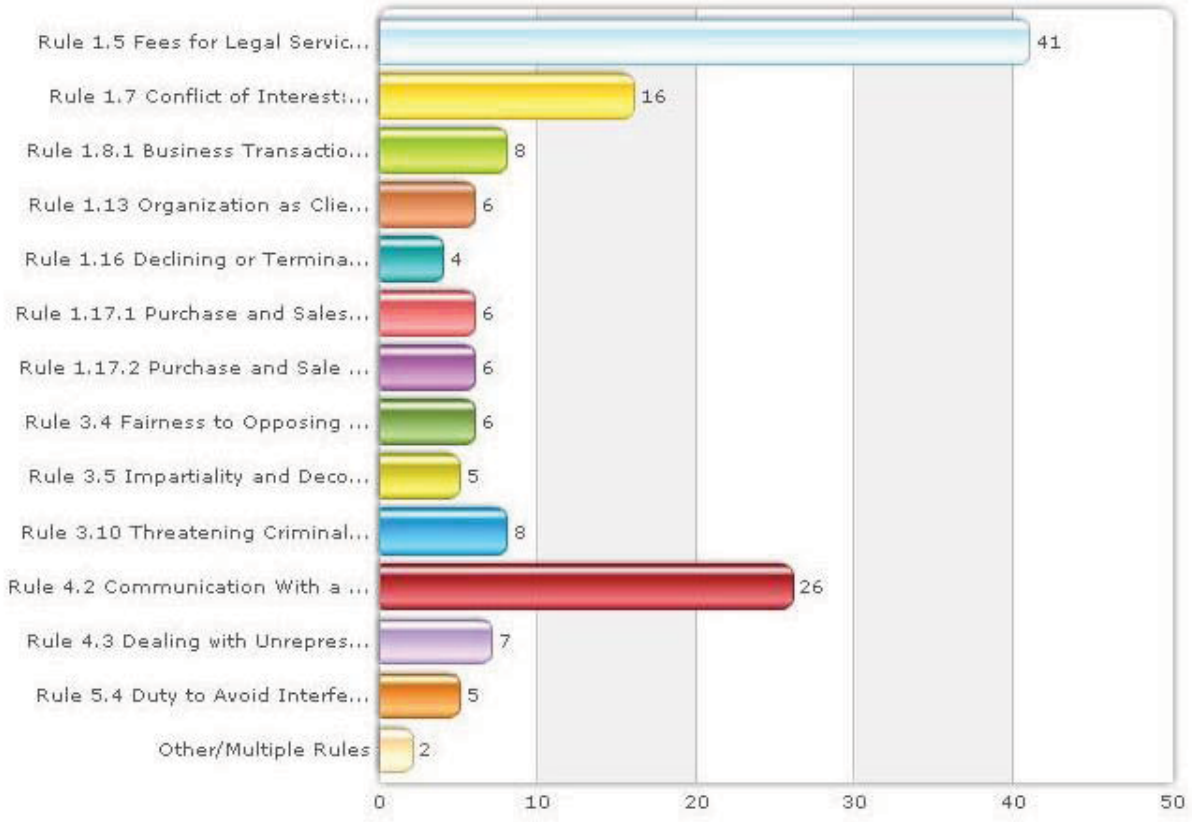
Phillip Feldman

By: Phillip Feldman

*Certified, American Board of Professional Liability Attorneys in and for the American Bar Association & California State Board of Legal Specialization: in Legal & Medical Malpractice.

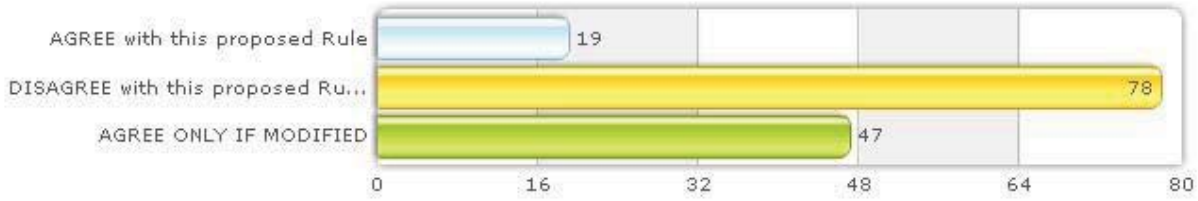
BATCH 3

Select the Proposed Rule that you would like to comment on from the drop down list.



Total Number of Responses for this Item: 146

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.



Total Number of Responses for this Item: 146