ATTACHMENT 2

Full Text of the Public Comments Received
on the Batch 4 Proposed Rules and the Previously
Submitted Rules in Batches 1, 2 & 3 Returned to the
Commission for Further Consideration

Full Text of the Public Comments Received on the Batch 4 Proposed Rules

PUBLIC COMMENTS [1.15] ~ FILE LIST

D-2009-263 James Bach [1.15]

D-2009-266 COPRAC [1.15]

D-2009-272 Michael J. Medina [1.15]

D-2009-274 Paul Smith [1.15]

D-2009-275c State Bar OCTC [1.15]

D-2009-276c David Carr SDCBA Legal Ethics Comm [1.15]

D-2009-283b Orange County Bar [1.15]

D-2009-286b James Ham LACBA [1.15]

D-2009-287c Santa Clara County Bar [1.15]

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: OCTOBER 23, 2009

Your Information

Professional Affiliation Commissioner, State Bar of California Immigration and

Commenting on behalf of an organization
- ○ Yes
- ◉ No

*** Name** James A. Bach

*** City** San Francisco

*** State** California

*** Email address** (You will receive a copy of your comment submission.) jbach@immilaw.com

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The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)]
Rule 1.8.7 [3-310(D)]
Rule 1.15 [4-100]
Rule 3.3 [5-200]
Rule 3.6 [5-120]
Rule 3.7 [5-210]
Rule 6.3 [n/a]
Rule 6.4 [n/a]
Batch 4 Discussion Draft (All rules)

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

Rule 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons [4-100]

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 whole-heartedly endorse and recommend the proposed rule that would permit accepting advance fees outside of the trust account, and requiring deposit into the trust account only if those fees are disputed.

Most immigration attorneys depend on flat-fee (rather than hourly rate) billing arrangements with their clients, with a significant "retainer" collected in advance. The nature of this "retainer" creates a dilemma for attorneys, who must either characterize it as a "true retainer" or an advance fee that may have to be deposited in a trust account.

The dimensions of a "true retainer" are always unclear, but certainly an argument can be made in every case that the "retainer" is for the purpose of attaining the lawyer's availability and is earned at the moment it is paid. However, it is more in the consumer's interest, and probably closer to reality, to deem the "retainer" to be an advance fee that can and should be refundable.

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**.

Attachment Browse...

Upload

Attachment Browse...

Upload

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ENTER COMMENTS HERE. To upload files proceed to the **ATTACHMENTS** section below.

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The dimensions of a "true retainer" are always unclear, but certainly an argument can be made in every case that the "retainer" is for the purpose of attaining the lawyer's availability and is earned at the moment it is paid. However, it is more in the consumer's interest, and probably closer to reality, to deem the "retainer" to be an advance fee that can and should be refundable.

In a flat fee case there is no guideline or metric to determine what part of the advance fee should be deposited into the trust account. Usually significant work on the case is commenced on the day the fee is received, so it would be improper to deposit all of it into the trust account (since the lawyer has already earned a portion of it). Also, a significant portion or all of the advance fee may be earned within a few days or weeks of payment, so an amount deposited into the trust account would have to be withdrawn right away, requiring the attorney's administrative time that could be better used helping the client.

In sum, the proposed rule is sensible for all types of advance fees, but make particular sense in flat fee cases in which it is always unclear what portion is already earned and what portion has yet to be earned.

OFFICE USE ONLY.

*** Date**
08/26/2009

Period
PC

File :
D-2009-263 James Bach.pdf

Commented On:
Entire Rule

Specify:

Submitted via:
Online

***** Required

THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2107

September 10, 2009

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 1.15 – Handling Funds and Property of Clients and Other Persons

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 1.15 and offers the following comments.

First, we wish to commend the Commission for its work on this rule. For reasons explained by the Commission, to which we wholly subscribe, it was necessary and appropriate to deviate from the generalized approach of the Model Rules, both to comply with the State Bar Act but also to provide much needed guidance on the many unanswered questions arising from the Model Rules and the current Rule 4-100, as well as to create an updated rule that reflects technological advancements.

Among the unanswered questions before this proposed rule was the propriety of transferring disputed trust funds to court by way of interpleader. We support the Commission's recommendation in favor of this dispute resolution device. *We urge only that this provision, now resident in Comment [14], be included as part of the Rule itself.*

We also subscribe to the importance of establishing definitions of key terms, and we are in accord with the definitions developed by the Commission. *We urge only that these definitions be incorporated into the Rule itself.*

Finally, we ask the Commission to clarify the status of the "standards" heretofore promulgated by the Board of Governors for purpose of the existing Rule 4-100. More to the point, *we recommend that the proposed Rule 1.15 call for the continued efficacy of those standards pending Board of Governors review to determine whether changes are in order once proposed Rule 1.15 is adopted.*

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

Suzanne M. Mellard

Suzanne Mellard, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

McCurdy, Lauren

From: Mike [mjmedina@verizon.net]
Sent: Tuesday, September 29, 2009 5:06 PM
To: McCurdy, Lauren
Subject: "ethics" question

Attn Lauren McCurdy:

Per the suggestion of your employee Susan, I wish to refer, through you, a dilemna my office has, to the RULES REVISION COMMISSION.

My office does bankruptcy filings. Federal rules required all cases be filed electronically, including fee payments.

State bar rules require that court costs and fees be deposited in Attorney-Client trust accounts.

Financial institutions will not issue debit cards or credit cards on IOLTA accounts, i.e.: Attorney-Client Trust Accounts.

Therefore, the only way to service our clients is to transfer funds from Trust accounts to General Accounts and electronically submit fee payments. I can have the clients give me a waiver, but, I think, as to a non-waivable provision.

I believe our office is in technical violation of rule 4-100, which, of course, would not be just "technical".

I believe in the future most business will be conducted electronically.

State Bar rules need to recognize this legitmate way of doing business. Moreover, Federal Courts are not going to change their proceedures to accommodate individual state rules for attorneys.

Michael J. Medina bar #42564

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 COMMENT IS: OCTOBER 23, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization
- ○ Yes
- ◉ No

*** Name** Paul W. Smith

*** City** Vista

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) paulsmithv@yahoo.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)] | Rule 3.3 [5-200] | Rule 6.3 [n/a]
Rule 1.8.7 [3-310(D)] | Rule 3.6 [5-120] | Rule 6.4 [n/a]
Rule 1.15 [4-100] | Rule 3.7 [5-210] | Batch 4 Discussion Draft (All rules)

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons [4-100]

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 believe subparagraph (j) regarding the method of accepting credit card payments should be modified. As proposed it ignore the economic realities of accepting payments by credit card, at least as to small firms or sole practitioners.

The service providers I have used have two charges. A monthly service fee and a percentage of the transaction. For a large majority of us that only have a few trust account transactions a month it is not justifiable to be paying $30-$45 per month just for the privilege of accepting cards which is duplicated if we accept them in the general account.

Also, I understand that very few providers will deposit the funds in one account and take the charges out of another one. This rule ignores that reality. It would be just as safe and much more practical to allow the initial funds to be credited to the general account and when cleared, moved to the trust account. What is the "safety" difference from having a physical check [CONTINUED...SEE ATTACHED...]

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I believe subparagraph (j) regarding the method of accepting credit card payments should be modified. As proposed it ignore the economic realities of accepting payments by credit card, at least as to small firms or sole practitioners.

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Also, I understand that very few providers will deposit the funds in one account and take the charges out of another one. This rule ignores that reality. It would be just as safe and much more practical to allow the initial funds to be credited to the general account and when cleared, moved to the trust account. What is the "safety" difference from having a physical check in my hand which I manually deposit in the trust account verses moving funds electronically or writing a check from the general to the trust account? Many of us will continue to refuse to accept trust fund deposits because of this. It is form over substance and ignores the realities of business.

Please reconsider. Thank you.

OFFICE USE ONLY.

*** Date**
10/20/2009

Period
PC

File :
D-2009-274 Paul Smith [1.15]

Commented On:

Specify:

Submitted via:
Online

* Required

THE STATE BAR OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
Russell G. Weiner, Interim Chief Trial Counsel

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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http://www.calbar.ca.gov

DIRECT DIAL: (415) 538-2063

October 20, 2009

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 July 2009. Here are our comments:

~~**Rule 1.8.6 Payments Not from Client.**~~

~~1. The Office of the Chief Trial Counsel (OCTC) supports this rule. However, OCTC believes that a comment should be added suggesting to the lawyers that they advise in writing both the client and the paying non-client that the lawyer's duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to the non-client and even with such a designation the lawyer must preserve the client's confidences and secrets. OCTC finds that often the paying non-client complains to us because they do not understand that the lawyer cannot communicate with them.~~

~~**Rule 1.8.7 Aggregate Settlements.**~~

~~1. OCTC supports the proposal to use the term "informed written consent" as that term is used in other California rules. However, OCTC finds the rule as written and the Commission's Comments confusing. For example, OCTC finds Comment 4, which is not in the Model Rules, very confusing and problematic. If the Commission is seeking to allow clients to agree that a neutral third-party may determine the allocation of the aggregate settlement, then that should be in the rule itself, not in a Comment. OCTC also finds unclear and confusing what the Commission means by aggregate package deals in criminal cases. That might need some clarification.~~

Rule 1.15 Handling Funds and Property of Clients and Other Persons.

1. While OCTC supports some of the Commission's additions or changes to the Model Rules, such as the Commission's exclusion of trust accounts maintained in other jurisdictions, and there is merit to its explanation that costs are covered by the rule, OCTC finds most of the changes from the Model Rules confusing and potentially inconsistent. For example, OCTC supports the Model Rules provision requiring that advanced fees be placed in the Client Trust Account (CTA). This will prevent confusion and lack of consistency. Either every lawyer should be placing advanced fees in the CTA or no lawyer should be placing the advanced fees in the CTA. A rule requiring that advanced fees be deposited into the CTA will also protect clients. OCTC has many cases where the attorney does not return unearned fees and claims not to have the funds to do so. If this proposal is adopted, it may require a change to Comment 10.

2. OCTC finds very confusing and inconsistent the proposed rule as to when disputed funds need to be placed in the client trust account. (See proposed rules 1.15(d), (g), (h) and (i).) OCTC suggests deletion of the deviation from the Model Rules regarding these issues. This may require changes to Comments 12 – 14.

3. OCTC suggests that the term "inviolate" in proposed rule 1.15(e) be deleted as it is confusing and unnecessary in light of the rest of the sentence. All client funds should be maintained in a trust account until the time it is permitted to withdraw them.

4. OCTC finds confusing and inconsistent proposed rule 1.15(f). OCTC sees no compelling reason here to deviate from the Model Rules and, therefore, OCTC suggests that the first sentence of rule 1.15(a) of the Model Rules be reinstated. OCTC is particularly concerned that there are too many exceptions to the prohibition on the commingling of client funds and this will undermine the rule prohibiting commingling of client funds with the lawyer's own funds or allow such commingling if the attorney has the funds somewhere.

5. OCTC supports proposed rule 1.15(k) even though it is not in the Model Rules because it is essentially current rule 4-100(B). However, OCTC is concerned that subparagraph (6) is too limited as it does not provide for the Supreme Court or other court to issue an order for an audit. The rules should not determine jurisdiction or send a message that attorneys can violate a court's order. The Supreme Court has always provided that it has the right to involve itself at any stage of the disciplinary proceedings and investigation. (See *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 301; *In re Rose* (2000) 22 Cal.4th 430, 439; *Obrien v. Jones* (2000) 23 Cal.4th 40, 48. See also *In re Accusation of Walker* (1948) 32 Cal.2d 488, 490.) OCTC also believes that subparagraph (7) should add the word "authorized" to other person to make clear that only authorized persons can request undisputed funds.

6. OCTC is concerned that the language of rule 1.15(l) is too broad and, as written, no part of the rule applies to those attorneys and firms discussed in the subparagraphs. This seems counter to the purpose of the rule and public protection. OCTC is also concerned that subparagraphs (2) and (3) do not state, as subparagraph (1) does, that, if the rule does not apply in those situations, the firms and lawyers handle the funds in accordance with the law of the controlling jurisdiction. OCTC is further concerned how it would be able

to obtain copies of those out of state records and believes that the lawyers in those situations should have a disciplinable obligation to provide those to us or ensure that the financial institutions provide those records to us. Further, OCTC is concerned how this paragraph is impacted by the proposed Choice of Law rule in the September batch of proposed rules. (See proposed rule 8.5.)

~~Rule 3.3 Candor Toward the Tribunal.~~

~~1. OCTC is concerned that proposed rule 3.3 addresses only candor toward a tribunal. However, California law, unlike paragraph 3.3(a)(1), currently provides that an "attorney shall employ for purposes of maintaining causes confided to the member such means only as consistent with truth." Thus, the current rule covers, not just tribunals, but statements to others, including opposing counsel, parties, etc. Thus, unless this is covered in some other rule, OCTC believes that California's current rule should be incorporated into this rule or proposed rule 3.4. OCTC recognizes that proposed rule 3.4 is titled Fairness to Opposing Party and Counsel, but that proposed rule does not include this requirement of truth and candor either and that rule also is only designed to cover opposing parties and counsels.~~

~~2. OCTC is concerned that this proposed rule requires knowingly. It is unclear what that means, but if that requires intentional and not misstatements or concealment based on gross negligence, OCTC opposes it since that as is not consistent with California law. (See e.g. *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280.) In fact, while good faith in the statement may be a defense to a charge of misrepresentation, an attorney's unqualified and unequivocal statements to judges under circumstances that should have caused him at least some uncertainty are at minimum deceptive and support a finding of culpability. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Moreover, some of the proposed rules already permit violations for "knew or reasonably should have known." (See proposed rule 3.6.) For the same reasons, OCTC has concerns and disagrees with Comment 4. OCTC also wants to make clear that it believes the term material does not require that the attorney successfully misled court. Such an interpretation~~

~~3. OCTC is concerned that the proposed rule omits the term "artifice" as provided in current rule 5-200(b). If the Commission is intending to further limit the rule, OCTC opposes that. OCTC believes that word should remain in the rule. The proposed rule also omits the current rule that an attorney shall not intentionally misquote to a tribunal the language of a book, statute, or decision. OCTC is unsure if the Commission is intending to remove that, but OCTC believes that this language should remain and be added to the proposed rule. Likewise, the proposed rule omits the language that an attorney "shall not assert personal knowledge of the facts at issue, except when testifying as a witness." OCTC knows of no reason to omit that language and suggests that it be included in the proposed rule. In a similar vein, OCTC is concerned that nowhere in the proposed rules do they provide for 1) when an attorney states or alludes at trial to evidence that the attorney knows or reasonable believes is not relevant or admissible evidence or has already been ruled by the court inadmissible; 2) states the attorney's belief in the credibility of a witness; and 3) includes when an attorney violates discovery orders of a court. OCTC believes these belong in rule 3.3. OCTC recognizes that these are in rule 3.4 of Model~~

~~Rule, but believe that they belong here, although what is most important is that they remain in the rules. They or some of them appear to be at least implicitly currently in rule 5-200.~~

~~4. OCTC is concerned that Comment 3 is incomplete as written because FRCP and CCP 128.7 requires that statements in pleadings be made "after an inquiry reasonable under the circumstances." Likewise, the California Supreme court has written that "while an attorney may often rely upon statements made by a client without further investigation, circumstances known to the attorney may require an investigation." *(Butler v. State Bar* (1986) 42 Cal.3d 323, 329.)~~

~~**Rule 6.4 Law Reform Activities Affecting Client Interests.**~~

~~1. OCTC is concerned that, while this rule requires the lawyer to inform an organization in which he or she serves as a director, officer, or member when the reform may affect the interests of the client, nothing in the rule requires the lawyer to inform the client. Perhaps that is already required by the conflict rules, but it should be made clear here.~~

Again, thank you for the opportunity to comment on these rules.

Very truly yours,

Russell G. Weiner

Russell G. Weiner
Interim Chief Trial Counsel

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC)
BATCH #4, Comment Deadline October 23, 2009
SDCBA Legal Ethics Committee Deadline September 22, 2009
Subcommittee Deadline August 31, 2009

LEC Rule Volunteer Name(s): David Cameron Carr

Old Rule No./Title: 4-100

Proposed New Rule No./ Title: 1.15

QUESTIONS (please use separate sheets of paper as necessary):

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.
Yes [x] No [ ]

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [x] No [ ]

(3) Is the new rule **worded correctly and clearly**? If "yes, please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [x] No [ ]

A uncertain "yes" here. The new rule is much longer than the old rule, to accomodate all of the changes and nuances in the law governing client trust accounts that have happened in the last 20 years. If there was any doubt that the rules of professional conduct have become rules of substantive law, it is answered here. Are lawyers going to actually read and understand this rule? Based on the admittedly skewed sample of lawyers that I represent, the answer is that many will not. But that sample also tells me that many lawyers have not read the existing, shorter rule. This is probably as good as it gets.

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [x] No [ ]

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

The new rule clarifies that advanced fees may be placed in the client trust account and that this does not constituted impermissible co-mingling, even though the fees are not yet earned but it does not require them to placed in the client trust account, consistent with the Baranowski v. State Bar ((1979) 24 Cal.3d 153.

The new rule also clarifies that the lawyer must account for advanced fees even if the fees are not placed in the client trust account, incorporating the gloss on rule 4-100(b)(3) from In the Matter of Fonte (Review Dept. 1994) 2 Cal. State Bar Ct. Rtpr. 752, 757. The failure to account of advanced unearned fees is one of most insidious discipline traps for the unwary,

The new rule expands the duty to account for advanced fees from the client (current rule 4-100(b)(3)) to include the client and the person who advanced the fee. This duty is made subject to the statutory duty to maintain client confidences (Bus. & Prof. Code section 6068(e)), consistent with current rule 3-310(f) which provides for payment of legal fees by another if the client consents in writing and information related to the representation is protected from the disclosure to the payor. One of the strange things about current rule 3-310(f) is that it does not require the attorney to advise the payor in that scenario that information related to the disclosure but the new rule specifically describes (in 1.15(k)(4)) the information that accounted for to the client or to the third party payor.

New section 1.15(g)(3), clarifies that the attorney has an affirmative obligation to resolve the dispute over funds being held in trust. This is a good change and eliminates another discipline trap for the unwary (at least for those with the sense to be wary about the rules.).

Another positive change is new section 1.15(j) which addresses credit card payments for cost advances. It provides that credit card payments for costs can be made provided "that the contract with the merchant bank or electronic payment service requires that the lawyer's obligations for any charges, chargebacks and offsets be paid from a source that isnot a trust account." My understanding is such merchant accounts are being offered to lawyers, some through local bar association. SDCBA should consider talking to some local bank about making this a member benefit.

CONCLUSIONS (pick one):

[x] We approve the new rule in its entirety.
[ ] We approve the new rule with modifications.*
[ ] We disapprove the new rule and support keeping the old rule.
[ ] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*
[ ] We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, October 23, 2009 2:46 PM
To: Hollins, Audrey
Cc: 'Shawn M Harpen'; 'Garner, Scott'; 'Bagosy, Jennifer'; 'Yoder, Mike'
Subject: Orange County Bar Comments Re Rule Revisions
Attachments: OCBA Comments on Rules Due Oct 23 2009.pdf

Dear Ms. Collins:

Please find attached the comments from the Orange County Bar Association regarding the following proposed amended rules. We appreciate the opportunity to offer our comments to the Bar's Special Commission for the Revision of the Rules of Professional Conduct. Please note that we will not be submitting comments on Rule 1.8.6.

Please let me know if you have any questions. I would also appreciate your acknowledgement of receipt of these comments.

Rule 1.8.7
Aggregate Settlements [3-310(D)]
Rule 1.15
Safekeeping Property: Handling Funds and Property of Clients and Other Persons [4-100]
Rule 3.3
Candor Toward the Tribunal [5-200]
Rule 3.6
Trial Publicity [5-120]
Rule 3.7
Lawyer as Witness [5-210]
Rule 6.3
Membership in Legal Services Organization [n/a]
Rule 6.4
Law Reform Activities Affecting Client Interests [n/a]

Trudy C. Levindofske, CAE
Executive Director
Orange County Bar Association
Orange County Bar Association Charitable Fund
(949)440-6700, ext. 213

MEMORANDUM

Date: September 4, 2009

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

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.15 – Safekeeping Property: Handling Funds and Property of Clients and Other Persons**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations 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 proposed Rule 1.15:

*****

The OCBA believes that the Commission has done an excellent job in creating a very well thought out and detailed procedural guide for the handling of funds and property that will serve the legal profession and clients well. The Proposed Rule incorporates most of the relevant California case law on the subject.

The OCBA does recommend for consistency purposes that the definitions appear in the body of the Proposed Rule, rather than in the Comments.

In addition, the OCBA recommends that a definition of the term "fixed," as used in subsection (g), be included in order to provide useful guidance to the membership with regard to their duties under the Proposed Rule.

LACBA
LOS ANGELES COUNTY BAR ASSOCIATION

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HON. RICHARD C. NEAL (RET.)
ELLEN A. PANSKY
ANN I. PARK
DAVID K. REINERT
MARIA M. ROHAIDY
ALEC S. ROSE
JOHN K. RUBINER
NANCY A. SHAW
LAURA S. SHIN
DAVID W. SWIFT
LUCY VARPETIAN
NORMA J. WILLIAMS
ROBIN L. YEAGER

October 23, 2009

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

RE: Comment Regarding Proposed Rule of Professional Conduct 1.15 –

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has the following comments regarding proposed Rule 1.15 of the Rules of Professional Conduct.

ABA Model Rule 1.15 is superior in form and function to the convoluted proposed Rule 1.15. The ABA Model rule on safekeeping property, in five subparts and six comments, comprehensively and succinctly sets forth the mandatory requirements for receiving, maintaining, and safeguarding client funds. The rule requires that client funds be segregated in a separate account, properly identified and protected, and all transactions documented for 5 years; commingling of the lawyer's funds with client funds is prohibited; advanced fees and costs are to be held in the trust account; the client must be promptly notified of the lawyer's receipt of trust funds; funds to which the client is entitled must be promptly delivered and accounted for; and where there is a dispute as to the entitlement to the trust funds, the lawyer must hold the disputed funds in trust while the dispute is being resolved.

In contrast, the RRC's proposed California rule 1.15 contains 13 subparts, and 16 comments, plus an additional "guidance" comment. Proposed rule 1.15 is a commendable effort to provide guidance and suggestions to lawyers regarding client trust account management and transactions, which might be useful to practitioners. However, Rule 1.15 is a disciplinary rule, not a best practices commentary. Under the disciplinary rules, any "wilful" violation of Rule 1.15 results in severe discipline, even innocent and negligent mistakes in trust account management that are quickly caught and remedied resulting in no client harm. Pursuant to disciplinary Standard 2.2, any willful or grossly negligent violation of the rule governing client trust funds (e.g., including failures to complete proper bookkeeping; temporal or non-harmful commingling not accompanied by misappropriation or any other sort of impropriety; failure to promptly withdraw earned fees, failure to reconcile the trust account on a monthly basis, an isolated

bounced check, etc.) results in a 90 day suspension from the practice of law, irrespective of mitigating circumstances.

Although no one argues with the RRC's observation that a strong rule may deter misconduct, proposed Rule 1.15 is not a strong disciplinary standard but, rather, an impossibly detailed trap for the unwary. This rule should be published as a guideline, as part of the State Bar's official publication on client trust accounts (which the state bar currently publishes, and which it could easily place online or email to each of its active members), rather than as a disciplinary rule.

Furthermore, a majority of the members of our committee agrees with the RRC that, based on longstanding and well understood California law, costs must be deposited into the client trust account, but advanced fees may or may not be. PREC has no objection to including a recommendation in the State Bar's publication, to the effect that advanced fees should be safeguarded against the possibility that, if the services are not completed, the lawyer will be ethically required to refund the unearned portion of the fees. However, it ought not be a disciplinary offense if a California lawyer follows the traditional rule and does not deposit the advanced fee in the trust account, particularly where the services were fully performed and the fee fully earned.

Based on the foregoing, PREC recommends that ABA Model Rule 1.15, be adopted, except that the word "fees" be deleted from Model Rule subpart (c); or alternatively, that current Rule 4-100 be retained as is, and simply renumbered as rule 1.15.

We appreciate the opportunity to comment on the proposed rules.

Sincerely yours,

James I. Ham
Chair, LACBA Professional
Responsibility and Ethics Committee

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: OCTOBER 23, 2009

Your Information

Professional Affiliation Santa Clara County Bar Association

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** Jil Dalesandro, President

*** City** San Jose

*** State** California

*** Email address**
(You will receive a copy of your comment submission.)
chrisb@sccba.com

The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)] | Rule 3.3 [5-200] | Rule 6.3 [n/a]
Rule 1.8.7 [3-310(D)] | Rule 3.6 [5-120] | Rule 6.4 [n/a]
Rule 1.15 [4-100] | Rule 3.7 [5-210] | Batch 4 Discussion Draft (All rules)

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons [4-100]

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.

The Santa Clara County Bar Association (SCCBA) commends the Commission for trying to clarify and add specifics to proposed Rule 1.15 to provide better guidance to the practitioner. The SCCBA believes that the proposed rule still does not adequately account for the differences and distinctions between advance payment of fees; true retainers and flat fees. The proposed rule speaks to advance payment of fees and true retainers but does not explain the treatment of flat fees. In fact, the definition and discussion of advanced fees and true retainers in Comments [5], [8], [9] and [10] should be clearer in defining these three categories of fees. For example, in Comment [5], it uses the word "retainer" in defining an "advance for fees." We recommend that the word "retainer" be deleted so that the practitioner does not confuse it with a "true retainer." In addition, a flat fee needs to be defined and distinguished from a true retainer. The definition and discussion of a "true retainer" does not make clear that it is not the same as a flat fee, a common mistake made by many practitioners.

OFFICE USE ONLY.

* Date	Period	File :
10/30/2009	PC	D-2009-287c Santa Clara County Bar [1.15].pdf

Commented On:	Specify:	Submitted via:
		Online

* Required

PUBLIC COMMENTS [1.8.6] ~ FILE LIST

D-2009-264 COPRAC [1.8.6]

D-2009-275a State Bar OCTC [1.8.6]

D-2009-276a Jack Leer SDCBA Legal Ethics Comm [1.8.6]

D-2009-278a California Commission on Access to Justice [1.8.6]

D-2009-280a Legal Aid Assoc CA [1.8.6]

D-2009-281 The Sall Law Firm [1.8.6]

D-2009-285a Ted Cassman CACJ [1.8.6]

D-2009-287a Santa Clara County Bar [1.8.6]

THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2107

September 10, 2009

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 1.8.6 – Payments Not From Client

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 1.8.6 – Payments Not From Client. COPRAC generally supports the adoption of proposed Rule 1.8.6. However, COPRAC is concerned about the application of the proposed rule to lawyers employed by non-profit organizations to provide legal services to low-income clients and to lawyers representing clients in certain commercial transactions. With respect to the former, COPRAC suggests that the rule itself be broadened to include other providers of legal assistance to low-income clients. With respect to transactional work, COPRAC suggests that Comment 4 be amended to identify the types of transactions where consent may be difficult to obtain before a fee agreement is signed.

COPRAC is concerned that the rule, as drafted, may inadvertently create unnecessary hurdles for lawyers employed by non-profit organizations who provide free legal services to low-income clients. In an effort to "enhance access to justice," the current draft provides that lawyers "rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public" do not need to disclose that fact nor obtain informed written consent. COPRAC supports this provision. The problem, however, is that many providers of free legal services are employed by nonprofit organizations, not "public agencies." By excepting public agencies but not other organizations that provide these services, the rule may create impediments to providing access to justice for the majority of those lawyers who assist low-income clients without charge in civil cases.

We believe this problem can be solved by adding language to the rule that is consistent with the language in recently-adopted Rule 1-650. That rule covers lawyers who provide legal services "under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization." Substitution of that language for "on behalf of a public agency" in the current draft should eliminate ambiguity and, we believe, satisfy the stated intent of the drafters. (It may be possible to correct the problem merely by adding "or nonprofit organization" after "public agency" in the draft, but we prefer the more expansive language since we are not familiar with the organizational structures of the many providers of legal services to the poor.)

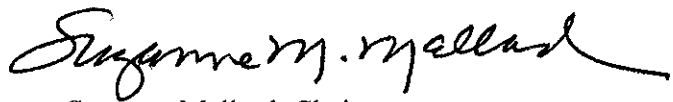
COPRAC also suggests that the comments to the rule be amended to recognize the practicalities and common practice in commercial transactions where a company (typically a corporate issuer of equity or debt securities) commits to pay the legal fees and expenses of counsel for one or more investors in such securities. Such arrangements are especially common in connection with corporate debt restructurings, where the debtor often pays the fees of counsel for a group or committee of existing creditors. Similarly, companies often pay the fees of designated counsel for investors in a securities offering (whether prior to or after the issuance of such securities), and sometimes pay the fees of

designated counsel for shareholders party to a transaction where such company is being sold in a stock transaction or merger. In such circumstances, it is not uncommon for counsel to be designated and to enter into a fee agreement with the company and be paid a retainer before the prospective client-investors are even identified. As investors enter the group of represented clients, they do so with the understanding that counsel represents them solely in their capacity as members of the group and that none of them are responsible for payment. The larger the group of investors, and the more fluid that group is (with investors joining or leaving the group), the more impractical it is for counsel to secure the informed written consent of each investor at the onset of the representation. While the context is quite different, the impracticality of the situation is not dissimilar to the situation (referenced in Comment [4]) when a lawyer is paid by a family member on behalf of an incarcerated client. Because such fee arrangements are not uncommon in commercial transactions, COPRAC suggests that RAD consider adding a specific reference to such commercial transactions in Comment [4]. Accordingly, we suggest that RAD consider adding the language to the following effect to the end of Comment [4]:

> "Similarly, in certain commercial transactions when the client is a lender or investor, or a group or committee consisting of several lenders or investors, the borrower or issuer of securities may agree to compensate the lawyer, and it may be impractical to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. In such transactions, it may not be reasonably practicable to obtain consent until the closing of the transaction or, if earlier, when the transaction-related documents are normally executed."

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,



Suzanne Mellard, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

THE STATE BAR OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
Russell G. Weiner, Interim Chief Trial Counsel

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October 20, 2009

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 July 2009. Here are our comments:

Rule 1.8.6 Payments Not from Client.

1. The Office of the Chief Trial Counsel (OCTC) supports this rule. However, OCTC believes that a comment should be added suggesting to the lawyers that they advise in writing both the client and the paying non-client that the lawyer's duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to the non-client and even with such a designation the lawyer must preserve the client's confidences and secrets. OCTC finds that often the paying non-client complains to us because they do not understand that the lawyer cannot communicate with them.

~~**Rule 1.8.7 Aggregate Settlements.**~~

~~1. OCTC supports the proposal to use the term "informed written consent" as that term is used in other California rules. However, OCTC finds the rule as written and the Commission's Comments confusing. For example, OCTC finds Comment 4, which is not in the Model Rules, very confusing and problematic. If the Commission is seeking to allow clients to agree that a neutral third-party may determine the allocation of the aggregate settlement, then that should be in the rule itself, not in a Comment. OCTC also finds unclear and confusing what the Commission means by aggregate package deals in criminal cases. That might need some clarification.~~

Rule 1.15 Handling Funds and Property of Clients and Other Persons.

1. While OCTC supports some of the Commission's additions or changes to the Model Rules, such as the Commission's exclusion of trust accounts maintained in other jurisdictions, and there is merit to its explanation that costs are covered by the rule, OCTC finds most of the changes from the Model Rules confusing and potentially inconsistent. For example, OCTC supports the Model Rules provision requiring that advanced fees be placed in the Client Trust Account (CTA). This will prevent confusion and lack of consistency. Either every lawyer should be placing advanced fees in the CTA or no lawyer should be placing the advanced fees in the CTA. A rule requiring that advanced fees be deposited into the CTA will also protect clients. OCTC has many cases where the attorney does not return unearned fees and claims not to have the funds to do so. If this proposal is adopted, it may require a change to Comment 10.

2. OCTC finds very confusing and inconsistent the proposed rule as to when disputed funds need to be placed in the client trust account. (See proposed rules 1.15(d), (g), (h) and (i).) OCTC suggests deletion of the deviation from the Model Rules regarding these issues. This may require changes to Comments 12 – 14.

3. OCTC suggests that the term "inviolate" in proposed rule 1.15(e) be deleted as it is confusing and unnecessary in light of the rest of the sentence. All client funds should be maintained in a trust account until the time it is permitted to withdraw them.

4. OCTC finds confusing and inconsistent proposed rule 1.15(f). OCTC sees no compelling reason here to deviate from the Model Rules and, therefore, OCTC suggests that the first sentence of rule 1.15(a) of the Model Rules be reinstated. OCTC is particularly concerned that there are too many exceptions to the prohibition on the commingling of client funds and this will undermine the rule prohibiting commingling of client funds with the lawyer's own funds or allow such commingling if the attorney has the funds somewhere.

5. OCTC supports proposed rule 1.15(k) even though it is not in the Model Rules because it is essentially current rule 4-100(B). However, OCTC is concerned that subparagraph (6) is too limited as it does not provide for the Supreme Court or other court to issue an order for an audit. The rules should not determine jurisdiction or send a message that attorneys can violate a court's order. The Supreme Court has always provided that it has the right to involve itself at any stage of the disciplinary proceedings and investigation. (See *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 301; *In re Rose* (2000) 22 Cal.4th 430, 439; *Obrien v. Jones* (2000) 23 Cal.4th 40, 48. See also *In re Accusation of Walker* (1948) 32 Cal.2d 488, 490.) OCTC also believes that subparagraph (7) should add the word "authorized" to other person to make clear that only authorized persons can request undisputed funds.

6. OCTC is concerned that the language of rule 1.15(l) is too broad and, as written, no part of the rule applies to those attorneys and firms discussed in the subparagraphs. This seems counter to the purpose of the rule and public protection. OCTC is also concerned that subparagraphs (2) and (3) do not state, as subparagraph (1) does, that, if the rule does not apply in those situations, the firms and lawyers handle the funds in accordance with the law of the controlling jurisdiction. OCTC is further concerned how it would be able

to obtain copies of those out of state records and believes that the lawyers in those situations should have a disciplinable obligation to provide those to us or ensure that the financial institutions provide those records to us. Further, OCTC is concerned how this paragraph is impacted by the proposed Choice of Law rule in the September batch of proposed rules. (See proposed rule 8.5.)

Rule 3.3 Candor Toward the Tribunal.

1. OCTC is concerned that proposed rule 3.3 addresses only candor toward a tribunal. However, California law, unlike paragraph 3.3(a)(1), currently provides that an "attorney shall employ for purposes of maintaining causes confided to the member such means only as consistent with truth." Thus, the current rule covers, not just tribunals, but statements to others, including opposing counsel, parties, etc. Thus, unless this is covered in some other rule, OCTC believes that California's current rule should be incorporated into this rule or proposed rule 3.4. OCTC recognizes that proposed rule 3.4 is titled Fairness to Opposing Party and Counsel, but that proposed rule does not include this requirement of truth and candor either and that rule also is only designed to cover opposing parties and counsels.

2. OCTC is concerned that this proposed rule requires knowingly. It is unclear what that means, but if that requires intentional and not misstatements or concealment based on gross negligence, OCTC opposes it since that as is not consistent with California law. (See e.g. *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280.) In fact, while good faith in the statement may be a defense to a charge of misrepresentation, an attorney's unqualified and unequivocal statements to judges under circumstances that should have caused him at least some uncertainty are at minimum deceptive and support a finding of culpability. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Moreover, some of the proposed rules already permit violations for "knew or reasonably should have known." (See proposed rule 3.6.) For the same reasons, OCTC has concerns and disagrees with Comment 4. OCTC also wants to make clear that it believes the term material does not require that the attorney successfully misled court. Such an interpretation

3. OCTC is concerned that the proposed rule omits the term "artifice" as provided in current rule 5-200(b). If the Commission is intending to further limit the rule, OCTC opposes that. OCTC believes that word should remain in the rule. The proposed rule also omits the current rule that an attorney shall not intentionally misquote to a tribunal the language of a book, statute, or decision. OCTC is unsure if the Commission is intending to remove that, but OCTC believes that this language should remain and be added to the proposed rule. Likewise, the proposed rule omits the language that an attorney "shall not assert personal knowledge of the facts at issue, except when testifying as a witness." OCTC knows of no reason to omit that language and suggests that it be included in the proposed rule. In a similar vein, OCTC is concerned that nowhere in the proposed rules do they provide for 1) when an attorney states or alludes at trial to evidence that the attorney knows or reasonable believes is not relevant or admissible evidence or has already been ruled by the court inadmissible; 2) states the attorney's belief in the credibility of a witness; and 3) includes when an attorney violates discovery orders of a court. OCTC believes these belong in rule 3.3. OCTC recognizes that these are in rule 3.4 of Model

~~Rule, but believe that they belong here, although what is most important is that they remain in the rules. They or some of them appear to be at least implicitly currently in rule 5-200.~~

~~4. OCTC is concerned that Comment 3 is incomplete as written because FRCP and CCP 128.7 requires that statements in pleadings be made "after an inquiry reasonable under the circumstances." Likewise, the California Supreme court has written that "while an attorney may often rely upon statements made by a client without further investigation, circumstances known to the attorney may require an investigation." *(Butler v. State Bar* (1986) 42 Cal.3d 323, 329.)~~

~~**Rule 6.4 Law Reform Activities Affecting Client Interests.**~~

~~1. OCTC is concerned that, while this rule requires the lawyer to inform an organization in which he or she serves as a director, officer, or member when the reform may affect the interests of the client, nothing in the rule requires the lawyer to inform the client. Perhaps that is already required by the conflict rules, but it should be made clear here.~~

Again, thank you for the opportunity to comment on these rules.

Very truly yours,

Russell G. Weiner

Russell G. Weiner
Interim Chief Trial Counsel

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC)
BATCH #4, Comment Deadline October 23, 2009
SDCBA Legal Ethics Committee Deadline September 22, 2009
Subcommittee Deadline August 31, 2009

LEC Rule Volunteer Name(s): Jack Leer

Old Rule No./Title: 3-310(f)

Proposed New Rule No./ Title: Rule 1.8.6

QUESTIONS (please use separate sheets of paper as necessary):

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.
Yes [X] No [ ]

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [X] No [ ]

(3) Is the new rule **worded correctly and clearly**? If "yes, please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [X] No [ ]

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [ ] No [ ]

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

Both the Model Rule and our existing Rule 3-310(f) prohibit the acceptance of compensation without the client's consent. The proposed rule would broaden the scope of the prohibition on accepting compensation to also include entering into agreements with, or charging, third parties without the client's consent. The intent of the change is to cover situations where the actual acceptance of the compensation may be delayed, but the expectation of compensation from a third party would still give rise to the conflict of interest. Such a change seems justified, as the same potential conflict exists in the situation where the attorney expects payment from a third party as it does where the

attorney actually accepts compensation.

The proposed rule also adds to the protections for the client by requiring written informed consent before the member enters into the agreement, charges the third party, or accepts payment (or as soon thereafter as is reasonably practical). Both the Model Rule and 3-310(f) are not specific as to when consent must be obtained, and the Model Rule does not require written consent. Again, the proposed change is warranted, as the requirement of written consent in advance affords the client a greater level of protection and also reduces the chance of disputes between the attorney and client regarding the required consent.

Like the existing Rule 3-310(f), the proposed rule includes an express exemption for a situation where the member works for a public agency that is providing legal services to other public agencies or the public. The Commission explains that the concerns covered by this Rule doe not "come into play" in such situations. From the drafting committee's comments, this exception to the rule appears intended primarily to cover situations where a public defender represents a criminal defendant. The drafting committee did not discuss this exemption in great detail (at least not that was apparent from their e-mails. This broad exception would seem to cover some situations where the concerns addressed by the rule do come into play and informed written consent should be obtained. As an example, a city attorney providing legal services to his/her city's retirement system, redevelopment agency, or other similar agency, would seem to have the same conflict of interest with respect to being paid by the city while representing the other agency. How is this different from the conflict arising when a private attorney accepts compensation from a third party, and why should the represented agency not be advised and consent to the potential conflict of interests? Notably, despite citing to case law holding the conflict does not apply where an insurer has the right to appoint counsel to defend the insured, the Commission does not include an express exemption for such situations, instead addressing them in the comments to the proposed rule. It is not clear why one exception is included in the rule itself, while the other is only worthy of a comment. Despite these concerns about the express public agency exception, the proposed Rule 1.8.6 is consistent with both the spirit and letter of the existing Rule 3-310(f) and the model rule.

CONCLUSIONS (pick one):

[X] We approve the new rule in its entirety.

[ ] We approve the new rule with modifications.*

[ ] We disapprove the new rule and support keeping the old rule.

[ ] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

[ ] We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.

CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

c/o State Bar of California - 180 Howard Street - San Francisco, CA 94105 - (415) 538-2251- (415) 538-2524/fax

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Director, Legal Services Outreach
State Bar of California
San Francisco

October 23, 2009

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

Re: Comment on proposed Rules 6.3, 6.4, 1.8.6, and 1.8.7

Dear Ms. Hollins:

On behalf of the California Commission on Access to Justice, I am writing to provide input to the rules identified above.

- **Proposed Rule 1.8.6** – The Access Commission recommends a minor revision to Rule 1.8.6 – to add to the exception those non-profit charitable organizations which represent clients without a fee.

  This rule, titled "Payments Not From Client", addresses the situation where someone other than the client is paying the attorneys fees, such as an employer, a family member, or an insurance company. The rule requires "informed written consent" from the client. The proposed Rule includes an exception that is in the current California rule (3-310[F]), but is not in the ABA rule. The exception says that "no disclosure or consent is required if the lawyer is rendering legal services on behalf of a public agency that provides legal services to other public agencies or to the public." The rationale for this exception is "…because the concerns addressed by the Rule do not come into play in those situations." While the exception will cover attorneys working with County Counsel who represent local school districts, and will also cover the Public Defender, it fails to cover legal services programs.

  The Commission's stated rationale for the exception -- enhancing access to justice -- also applies to legal services programs. If this rule goes into effect, legal aid programs would have to fully inform each client that any fees are paid by someone else, and then get the client's written consent, before rendering any service. Not only would this shut down hotlines and other phone-based services, but it would unnecessarily slow down in-person services and result in fewer low-income people receiving services. And nothing would be gained by making this Rule applicable to legal services programs. Therefore, the Access Commission urges that this rule be amended by including in the exception those non-profit charitable organizations which represent clients without a fee.

- **Proposed Rule 1.8.7** - The Access Commission urges that this Rule on Aggregate Settlements be modified to permit attorneys to obtain prior approval from clients. While the proposed rule is only slightly more difficult than existing rule 3-310 (D), even the existing rule does not comport with the reality of aggregate litigation. When a suit is filed on behalf of multiple plaintiffs, such as employees, tenants, etc., the rule would require full, extensive disclosure to each client of considerable information, and the informed written consent of each client. When such a case is settled, for example on the courthouse steps, it is very common that not all of the clients are present. Therefore, the settlement would be delayed while all of the clients are located, the agreement is perhaps translated, and written consent is obtained from all. We believe that such a process would unduly restrict and even discourage potential settlements. Therefore, we believe that the Rule should permit attorneys to obtain prior consent to such settlements, and that a follow-up notification be required within a reasonable amount of time after the settlement is finalized.

- **Proposed Rule 6.3** – This proposed rule has not existed in California in the past, and the Access Commission strongly supports its inclusion in our Rules of Professional Conduct. The rule as drafted is excellent, and it will help provide valuable guidance and protection for those wishing to serve on the boards of legal services programs. The mission of legal aid programs to serve the legal needs of low-income communities will often be in conflict with the interests of large corporations. But that should not be a barrier for an attorney who makes his or her living as a corporate attorney who wishes to provide public service by joining a legal aid board. We wholeheartedly support the adoption of this Rule.

- **Proposed Rule 6.4** – Likewise, the Access Commission strongly supports the addition of proposed Rule 6.4. This Rule will encourage attorneys to participate in law reform organizations, and provides a reasonable procedure for them to follow whenever their clients might be benefited by the work of that organization. Working to improve the law is an important role for lawyers, and it is critical that lawyers feel that they can be involved in these activities without fearing ethical problems because of the potential impact on clients.

Thank you for this opportunity to comment. Please feel free to contact me if you have any questions.

Respectfully submitted,



Hon. Steven K. Austin
Co-Chair

"The Unified Voice of Legal Services"

LAAC
Legal Aid Association of California

VIA FACSIMILE (415) 538-2171

October 22, 2009

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

Re: Public Comment on proposed Rules 6.3, 6.4, 1.8.6 and 1.8.7

Dear Ms. Hollins:
I am writing on behalf of the Legal Aid Association of California (LAAC), and our member legal services nonprofit organizations, with comments on four of the proposed Rules of Professional Conduct.

Founded in 1984, the Legal Aid Association of California (LAAC) is a non-profit organization created for the purpose of ensuring the effective delivery of legal services to low-income and underserved people and families throughout California. LAAC is the statewide membership organization for more than 70 non-profit legal services organizations in the state.

Our members provide high-quality legal services to our state's most vulnerable populations. These services to low-income and other underrepresented individuals form an essential safety net in California and often ensure that the programs' clients have access to life's basic necessities, such as food, safe and affordable housing, freedom from violence, health care, employment, economic self-sufficiency, and access to the legal system.

Comments on Proposed Rule 6.3 - SUPPORT
LAAC supports the proposed Rule 6.3 on lawyers serving as a member or director of a legal services organization.

Comments on Proposed Rule 6.4 - SUPPORT
LAAC supports proposed Rule 6.3 regarding attorneys serving as directors, officers or members of an organization involved in the reform of the law or its administration.

433 California Street, Suite 815| San Francisco, CA 94108
Phone (415) 834-0100 | Fax (415) 834-0202

Comments on Proposed Rule 1.8.6 – SUPPORT IF AMENDED
This rule address the situation where someone other than the client is paying the attorneys fees, such as an employer, a family member, or an insurance company and requires "informed written consent" from the client. The proposed rule includes an exception that is in the current California rule (3-310[F]), such that "no disclosure or consent is required if the lawyer is rendering legal services on behalf of a public agency that provides legal services to other public agencies or to the public." This exception would cover situations such as a County Counsel who represents local school districts and Public Defender programs, but does not cover legal services nonprofit corporations.

The Commission's stated rationale for the exception, which it identifies as enhancing access to justice, is "because the concerns addressed by the Rule do not come into play in those situations." The same is true for legal services nonprofit organizations that represent clients without a fee. Legal services nonprofit corporations be included in this exception; without this, there is a significant risk that legal services nonprofits would be forced to eliminate critical hotlines and other phone-based services, that currently serve many low-income clients and could also slow down the provision of in-person assistance, such that many fewer low-income Californians would be able to receive the vital legal help they need. LAAC strongly recommends that the exception be modified to include non-profit charitable organizations that represent clients without a fee, as well as the public agencies already included in the proposed rule. LAAC supports proposed Rule 1.8.6 with this amendment.

Comments on Proposed Rule 1.8.7 - OPPOSE
While LAAC understands the ethical considerations that form the basis for this rule, the construct of the proposed rule simply does not comport with the reality of aggregate litigation. The requirements in the proposed rule would likely result many fewer such cases being resolved through settlement or settlements being significantly delayed. This important topic requires additional discussion and a rule that actually permits the efficient settlement of aggregate cases. The Commission should revisit and modify this proposed rule accordingly, including returning to the language of the ABA Model Rule, which requires informed consent, in a writing signed by the client.

Thank you for your kind consideration of these comments.

Sincerely,

Julia R. Wilson
Executive Director

433 California Street, Suite 615| San Francisco, CA 94108
Phone (415) 834-0100 | Fax (415) 834-0202

THE SALL LAW FIRM
A PROFESSIONAL CORPORATION

ROBERT K SALL

32351 COAST HIGHWAY
LAGUNA BEACH, CALIFORNIA 92651-6703
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JAMES T BIGGS
LARA A.S CALLAS
BRANDON N KRUEGER

October 22, 2009

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

Re: Public Comment for Rules of Professional Conduct
Rule 1.8.6 – Third Party Payors

Dear Ms. Hollins:

I am a member of the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association, and the Professionalism and Ethic Committee of the Orange County Bar Association. However, I am submitting these public comments in my individual capacity, and not as the comments of any of the committees on which I serve.

I have the following comments on Proposed Rule 1.8.6, and the recurring problem of accepting payment from third party payors.

I am normally a strong proponent of informed written consent, but Proposed Rule 1.8.6 is one area where I deviate. I believe that requiring informed written consent for accepting payment from a third party is an unnecessary burden and creates a trap for the unwary. While the Proposed Rule adds a limited impracticality exception to the requirement that the writing be obtained in advance, the rule nevertheless imposes a burden that is largely unnecessary.

The interests that are being protected here are loyalty, independent judgment and confidentiality. A lawyer does not violate those principles simply by accepting a check from a third party payor. Instead, there is merely a risk that the lawyer who accepts such payments will take directions from the third party or reveal confidences to the third party. The lawyer should not be subject to discipline for taking the payment. He or she should be subject to discipline only when the lawyer breaches confidence, loyalty or independent judgment.

Concerns about the impact of third party payments upon loyalty, confidences and independent judgment can be handled in an oral disclosure. These duties can be maintained whether or not there has been written consent. I have written these disclosure letters many times over the years and it is sometimes a silly exercise. What does the letter say? I will adhere to the duties I already have to maintain your confidences. I will not let Mr. Payor control my actions. I don't see how this advances already existing duties or independent judgment. It is merely a burden every time a client decides to have a brother, sister or parent send a check. And sometimes, the third party checks come in out of the blue, completely unanticipated. Suddenly the lawyer is supposed to monitor the bookkeeping department to catch the third party payment and hold the check until letters have been crafted, sent, signed and returned. The process is merely an exercise that doesn't accomplish its purpose.

It is enough here to provide oral disclosure and oral consent. The requirement of informed written consent, especially obtaining one in advance of cashing the check, adds nothing to the principles we are truly trying to protect with this rule.

Thank you for your consideration.

Very truly yours,

THE SALL LAW FIRM
A Professional Corporation



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: OCTOBER 23, 2009

Your Information

Professional Affiliation California Attorneys for Criminal Justice (

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** Ted W. Cassman

*** City** Berkeley

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) cassman@achlaw.com

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The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)] | Rule 3.3 [5-200] | Rule 6.3 [n/a]
Rule 1.8.7 [3-310(D)] | Rule 3.6 [5-120] | Rule 6.4 [n/a]
Rule 1.15 [4-100] | Rule 3.7 [5-210] | Batch 4 Discussion Draft (All rules)

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 1.8.6 Third Party Payors [3-310(F)]

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**.

Attachment ? Browse...

Upload

file: 1.8.6.pdf (53k)

Attachment ? Browse...

Upload

Attachment ? Browse...

Upload

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.

1.8.6 -- Third Party Payors. CACJ believes that the proposed rule fails to recognize that parents and other family members commonly will retain counsel for a criminal defendant who is incompetent or otherwise and incapable of giving legal consent, either because of a mental condition or because he or she is a minor. We request that the proposed rule include the following comment:

> Comment no. 5:
>
> (5) In some limited circumstances, it may not be possible for a lawyer to obtain informed written consent from a client, for instance, in the case of incapacitation, or incompetency due to mental deficit or because the client has not yet reached the age of majority. When this occurs, paragraph (a) shall not apply. Representation will be permitted as long as the lawyer complies with all other provisions of this Rule.

OFFICE USE ONLY.

* Date	Period	File :
10/23/2009	PC	D-2009-285a Ted Cassman CACJ [1.8.6].pdf

Commented On:	Specify:	Submitted via:
		Online

* Required

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: OCTOBER 23, 2009

Your Information

Professional Affiliation Santa Clara County Bar Association

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** Jil Dalesandro, President

*** City** San Jose

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) chrisb@sccba.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)]
Rule 1.8.7 [3-310(D)]
Rule 1.15 [4-100]
Rule 3.3 [5-200]
Rule 3.6 [5-120]
Rule 3.7 [5-210]
Rule 6.3 [n/a]
Rule 6.4 [n/a]
Batch 4 Discussion Draft (All rules)

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 1.8.6 Third Party Payors [3-310(F)]

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 believes that the proposed changes to this rule are important changes for public protection reasons.

OFFICE USE ONLY.

* Date	Period	File :
10/30/2009	PC	D-2009-287a Santa Clara County Bar [1.8.6].pdf

Commented On:	Specify:	Submitted via:
		Online

* Required

PUBLIC COMMENTS [1.8.7] ~ FILE LIST

D-2009-265 COPRAC [1.8.7]

D-2009-275b State Bar OCTC [1.8.7]

D-2009-276b Frank Tobin SDCBA Legal Ethics Comm [1.8.7]

D-2009-278b California Commission on Access to Justice [1.8.7]

D-2009-280b Legal Aid Assoc CA [1.8.7]

D-2009-282 Suzanne Chamberlain [1.8.7]

D-2009-283a Orange County Bar [1.8.7]

D-2009-285c Ted Cassman CACJ [1.8.7]

D-2009-286a James Ham LACBA [1.8.7]

D-2009-287b Santa Clara County Bar [1.8.7]

THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2107

September 10, 2009

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 1.8.7 – Aggregate Settlements

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 1.8.7 on aggregate settlements. COPRAC supports the adoption of the proposed rule, but recommends that the language of Comment [4] be revised to clarify what the Comment is intended to convey when it is read without the benefit of the explanatory language that accompanies it in the materials circulated for public comment. As presently proposed, the language of Comment [4] could be read to suggest that additional disclosures and consents may need to be provided under the Rule with regard to any allocation agreement or arrangement between the jointly represented clients.

In this regard, COPRAC recommends that the last two sentences contained in the "Explanation of Changes to the ABA Model Rule" be inserted at the beginning of Comment [4]. This would provide an appropriate introduction to the examples that are included and place them in context. Comment [4] would then provide as follows (recommended additional text is italicized):

> *The aggregate settlement that is the topic of this Rule is the agreement with the adverse parties. The Rule itself does not address any process by which the jointly-represented clients determine how to share the benefits or burdens of that settlement. For example,* this Rule does not prevent a lawyer in a civil matter from participating in making an aggregate settlement although the allocation of the benefits or burdens of the settlement is delayed for subsequent agreement among the lawyer's clients, so long as the lawyer complies with the written disclosure and consent requirements of the Rule. See Comment [3]. Also, provided a lawyer complies with those disclosure and consent requirements, it does not prevent the lawyer from assisting the jointly-represented clients from agreeing at any time to a procedure by which a third-party neutral would be

> authorized to determine what each of the clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.

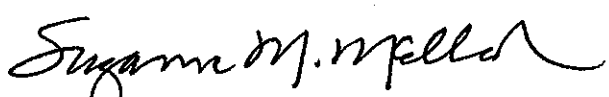
Alternatively, if the current proposed language of Comment [4] is intended to clarify that the Rule does not prohibit the specific circumstances identified, as opposed to providing examples of the types of allocation procedures among jointly represented clients that would not be precluded by the Rule, Comment [4] could be revised as follows:

> This Rule applies to aggregate settlements, as defined in Comment 1, even if the allocation of the benefits or burdens of the settlement is delayed for subsequent agreements among the lawyer's clients or in matters where the jointly-represented clients agree to a procedure by which a third-party neutral would be authorized to determine what each of the clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.

This revision would eliminate possible confusion that could result from references to the written disclosure and consent requirements in such circumstances.

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,



Suzanne Mellard, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

THE STATE BAR OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
Russell G. Weiner, Interim Chief Trial Counsel

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http://www.calbar.ca.gov

DIRECT DIAL: (415) 538-2063

October 20, 2009

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 July 2009. Here are our comments:

~~**Rule 1.8.6 Payments Not from Client.**~~

~~1. The Office of the Chief Trial Counsel (OCTC) supports this rule. However, OCTC believes that a comment should be added suggesting to the lawyers that they advise in writing both the client and the paying non-client that the lawyer's duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to the non-client and even with such a designation the lawyer must preserve the client's confidences and secrets. OCTC finds that often the paying non-client complains to us because they do not understand that the lawyer cannot communicate with them.~~

Rule 1.8.7 Aggregate Settlements.

1. OCTC supports the proposal to use the term "informed written consent" as that term is used in other California rules. However, OCTC finds the rule as written and the Commission's Comments confusing. For example, OCTC finds Comment 4, which is not in the Model Rules, very confusing and problematic. If the Commission is seeking to allow clients to agree that a neutral third-party may determine the allocation of the aggregate settlement, then that should be in the rule itself, not in a Comment. OCTC also finds unclear and confusing what the Commission means by aggregate package deals in criminal cases. That might need some clarification.

Rule 1.15 Handling Funds and Property of Clients and Other Persons.

1. While OCTC supports some of the Commission's additions or changes to the Model Rules, such as the Commission's exclusion of trust accounts maintained in other jurisdictions, and there is merit to its explanation that costs are covered by the rule, OCTC finds most of the changes from the Model Rules confusing and potentially inconsistent. For example, OCTC supports the Model Rules provision requiring that advanced fees be placed in the Client Trust Account (CTA). This will prevent confusion and lack of consistency. Either every lawyer should be placing advanced fees in the CTA or no lawyer should be placing the advanced fees in the CTA. A rule requiring that advanced fees be deposited into the CTA will also protect clients. OCTC has many cases where the attorney does not return unearned fees and claims not to have the funds to do so. If this proposal is adopted, it may require a change to Comment 10.

2. OCTC finds very confusing and inconsistent the proposed rule as to when disputed funds need to be placed in the client trust account. (See proposed rules 1.15(d), (g), (h) and (i).) OCTC suggests deletion of the deviation from the Model Rules regarding these issues. This may require changes to Comments 12 – 14.

3. OCTC suggests that the term "inviolate" in proposed rule 1.15(e) be deleted as it is confusing and unnecessary in light of the rest of the sentence. All client funds should be maintained in a trust account until the time it is permitted to withdraw them.

4. OCTC finds confusing and inconsistent proposed rule 1.15(f). OCTC sees no compelling reason here to deviate from the Model Rules and, therefore, OCTC suggests that the first sentence of rule 1.15(a) of the Model Rules be reinstated. OCTC is particularly concerned that there are too many exceptions to the prohibition on the commingling of client funds and this will undermine the rule prohibiting commingling of client funds with the lawyer's own funds or allow such commingling if the attorney has the funds somewhere.

5. OCTC supports proposed rule 1.15(k) even though it is not in the Model Rules because it is essentially current rule 4-100(B). However, OCTC is concerned that subparagraph (6) is too limited as it does not provide for the Supreme Court or other court to issue an order for an audit. The rules should not determine jurisdiction or send a message that attorneys can violate a court's order. The Supreme Court has always provided that it has the right to involve itself at any stage of the disciplinary proceedings and investigation. (See *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 301; *In re Rose* (2000) 22 Cal.4th 430, 439; *Obrien v. Jones* (2000) 23 Cal.4th 40, 48. See also *In re Accusation of Walker* (1948) 32 Cal.2d 488, 490.) OCTC also believes that subparagraph (7) should add the word "authorized" to other person to make clear that only authorized persons can request undisputed funds.

6. OCTC is concerned that the language of rule 1.15(l) is too broad and, as written, no part of the rule applies to those attorneys and firms discussed in the subparagraphs. This seems counter to the purpose of the rule and public protection. OCTC is also concerned that subparagraphs (2) and (3) do not state, as subparagraph (1) does, that, if the rule does not apply in those situations, the firms and lawyers handle the funds in accordance with the law of the controlling jurisdiction. OCTC is further concerned how it would be able

to obtain copies of those out of state records and believes that the lawyers in those situations should have a disciplinable obligation to provide those to us or ensure that the financial institutions provide those records to us. Further, OCTC is concerned how this paragraph is impacted by the proposed Choice of Law rule in the September batch of proposed rules. (See proposed rule 8.5.)

Rule 3.3 Candor Toward the Tribunal.

1. OCTC is concerned that proposed rule 3.3 addresses only candor toward a tribunal. However, California law, unlike paragraph 3.3(a)(1), currently provides that an "attorney shall employ for purposes of maintaining causes confided to the member such means only as consistent with truth." Thus, the current rule covers, not just tribunals, but statements to others, including opposing counsel, parties, etc. Thus, unless this is covered in some other rule, OCTC believes that California's current rule should be incorporated into this rule or proposed rule 3.4. OCTC recognizes that proposed rule 3.4 is titled Fairness to Opposing Party and Counsel, but that proposed rule does not include this requirement of truth and candor either and that rule also is only designed to cover opposing parties and counsels.

2. OCTC is concerned that this proposed rule requires knowingly. It is unclear what that means, but if that requires intentional and not misstatements or concealment based on gross negligence, OCTC opposes it since that as is not consistent with California law. (See e.g. *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280.) In fact, while good faith in the statement may be a defense to a charge of misrepresentation, an attorney's unqualified and unequivocal statements to judges under circumstances that should have caused him at least some uncertainty are at minimum deceptive and support a finding of culpability. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Moreover, some of the proposed rules already permit violations for "knew or reasonably should have known." (See proposed rule 3.6.) For the same reasons, OCTC has concerns and disagrees with Comment 4. OCTC also wants to make clear that it believes the term material does not require that the attorney successfully misled court. Such an interpretation

3. OCTC is concerned that the proposed rule omits the term "artifice" as provided in current rule 5-200(b). If the Commission is intending to further limit the rule, OCTC opposes that. OCTC believes that word should remain in the rule. The proposed rule also omits the current rule that an attorney shall not intentionally misquote to a tribunal the language of a book, statute, or decision. OCTC is unsure if the Commission is intending to remove that, but OCTC believes that this language should remain and be added to the proposed rule. Likewise, the proposed rule omits the language that an attorney "shall not assert personal knowledge of the facts at issue, except when testifying as a witness." OCTC knows of no reason to omit that language and suggests that it be included in the proposed rule. In a similar vein, OCTC is concerned that nowhere in the proposed rules do they provide for 1) when an attorney states or alludes at trial to evidence that the attorney knows or reasonable believes is not relevant or admissible evidence or has already been ruled by the court inadmissible; 2) states the attorney's belief in the credibility of a witness; and 3) includes when an attorney violates discovery orders of a court. OCTC believes these belong in rule 3.3. OCTC recognizes that these are in rule 3.4 of Model

~~Rule, but believe that they belong here, although what is most important is that they remain in the rules. They or some of them appear to be at least implicitly currently in rule 5-200.~~

~~4. OCTC is concerned that Comment 3 is incomplete as written because FRCP and CCP 128.7 requires that statements in pleadings be made "after an inquiry reasonable under the circumstances." Likewise, the California Supreme court has written that "while an attorney may often rely upon statements made by a client without further investigation, circumstances known to the attorney may require an investigation." *(Butler v. State Bar* (1986) 42 Cal.3d 323, 329.)~~

~~**Rule 6.4 Law Reform Activities Affecting Client Interests.**~~

~~1. OCTC is concerned that, while this rule requires the lawyer to inform an organization in which he or she serves as a director, officer, or member when the reform may affect the interests of the client, nothing in the rule requires the lawyer to inform the client. Perhaps that is already required by the conflict rules, but it should be made clear here.~~

Again, thank you for the opportunity to comment on these rules.

Very truly yours,

Russell G. Weiner

Russell G. Weiner
Interim Chief Trial Counsel

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC)
BATCH #4, Comment Deadline October 23, 2009
SDCBA Legal Ethics Committee Deadline September 22, 2009
Subcommittee Deadline August 31, 2009

LEC Rule Volunteer Name(s): Frank L. Tobin

Old Rule No./Title: 3-310(D)/Avoiding the Representation of Adverse Interests

Proposed New Rule No./ Title: 1.8.7/Aggregate Settlements

QUESTIONS (please use separate sheets of paper as necessary):

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.
Yes [x] No [ ]

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [x] No [ ]

(3) Is the new rule **worded correctly and clearly**? If "yes, please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [ ] No [x] The second sentence of the new rule is not clear. The second sentence reads:

> The lawyer's disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

By using the language "among other things", the second sentence is vague and not inclusive of all of the items that must be in the disclosure. The second sentence does not specifically define what exactly must be covered when disclosing the existence and nature of <u>all</u> of the claims and pleas. This could lead to confusion as to the extent of what should be disclosed. One of the committee members, specifically in comments contained in February 25 and 27, 2009 emails from Melchior, expressed concerns that this sentence may create the requirement of drafting a treatise with regard to explaining "the nature of the claims involved." I have attached these emails. I tend to agree that in cases where a large number of claims and defenses are included, this language is confusing as to what is actually required when providing a written disclosure as to each claim and defense involved. Because of the lack of clarity and because the sentence does not otherwise list all of the items that must be included in the disclosure,[1] I recommend taking the second sentence out as unnecessary and likely to cause confusion. Once taken out, the proposed rule becomes very similar to existing Rule 3-310(D). In addition, if the second sentence of the new rule is taken out, then the sentence in Comment [3] that refers to the requirement in the second sentence should be revised as follows: "In making written disclosure to each client of the existence and nature of ~~all~~ the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining

1 By using the language "among other things", there are presumably items that must be in the written disclosure that are not expressly set forth in the body of the new rule.

informed written consent, the lawyer ordinarily must include the material terms of the settlement, what each of the lawyer's clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them." This change which omits the word "all" addresses the concern about being required to write a treatise and allows more flexibility when disclosing the nature and existence of the claims or defenses.

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [x] No [ ]

(5) Do you have any other comments about the proposed rule? If so, please elaborate here: See above.

The first sentence of the new rule and Rule 3-310(D) are very similar. Rule 3-310(D) provides: "A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client." The first sentence of the new rule provides:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent.

Unlike Rule 3-310(D), the first sentence of the new rule clarifies that it applies to aggregate agreements as to guilty or nolo contendere pleas in criminal matters. Otherwise, the new rule and Rule 3-310(D) are consistent. I recommend approving the new rule modified by omission of the second sentence and revision of the sentence in Comment [3] as explained above.

CONCLUSIONS (pick one):

[ ] We approve the new rule in its entirety.

[X] We approve the new rule with modifications.*

[ ] We disapprove the new rule and support keeping the old rule.

[ ] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

[ ] We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.

CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

c/o State Bar of California - 180 Howard Street - San Francisco, CA 94105 - (415) 538-2251- (415) 538-2524/fax

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Santa Clara

MARY LAVERY FLYNN
Director, Legal Services Outreach
State Bar of California
San Francisco

October 23, 2009

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

Re: Comment on proposed Rules 6.3, 6.4, 1.8.6, and 1.8.7

Dear Ms. Hollins:

On behalf of the California Commission on Access to Justice, I am writing to provide input to the rules identified above.

- ~~**Proposed Rule 1.8.6** – The Access Commission recommends a minor revision to Rule 1.8.6 – to add to the exception those non-profit charitable organizations which represent clients without a fee.~~

  ~~This rule, titled "Payments Not From Client", addresses the situation where someone other than the client is paying the attorneys fees, such as an employer, a family member, or an insurance company. The rule requires "informed written consent" from the client. The proposed Rule includes an exception that is in the current California rule (3-310[F]), but is not in the ABA rule. The exception says that "no disclosure or consent is required if the lawyer is rendering legal services on behalf of a public agency that provides legal services to other public agencies or to the public." The rationale for this exception is "…because the concerns addressed by the Rule do not come into play in those situations." While the exception will cover attorneys working with County Counsel who represent local school districts, and will also cover the Public Defender, it fails to cover legal services programs.~~

  ~~The Commission's stated rationale for the exception – enhancing access to justice – also applies to legal services programs. If this rule goes into effect, legal aid programs would have to fully inform each client that any fees are paid by someone else, and then get the client's written consent, before rendering any service. Not only would this shut down hotlines and other phone-based services, but it would unnecessarily slow down in-person services and result in fewer low-income people receiving services. And nothing would be gained by making this Rule applicable to legal services programs. Therefore, the Access Commission urges that this rule be amended by including in the exception those non-profit charitable organizations which represent clients without a fee.~~

- **Proposed Rule 1.8.7 -** The Access Commission urges that this Rule on Aggregate Settlements be modified to permit attorneys to obtain prior approval from clients. While the proposed rule is only slightly more difficult than existing rule 3-310 (D), even the existing rule does not comport with the reality of aggregate litigation. When a suit is filed on behalf of multiple plaintiffs, such as employees, tenants, etc., the rule would require full, extensive disclosure to each client of considerable information, and the informed written consent of each client. When such a case is settled, for example on the courthouse steps, it is very common that not all of the clients are present. Therefore, the settlement would be delayed while all of the clients are located, the agreement is perhaps translated, and written consent is obtained from all. We believe that such a process would unduly restrict and even discourage potential settlements. Therefore, we believe that the Rule should permit attorneys to obtain prior consent to such settlements, and that a follow-up notification be required within a reasonable amount of time after the settlement is finalized.

- ~~**Proposed Rule 6.3** – This proposed rule has not existed in California in the past, and the Access Commission strongly supports its inclusion in our Rules of Professional Conduct. The rule as drafted is excellent, and it will help provide valuable guidance and protection for those wishing to serve on the boards of legal services programs. The mission of legal aid programs to serve the legal needs of low-income communities will often be in conflict with the interests of large corporations. But that should not be a barrier for an attorney who makes his or her living as a corporate attorney who wishes to provide public service by joining a legal aid board. We wholeheartedly support the adoption of this Rule.~~

- ~~**Proposed Rule 6.4** – Likewise, the Access Commission strongly supports the addition of proposed Rule 6.4. This Rule will encourage attorneys to participate in law reform organizations, and provides a reasonable procedure for them to follow whenever their clients might be benefited by the work of that organization. Working to improve the law is an important role for lawyers, and it is critical that lawyers feel that they can be involved in these activities without fearing ethical problems because of the potential impact on clients.~~

Thank you for this opportunity to comment. Please feel free to contact me if you have any questions.

Respectfully submitted,



Hon. Steven K. Austin
Co-Chair

"The Unified Voice of Legal Services"

LAAC
Legal Aid Association
of California

VIA FACSIMILE (415) 538-2171

October 22, 2009

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

Re: Public Comment on proposed Rules 6.3, 6.4, 1.8.6 and 1.8.7

Dear Ms. Hollins:
I am writing on behalf of the Legal Aid Association of California (LAAC), and our member legal services nonprofit organizations, with comments on four of the proposed Rules of Professional Conduct.

Founded in 1984, the Legal Aid Association of California (LAAC) is a non-profit organization created for the purpose of ensuring the effective delivery of legal services to low-income and underserved people and families throughout California. LAAC is the statewide membership organization for more than 70 non-profit legal services organizations in the state.

Our members provide high-quality legal services to our state's most vulnerable populations. These services to low-income and other underrepresented individuals form an essential safety net in California and often ensure that the programs' clients have access to life's basic necessities, such as food, safe and affordable housing, freedom from violence, health care, employment, economic self-sufficiency, and access to the legal system.

Comments on Proposed Rule 6.3 - SUPPORT
LAAC supports the proposed Rule 6.3 on lawyers serving as a member or director of a legal services organization.

Comments on Proposed Rule 6.4 - SUPPORT
LAAC supports proposed Rule 6.3 regarding attorneys serving as directors, officers or members of an organization involved in the reform of the law or its administration.

433 California Street, Suite 815| San Francisco, CA 94108
Phone (415) 834-0100 | Fax (415) 834-0202

Comments on Proposed Rule 1.8.6 – SUPPORT IF AMENDED
This rule address the situation where someone other than the client is paying the attorneys fees, such as an employer, a family member, or an insurance company and requires "informed written consent" from the client. The proposed rule includes an exception that is in the current California rule (3-310[F]), such that "no disclosure or consent is required if the lawyer is rendering legal services on behalf of a public agency that provides legal services to other public agencies or to the public." This exception would cover situations such as a County Counsel who represents local school districts and Public Defender programs, but does not cover legal services nonprofit corporations.

The Commission's stated rationale for the exception, which it identifies as enhancing access to justice, is "because the concerns addressed by the Rule do not come into play in those situations." The same is true for legal services nonprofit organizations that represent clients without a fee. Legal services nonprofit corporations be included in this exception; without this, there is a significant risk that legal services nonprofits would be forced to eliminate critical hotlines and other phone-based services, that currently serve many low-income clients and could also slow down the provision of in-person assistance, such that many fewer low-income Californians would be able to receive the vital legal help they need. LAAC strongly recommends that the exception be modified to include non-profit charitable organizations that represent clients without a fee, as well as the public agencies already included in the proposed rule. LAAC supports proposed Rule 1.8.6 with this amendment.

Comments on Proposed Rule 1.8.7 - OPPOSE
While LAAC understands the ethical considerations that form the basis for this rule, the construct of the proposed rule simply does not comport with the reality of aggregate litigation. The requirements in the proposed rule would likely result many fewer such cases being resolved through settlement or settlements being significantly delayed. This important topic requires additional discussion and a rule that actually permits the efficient settlement of aggregate cases. The Commission should revisit and modify this proposed rule accordingly, including returning to the language of the ABA Model Rule, which requires informed consent, in a writing signed by the client.

Thank you for your kind consideration of these comments.

Sincerely,

Julia R. Wilson
Executive Director

433 California Street, Suite 615| San Francisco, CA 94108
Phone (415) 834-0100 | Fax (415) 834-0202

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DEADLINE TO SUBMIT COMMENT IS: OCTOBER 23, 2009

Your Information

Professional Affiliation Attorney at Law

Commenting on behalf of an organization
- ○ Yes
- ◉ No

*** Name** Suzanne V. Chamberlain

*** City** Newport Beach

*** State** California

*** Email address** (You will receive a copy of your comment submission.) candvlaw@msn.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)]
Rule 1.8.7 [3-310(D)]
Rule 1.15 [4-100]
Rule 3.3 [5-200]
Rule 3.6 [5-120]
Rule 3.7 [5-210]
Rule 6.3 [n/a]
Rule 6.4 [n/a]
Batch 4 Discussion Draft (All rules)

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 1.8.7 Aggregate Settlements [3-310(D)]

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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"Settlement on the courthouse steps" has been an accepted, welcomed, almost expected occurrence in the annals of trial work. This phenomenon, seen always as a savings to the court system and often as a savior to litigants, as a practical matter, could become a thing of the past for clients sharing a single counsel, were proposed rule 1.8.7 adopted.

In its "Explanation of Changes to the ABA Model Rule, at the third paragraph, the Commission states that, "current California rule 3-310(D) [which proposed rule 1.8.7 would replace] , the counterpart to Model Rule 1.8(g), requires 'the informed written consent of each client,' which under rule 3-310(A)(2) requires written disclosure. The Commission sees no reason to depart from the well-settled client protection rule currently in place." This, however, is an erroneous interpretation of the current rule which is demonstrable from the language of the rule itself, and borne out by practice and practicality.

To determine the true import of a passage containing a defined term, it is helpful to substitute the definition for the term itself. If, when this is done, the passage ceases to make sense, then it is likely that the term was used not as defined. For example, substituting the definition of "informed written consent" from rule 3-310(A)(2), while eliminating grammatically incompatible redundancies as would make the passage clumsy, rule 3-310(C) would read, "[a] member shall not, without each client's written agreement to the representation following written disclosure: (1) Accept representation ... ; or (2) Accept or continue representation ... ; or (3) Represent a client ... ." With the same substitution, rule 3-310(E) would read, "[a] member shall not, without the client's or former client's written agreement to the representation following written disclosure, accept employment ... ." Both of these subdivisions make sense when the language of the definition, rather than the defined term, is incorporated into each passage.

The Commission asserts that this same definition of "informed written consent" applies to rule 3-310(D), making the requirement of written attorney disclosure apply in connection with aggregate settlements. Substituting this definition, rule 3-310(D) would read, "[a] member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without each client's written agreement to the representation following written disclosure." Notwithstanding the provision of rule 3-310(A) that the definition is to apply for purposes of the rule, once incorporated, this passage does not make sense. This is because rule 3-310(D) does not deal with prospective or continued representation. Written disclosures as to representation are already to have been made. This passage is addressing activity within an existing representation, speaking in the active voice, that is, "[a] member who represents" or, stated another way, "a member who is representing." How else could the member be entering into settlement except in the course of an established, existing representation? In order that rule 3-310(D) make sense, its use of "informed written consent" must indicate some other type of disclosure sufficient to inform of claims, defenses and settlement terms, and quite distinct from the written disclosure of the definition addressing representation.

On occasion, settlement occurs pursuant to a measured exchange of correspondence carrying a series of respective demands and offers which nudge parties to mutual resolution. In these circumstances, admittedly desirable written disclosures by the attorney to the client, keeping tabs on the strengths and weaknesses of a side, bolstered or adversely impacted by evidentiary developments, are possible. Many settlements occur, however, as the result of a rush of negotiation, occasioned by the time constraints of the court in an MSC or the usual climax of the process in a mediation. In either of these circumstances, there is rarely time or inclination of the parties to draft more than basic deal-points, capturing a settlement made then, perhaps to be more fully set forth later. It is unrealistic to believe that the court in an MSC setting would wait with personnel at the ready, while counsel proceeds to draft a disclosure that includes, "among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement." It is equally unrealistic to believe that clients in a mediation would see such a written disclosure as "client protection" in light of the added expense incurred

for attorney and idle mediator fees associated with its preparation time, particularly when the value or cost of the case to them has just been fixed by way of settlement.

One of the values of settlement for clients, is that it puts the upset of the matter behind them. If they are to review a written, lengthy recitation of the allegations, of their conduct, and of others' conduct, the anticipated settlement may evaporate, not because they are now informed, but because they are now inflamed. Assuming the window for settlement even remains open, it is not likely to be on the same terms, as expenses and aggravation increase. Finally, the pressure on the member to fulfill his obligation to provide a written disclosure may actually create a conflict between the clients and the member as where, for example, at an MSC the member determines that there is not enough time to produce and discuss a written disclosure, and place the settlement "on the record," causing the member to balk, and lose the opportunity to settle due to imminent trial. Such a conflict truly would work a disadvantage to the clients and clearly need not exist.

Current rule 3-310(A)(1) contains a definition of "disclosure" which neither incorporates the concept of a writing nor requires that such be written. It is this type of disclosure likely anticipated by current rule 3-310(D) due to considerations of practicality. It is also this concept of an oral disclosure which the 1983 Model Rule found sufficient and which a number of states across the country, including New Jersey, North Dakota, Georgia, and Virginia, believe efficacious, requiring client consent "after consultation," that is, requiring no attorney writing.

Accordingly, it is urged that the Commission consider the practicality of a written attorney disclosure as required by proposed rule 1.8.7, and the difficulties that such would pose to settlement and to the attorney-client relationship. It is suggested that in connection with aggregated settlements, a member be required to secure the informed written consent of each client to the settlement, but that such informed consent may be effectuated by way of the member's oral disclosure.

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10/23/2009	PC	D-2009-282 Suzanne Chamberlain [1.8.7].pdf

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Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, October 23, 2009 2:46 PM
To: Hollins, Audrey
Cc: 'Shawn M Harpen'; 'Garner, Scott'; 'Bagosy, Jennifer'; 'Yoder, Mike'
Subject: Orange County Bar Comments Re Rule Revisions
Attachments: OCBA Comments on Rules Due Oct 23 2009.pdf

Dear Ms. Collins:

Please find attached the comments from the Orange County Bar Association regarding the following proposed amended rules. We appreciate the opportunity to offer our comments to the Bar's Special Commission for the Revision of the Rules of Professional Conduct. Please note that we will not be submitting comments on Rule 1.8.6.

Please let me know if you have any questions. I would also appreciate your acknowledgement of receipt of these comments.

Rule 1.8.7
Aggregate Settlements [3-310(D)]
Rule 1.15
Safekeeping Property: Handling Funds and Property of Clients and Other Persons [4-100]
Rule 3.3
Candor Toward the Tribunal [5-200]
Rule 3.6
Trial Publicity [5-120]
Rule 3.7
Lawyer as Witness [5-210]
Rule 6.3
Membership in Legal Services Organization [n/a]
Rule 6.4
Law Reform Activities Affecting Client Interests [n/a]

Trudy C. Levindofske, CAE
Executive Director
Orange County Bar Association
Orange County Bar Association Charitable Fund
(949)440-6700, ext. 213

MEMORANDUM

Date: September 4, 2009

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: **Proposed Rule 1.8.7 – Aggregate Settlements**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations 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 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 1.8.7 – Aggregate Settlements.

The OCBA supports the adoption of Proposed Rule 1.8.7 subject to the comment set forth below.

The Commission should consider whether a separate exception should be delineated in the Comments regarding oral settlements on the record, provided that the full disclosure of the terms and the consent outlined in Proposed Rule 1.8.7 are made orally in the presence of all parties and are transcribed by a licensed court reporter. Often, attorneys and clients participate in settlement conferences or court-ordered mediations that result in a resolution of a litigation. Many courts insist upon putting the settlement on the record at the settlement conference, and each client typically is required to give consent to the settlement on the record following a recitation of all of the terms of the settlement and an acknowledgment by each party that he or she understands the terms. The disclosures to the parties are made orally by the court, and the parties' consents are provided orally, but a written transcript is prepared. Courts typically make a translator available if one is required to ensure informed consent to the settlement is provided. Under these circumstances, the informed written consent requirement not only may be impractical and redundant of the disclosures made by the court on the record, but may impede the separate and equally important goal of fostering settlement and resolution. Therefore, the OCBA proposes modifying the last sentence of Comment [1] as follows:

"However, this Rule does not apply to (a) class action settlements that are subject to court approval; or (b) oral settlements made on the record in court and transcribed by a licensed court reporter, provided that the nature and terms of the settlement, as well as each parties' consent to the settlement, are recorded in the record."

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Your Information

Professional Affiliation California Attorneys for Criminal Justice (

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** Ted W. Cassman

*** City** Berkeley

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) cassman@achlaw.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)]
Rule 1.8.7 [3-310(D)]
Rule 1.15 [4-100]
Rule 3.3 [5-200]
Rule 3.6 [5-120]
Rule 3.7 [5-210]
Rule 6.3 [n/a]
Rule 6.4 [n/a]
Batch 4 Discussion Draft (All rules)

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 1.8.7 Aggregate Settlements [3-310(D)]

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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1.8.7 – Aggregate Settlements. CACJ believes that the proposed rule fails to accommodate situations in which a settlement proposal is made by a prosecutor or by the court with an urgent time line for acceptance or rejection, during the course of a hearing, pretrial conference or at trial. These situations which frequently arise. In such circumstances, it will frequently be impossible or impractical to obtain the client's written informed consent. The proposed rule should be modified to permit, in criminal cases, the client's informed consent to an aggregate settlement be made "on the record" in court. While multiple representation in criminal cases is rare, it does occur and often finalization of a settlement is made in court, perhaps on the day of trial. In such circumstances, obtaining written consent would be difficult and time consuming. The purpose of the rule can be fulfilled by having the Court accept the consent on the record.

CACJ requests that the first sentence of the proposed rule be modified to include the bold, italicized language below:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent ***or verbally consents on the record*.**

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LACBA
LOS ANGELES COUNTY BAR ASSOCIATION

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JOHN K. RUBINER
NANCY A. SHAW
LAURA S. SHIN
DAVID W. SWIFT
LUCY VARPETIAN
NORMA J. WILLIAMS
ROBIN L. YEAGER

October 23, 2009

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

RE: Comments Regarding Proposed Rule of Professional Conduct 1.8.7

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has the following comments regarding proposed Rule 1.8.7 of the Rules of Professional Conduct.

Certain requirements contained in proposed rule 1.8.7 are unworkable in many settings as a practical matter, which will lead to widespread noncompliance. PREC does not believe it is good policy to adopt disciplinary rules that are impractical or honored in the breach. The promulgation of impracticable rules threatens to degrade confidence in the administration of justice enforced, can lead to a perception of unfair selective prosecution.

First, the proposed rule should recognize an exception for multi-party cases (such as multidistrict litigation) where there is active judicial supervision of the settlement. In cases where there are hundreds (or perhaps thousands) of individual litigants, it is simply impracticable to seek written consent from each client. Where such settlements are crafted under active judicial supervision, the onerous written consent requirement is unnecessary, just as it is unnecessary in class action cases. This issue has been recognized by the American Law Institute in its recently approved Principles of Aggregate Litigation, Topic 3, "Non-Class Aggregate Settlements" and in the "Need for Special Treatment of Non-Class Aggregate Settlements" (Proposed Final Draft at 264).

Second, in many other cases, the requirement of written client consent after written disclosure is simply infeasible. Take, for example, an attorney who represents six tenants in a slum building who are suing their landlord, or eight welfare recipients suing the county for allegedly cutting off their support in violation of the law, or a husband and wife being jointly sued for eviction. In each case, an aggregate settlement may be reached when it is simply impossible to get the informed written consent of each client after full written disclosure in a timely manner. For example, the case may be called for trial, but a settlement reached at the last minute. Not all of the clients are present – some may be at

work or unavailable due to conflicting obligations. The settlement is discussed by phone, and the clients agree to accept the settlement.

As the proposed rule is written, an attorney must write up a full disclosure statement (and possibly get it translated), get a copy to each of the clients, and obtain their written consent before being able to agree to the settlement. In the meantime, the case may be assigned out for trial and the trial concluded. In other circumstances, the trial may already have begun when a settlement is reached. The permutations are endless, as is the mischief caused by a "written consent" requirement. The objectives of disciplinary rules -- public protection and maintaining confidence in the administration of justice -- are not sufficiently advanced by such a requirement, particularly when the rule practically forces attorneys into breach.

Impractical disciplinary rules undermine confidence in the fair administration of justice and respect for the disciplinary rules themselves. Great care should be taken to implement rules that are consistent with the day to day reality of legal practice, particularly where the perceived public protection benefit offered by the impractical rule is minimal.

We appreciate the opportunity to comment on the proposed rules.

Sincerely yours,

James I. Ham
Chair, LACBA Professional
Responsibility and Ethics Committee

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: OCTOBER 23, 2009

Your Information

Professional Affiliation Santa Clara County Bar Association

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** Jil Dalesandro, President

*** City** San Jose

*** State** California

*** Email address**
(You will receive a copy of your comment submission.)
chrisb@sccba.com

The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)] | Rule 3.3 [5-200] | Rule 6.3 [n/a]
Rule 1.8.7 [3-310(D)] | Rule 3.6 [5-120] | Rule 6.4 [n/a]
Rule 1.15 [4-100] | Rule 3.7 [5-210] | Batch 4 Discussion Draft (All rules)

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 1.8.7 Aggregate Settlements [3-310(D)]

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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The Santa Clara County Bar Association (SCCBA) supports the changes to this rule, in particular, the change to add "written" to the informed consent requirement. That informed consent be written is critical for client protection which is the primary objective of this rule. However, the SCCBA recommends that an exception be made for public agencies. This rule should not apply to public agencies that are required by law to defend and indemnify their officers and employees for claims or actions arising out of acts or omission occurring within the scope of their employment with the public agency. Requiring the public agency to obtain the written consent of named officers and employees but who have not participated in the litigation could unnecessarily complicate the settlement of these cases and, in some cases, the public agency may not have current contact information for the named employee.

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* Date	Period	File :
10/30/2009	PC	D-2009-287b Santa Clara County Bar [1.8.7].pdf

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PUBLIC COMMENTS [3.3] ~ FILE LIST

D-2009-267 COPRAC [3.3]

D-2009-273 Robert Scofield [3.3]

D-2009-275d State Bar OCTC [3.3]

D-2009-276d Rick Hendlin SDCBA Legal Ethics Comm [3.3]

D-2009-277b California Public Defenders Association [3.3]

D-2009-279 Michael Judge LA Public Defender [3.3]

D-2009-283c Orange County Bar [3.3]

D-2009-286c James Ham LACBA [3.3]

D-2009-287d Santa Clara County Bar [3.3]

THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2107

September 10, 2009

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 3.3 – Candor to Tribunal

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 3.3 and offers the following comments.

We approve of the majority of the proposed Rule. We have comments, however, on four areas.

First, regarding paragraph (c), we believe the minority position is the better one, regarding when a lawyer's obligations under paragraphs (a) and (c) should end. We are persuaded that a lawyer should not have a continuing obligation to oversee the course of a proceeding which the lawyer is no longer involved in, having been terminated or having withdrawn from representation. We believe a lawyer would lack standing to continue to be involved in proceedings regarding a former client and could potentially interfere with the relationship between the former client and his or her new lawyer. Accordingly, we believe the lawyer's duties should not continue to the conclusion of the proceeding, but to the conclusion of the representation, if such conclusion occurs earlier.

Second, in paragraph (d) regarding a lawyer's duty to inform the tribunal of necessary facts, we believe the language of the ABA Rule: "all material facts known to the lawyer that will enable the tribunal to make an informed decision," provides better guidance to practitioners than the Commission's proposed changes. We think it would be too difficult to opine on what facts a lawyer "reasonably should know are needed," as suggested by the Commission, particularly in retrospect, and the vagueness of this revised requirement could inure to the detriment of lawyers who are in good faith attempting to follow the Rule.

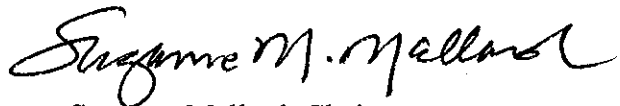
Third, in proposed Comment [7], we feel that using the term "criminal defendant" would make more sense than "criminal defense client." This is because there could be witnesses called by a lawyer that might be criminal defense clients in other cases, but the "narrative" approach is only available to the criminal defendant currently on trial.

Fourth, we disagree with proposed Comment [9], entitled Remedial Measures, to the extent that it is intended to provide that a lawyer has no obligation to take remedial measures when opposing counsel elicits testimony the lawyer knows to be false from the lawyer's client or a witness. We believe the better position is that a lawyer should have a duty to take remedial measures whenever the lawyer knows that the lawyer's client or witness has testified falsely, regardless of which side elicited the false testimony. To this end, we believe that the following phrase found in ABA Comment [10] that was deleted from proposed Comment [9], "either during the lawyer's direct examination or in response to cross examination by the opposing lawyer," should be reinserted in Comment 9.

We do not believe there is any legitimate rationale for the distinction established by the Comment [9], providing that a lawyer is obliged to take remedial measures if a client knowingly makes false statements during a deposition, but permitting a lawyer to forego such measures if a client makes false statements at trial. Most likely, opposing counsel would elicit the false statements elicited under either scenario. The proffered rationale, to avoid interference with trial strategy, is not compelling and could lead to gamesmanship, inconsistent with the statutory obligation to employ only such means as are consistent with the truth. In our view, the obligation of candor should prevail over an attorney's trial strategy where the client testifies falsely, whether in a deposition or at trial.

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,



Suzanne Mellard, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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: OCTOBER 23, 2009

Your Information

Professional Affiliation private attorney

Commenting on behalf of an organization
- Yes
- No

*** Name** Robert G. Scofield

*** City** Woodland

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) research@omsoft.com

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The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)]
Rule 1.8.7 [3-310(D)]
Rule 1.15 [4-100]
Rule 3.3 [5-200]
Rule 3.6 [5-120]
Rule 3.7 [5-210]
Rule 6.3 [n/a]
Rule 6.4 [n/a]
Batch 4 Discussion Draft (All rules)

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 3.3 Candor Toward the Tribunal [5-200]

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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Comment On Proposed Rule 3.3 Candor Toward The Tribunal

Robert G. Scofield

Introduction

I have a concern with one sentence in Comment [4] to the Commission's Proposed Rule 3.3 Candor Toward the Tribunal. The sentence of concern is: "'Controlling legal authority' may include authority outside the jurisdiction in which the tribunal sits." My concern is that this will be interpreted to require a lawyer to cite out-of-state case law adverse to his or her client's position. In thinking about this issue, however, I have discovered that proposed Rule 3.3, as interpreted by Comment [4], is ambiguous.

In what follows I: (1) state my concern; (2) explain why an attorney should not be required to cite out-of-state authority adverse to his or her client's position; (3) discuss the ambiguities in the proposed California version of Rule 3.3; and (4), argue that the ambiguities should be resolved by giving some specific examples of what is required in the citation of adverse authority.

The Concern

Comment [4] to proposed Rule 3.3 states in part: "'Controlling legal authority' may include authority *outside the jurisdiction in which the tribunal sits*." (Emphasis added.) The italicized language could be interpreted to mean that an attorney is required to cite out-of-state authority adverse to his or her client's position.

The fact that Comment [4] could be interpreted to refer to out-of-state cases does not mean that it has to be interpreted that way, or that it is the intent of the Commission that it refer to out-of-state cases. In California the intermediate appellate courts are not bound by opinions from other intermediate appellate courts. (See *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409 [105 Cal.Rptr.2d 863].) So while the Sacramento County Superior Court might be bound by cases from the Fifth District Court

of Appeal in Fresno, the Third District Court of Appeal in Sacramento is not. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937].) Therefore the statement that controlling legal authority may include authority outside the jurisdiction in which the tribunal sits might be intended to cover situations like the one where an attorney appearing before either the California Supreme Court, or the Third District Court of Appeal in Sacramento, is aware of an adverse case from the Fifth District Court of Appeal in Fresno.

Why There Should Ordinarily Be No Ethical Duty To Cite Out-of-State Case Law

It is clear that out-of-state cases are sometimes relevant to California litigation. Appellate courts have on occasion implicitly criticized attorneys for not citing out-of-state case law when the court faces an issue of first impression. (See *People v. Rhoden* (1999) 75 Cal.App.4th 1346, 1352, fn. 4 [89 Cal.Rptr.2d 819].) Two courts have stated that, if there is no California authority on point, the attorney may have an affirmative duty to cite out-of-state case law. (See *People v. Taylor* (1974) 39 Cal.App.3d 495, 496 [114 Cal.Rptr. 169]; *Tate v. Conica* (1960) 180 Cal.App.2d 898, 900 [5 Cal.Rptr. 28].) And in rare cases it might be that out-of-state case law is determinative of the issue before a California court. An example is where the out-of-state case's interpretation of the elements of a crime will determine whether a person convicted of that crime will have his sentence enhanced as a result of a later California conviction. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1203-1204 [96 Cal.Rptr.2d 1, 998 P.2d 969].)

While I would agree that an attorney would be ethically required to cite a Washington case adverse to his or her client's position in *People v. Riel*, lawyers should not have a general duty to cite of out-state-cases. I have a lot of experience researching out-of-state cases. In the vast majority of situations a lawyer will be able to find an out-of-state case that is contrary to the out-of-state case the lawyer wishes to cite to the court. Consider for example ALR annotations. To a great extent ALR annotations are just

compilations of conflicting out-of-state cases. A general duty to site out-of-state cases will turn a lawyer's brief into a virtual ALR annotation. And that would go against Comment [4]'s countervailing policy: "Although *a lawyer is not required to make a disinterested exposition of the law*, legal argument based on a knowing false representation of law constitutes dishonesty toward the tribunal." (Emphasis added.)

There is a reason why out-of-state law is more contradictory than law from within any single jurisdiction. (And hence why one will most often find out-of-state cases adverse to his or her client's position.) As will be explained later, controlling legal authority (with regard to case law) usually means that a controlling precedent is synonymous with a binding precedent. Historically binding precedents could not arise until there was a hierarchy of courts. (See *Hart v. Massanani* (9th Cir.) 266 F.3d 1155, 1164-1165, 1175.) "Only towards the end of the nineteenth century, after England had reorganized its courts, was the position of the House of Lords at the head of its judicial hierarchy confirmed. Before that, there was no single high court that could definitively say what the law was." (*Id*. at pp. 1164-1165.) In California the hierarchy allows the California Supreme Court to maintain a coherent body of case law by putting an end to splits of authority among the intermediate appellate courts of the state. California Rules of Court, Rule 8.500 subdivision (b), provides that one ground upon which a litigant may petition for review of a case by the California Supreme Court is when it is "necessary to secure uniformity of decision." But there is no hierarchy of courts that resolves the web of conflicting opinions that one finds in out-of-state cases.

If Rule 3.3 is construed to require the citation of out-of-state cases, then it will penalize the most diligent legal researchers. The harder one works to find cases, the more one will be required to turn over adverse authority to one's opponent.

The best interpretation of Rule 3.3 is that it does not require an attorney to cite adverse out-of-state case law. This interpretation can be supported by a reductio ad absurdum argument leading to the conclusion that, if Rule 3.3 does require the citation of

out-of-state case law, then an attorney with a California Supreme Court case directly on point, and in his client's favor, will additionally be required to cite a contrary case from the Mississippi Court of Appeal. My concern is with how Rule 3.3 *might* be interpreted.

The Seventh Circuit Court of Appeals may disagree with me. In litigation in federal district court in the State of Illinois, one party failed to cite a case from the Illinois state appellate court, and failed to cite a case from the Seventh Circuit. In response to the party's objection that the Illinois state case did not have to be cited because it was not dispositive, but merely persuasive authority, the Court of Appeals replied that "this argument is an exercise in gall when presented by the same attorney who argued in briefs that the district court should rule in his client's favor based upon intermediate California and Washington state court decisions, as well as decisions of federal district courts from outside this Circuit." (*Mannheim Video, Inc. v. County of Cook* (7th Cir. 1989) 884 F.2d 1043, 1047.) But *Mannheim* did not consider the arguments that I have made above.

The Ambiguities of Proposed Rule 3.3

Both the ABA Model Rule 3.3 and the proposed California Rule 3.3 use the adjective "controlling." The difference, however, is that the adjective modifies different nouns in the respective rules. In the ABA model rule the adjective modifies "jurisdiction" in the relevant part of the rule:

> (a) A lawyer shall not knowingly:
>
> (2) fail to disclose to the tribunal legal authority in the *controlling jurisdiction* known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(Emphasis added.)

In the proposed California rule the adjective modifies "legal authority" in the relevant part of the rule:

> (a) A lawyer shall not knowingly:

> (2) fail to disclose to the tribunal *controlling legal authority* known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(Emphasis added.)

I cannot find a definition of "controlling legal authority." What one does find are cases giving examples of what controlling authority is. Controlling authority includes statutes. (*Texas American Oil Corp. v. U.S. Dept. of Energy* (D.C. Cir. 1995) 44 F.3d 1557, 1561.) It even includes temporary treasury regulations. (*Bankers Trust New York Corp. v. U.S.* (1996) 36 Ct.Cl. 30, 37.) Clearly, "controlling law" includes cases. (See *Schaeffer v. State Bar* (1945) 26 Cal.2d 739, 747-748 [160 P.2d 825].) Sometimes we see the term "controlling precedent." (See *Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 109.)

The notion of controlling authority in the form of a case suggests reference to a proposition of law in a case that is binding; that is, a proposition that is part of a case's holding, as opposed to mere dicta.

> But there are also very important differences between controlling and persuasive authority. As noted, one of these is that, if a controlling precedent is determined to be on point, it must be followed. Another important distinction concerns the scope of controlling authority. Thus, an opinion of our court is binding within our circuit, not elsewhere in the country.

(*Hart v. Massanani*, *supra*, 266 F.3d at pp. 1172-1173.) And cases decided by the New York state courts are not "controlling authority" in federal district courts sitting in New York. (*JPMorgan Chase Bank v. Cook* (S.D.N.Y. 2004) 322 F.Supp.2d 353, 355.)

Thus without Comment [4] it might appear as though California has adopted the "narrow view," which sees "controlling authority" as those cases "decisive of the pending case." (See the discussion in *Tyler v. State* (Alaska App. 2001) 47 P.3d 1095, 1104-1107.) If so, then Comment [4] might change things by telling us that, if controlling authority may include cases from a jurisdiction other than that in which the tribunal sits,

then controlling legal authority in the Third District Court of Appeal includes cases from the Fifth District Court of Appeal. That is because, as controlling authority is usually understood, cases from the Fifth District Court of Appeal are not binding in other district courts of appeal (or in the California Supreme Court). In California appellate court opinions are persuasive authority for other appellate courts of equal authority in the judicial hierarchy. (See 9 Witkin, California Procedure (5th ed. 2008) Appeal §498, pp. 558-560.) So Comment [4] might have a purpose other than to require the citation of out-of-state cases.

There are some problems with this view, however. The Third District Court of Appeal is not bound by its own decisions. The California Supreme Court is not bound by its own decisions. (See 9 Witkin, California Procedure (5th ed. 2008) Appeal §492, p. 553.) And the California Supreme Court is not bound by the decisions of the courts of appeal. But there is no analogous comment to the proposed Rule 3.3 defining "controlling legal authority" as persuasive authority from the very tribunal before which the attorney is arguing. In other words (under the interpretation I have just put forth) the attorney is specifically told he or she must cite Fifth District Court of Appeal cases in the Third District Court of Appeal, but not specifically told that he or she has to cite adverse Third District Court of Appeal cases in the Third District Court of Appeal. The attorney is not specifically told that he or she is required to cite to the California Supreme Court adverse decisions from the courts of appeal. And the attorney is not specifically told that he or she has to cite to the California Supreme Court adverse decisions from the California Supreme Court.

A second problem is reflected in *Shaeffer v. State Bar*, *supra*, which weakens the notion of controlling authority in a way that suggests that California might not follow "the narrow view" after all. In that case an attorney was accused of misleading a trial court by failing to cite an applicable case. The attorney's defense was that the case in question was not controlling because the relevant statement was "dictum." While the

California Supreme Court failed to discipline the attorney, as to this particular charge, because there was no evidence the attorney intentionally mislead the court, the Supreme Court stated that the attorney should have cited the case, and then argued to the court that it was not controlling. (26 Cal.2d at p. 748.) This appears to be the same result as would be reached under the ABA Model Rule 3.3. Thus in *Tyler v. State, supra*, the court cited *Shaeffer* in support of its conclusion that an attorney has a duty to cite "adverse" legal authority under ABA Model Rule 3.3 even though the attorney reasonably believes that the court will conclude that the precedent does not control the present case because it is distinguishable, or for some other reason. (See 47 P.3d at pp. 1105-1106.) Under *Schaeffer* the attorney's duty is to cite cases that *might be* controlling. Whether a precedent is adverse under the ABA model rule, or controlling under the proposed California rule, is up to the court to decide; not the attorney.

There are some problems with *Schaeffer*. One is that it did not spend a lot of time analyzing the issue of the failure to cite controlling case law. A second problem is that *Schaeffer* fails to make the distinction between judicial dicta and obiter dicta. Obiter dicta are "by the way" statements. (Cross & Harris, Precedent in English Law (4th ed. 1991) 41.) Thus they are not entitled to serious consideration and can be safely ignored. (Scofield, *Judicial Dicta Versus Obiter Dicta: An Examination of the Dicta That Has Great Authority*, 25 Los Angeles Lawyer (Oct. 2002) 17.) But judicial dicta is entitled to greater weight since these are legal propositions resulting from a court's comprehensive discussion of the issues. (*Ibid*.) Judicial dicta "should be followed in the absence of some cogent reason for departing therefrom." (*State v. Fahringer* (Ariz. 1983) 666 P.2d 514, 515.) One reason this distinction is important for our purposes is that an ethical rule requiring the citation of adverse obiter dicta will lead to the courts becoming highly irritated. Judges do not want briefs lengthened by unsupported legal propositions. But the situation with regard to judicial dicta is different. Courts hold that judicial dicta from the California Supreme Court should be followed. (See, e.g. *Hubbard v. Superior Court*

(1997) 66 Cal.App.4th 1163, 1169 [78 Cal.Rptr.2d 819].) The spirit of the proposed Rule 3.3 would require attorneys to cite adverse judicial dicta from the courts of appeal and the California Supreme Court.

But if *Schaeffer* represents the California view of controlling legal authority, there doesn't seem to be much difference between the proposed California version of Rule 3.3 and the ABA version of Rule 3.3, notwithstanding the difference between where the adjective "controlling" is placed. In *Mannheim Video, Inc. v. County of Cook, supra,* the court made the following statement with regard to attorneys failing to cite a Seventh Circuit case in a district court governed by the Seventh Circuit:

> ... *Hill* and *Bonds* made clear that an attorney should not ignore potentially dispositive authorities; the word "potentially" deliberately included those cases arguably dispositive. Counsel is certainly under obligation to cite adverse cases which are ostensibly controlling and then may argue their merits or inapplicability.

(884 F.2d at p. 1047.) Under *Shaeffer* an attorney has to cite cases he or she may not believe are controlling authority because it is up to the court to make the determination of what constitutes controlling authority. And the cases seem to suggest that, as a practical matter, whether a case is adverse is very similar to whether a case is controlling. Thus a lawyer may argue under the ABA Rule 3.3 that a precedent is not adverse to his client's position because the case is distinguishable. And the lawyer can argue under the proposed California Rule 3.3 that the precedent is not controlling legal authority because it is distinguishable.

In summary, proposed Rule 3.3 is both over and under inclusive. It is over inclusive in that it could require the routine citation of adverse out-of-state cases. (I admit that it is only over inclusive if I am right that the citation of out-of-state case law is not part of the purpose of the proposed rule as interpreted by Comment [4].) It is under inclusive to the extent that it might be construed to require the citation of court of appeal cases from other district court of appeals, but not require the citation of court of appeal

cases to either the court of appeal issuing the case or the California Supreme Court. *The bottom line is that it is just not clear what Comment [4] means when it says that controlling legal authority may include authority outside the jurisdiction in which the tribunal sits*.

In addition to the problem of over and under inclusiveness, there is the problem of the ambiguity of "controlling legal authority" with regard to case law. Does it include judicial dicta? That is, does it include well articulated arguments presented by the court that were not necessary to the decision reached in the case?

I do not think that the ethical obligation can be expressed with general statements or principles. I think the rule, or the comment to the rule, should present examples. With all of these thoughts in mind I present a suggested revision below.

Proposed Revision of Comment [4]

My proposed revisions are in italics.

Legal Argument

[4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2) requires a lawyer to disclose directly adverse and controlling legal authority that is known to the lawyer and that has not been disclosed by the opposing party. "Controlling legal authority" may include authority outside the jurisdiction in which the tribunal sits. *This does not ordinarily require an attorney to cite out-of-state case law, though it would require the citation of such law where it would be determinative of the issue before the court as in* People v. Riel *(2000) 22 Cal.4th 1153, 1203-1204.* Under this Rule, the lawyer must

disclose authorities the court needs to be aware of in order to rule intelligently on the matter. *This would include case law that is not strictly binding on the tribunal before which the attorney is appearing. For example an attorney would be required to cite adverse cases that were issued by one panel of the Court of Appeal to another panel of the Court of Appeal. The attorney would also be required to cite an adverse case from the Court of Appeal to the California Supreme Court. And an attorney would be required to cite adverse precedent from the California Supreme Court to the California Supreme.* In addition, a lawyer may not knowingly edit and submit to a tribunal language from a book, statute, rule, or decision in such a way as to mislead the court, or knowingly fail to correct an inadvertent material misquotation that the lawyer previously made to the tribunal.

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*** Date** 10/13/2009

Period PC

File : D-2009-273 Robert Scofield [3.3].pdf

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THE STATE BAR OF CALIFORNIA

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October 20, 2009

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 July 2009. Here are our comments:

~~**Rule 1.8.6 Payments Not from Client.**~~

~~1. The Office of the Chief Trial Counsel (OCTC) supports this rule. However, OCTC believes that a comment should be added suggesting to the lawyers that they advise in writing both the client and the paying non-client that the lawyer's duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to the non-client and even with such a designation the lawyer must preserve the client's confidences and secrets. OCTC finds that often the paying non-client complains to us because they do not understand that the lawyer cannot communicate with them.~~

~~**Rule 1.8.7 Aggregate Settlements.**~~

~~1. OCTC supports the proposal to use the term "informed written consent" as that term is used in other California rules. However, OCTC finds the rule as written and the Commission's Comments confusing. For example, OCTC finds Comment 4, which is not in the Model Rules, very confusing and problematic. If the Commission is seeking to allow clients to agree that a neutral third-party may determine the allocation of the aggregate settlement, then that should be in the rule itself, not in a Comment. OCTC also finds unclear and confusing what the Commission means by aggregate package deals in criminal cases. That might need some clarification.~~

Rule 1.15 Handling Funds and Property of Clients and Other Persons.

1. While OCTC supports some of the Commission's additions or changes to the Model Rules, such as the Commission's exclusion of trust accounts maintained in other jurisdictions, and there is merit to its explanation that costs are covered by the rule, OCTC finds most of the changes from the Model Rules confusing and potentially inconsistent. For example, OCTC supports the Model Rules provision requiring that advanced fees be placed in the Client Trust Account (CTA). This will prevent confusion and lack of consistency. Either every lawyer should be placing advanced fees in the CTA or no lawyer should be placing the advanced fees in the CTA. A rule requiring that advanced fees be deposited into the CTA will also protect clients. OCTC has many cases where the attorney does not return unearned fees and claims not to have the funds to do so. If this proposal is adopted, it may require a change to Comment 10.

2. OCTC finds very confusing and inconsistent the proposed rule as to when disputed funds need to be placed in the client trust account. (See proposed rules 1.15(d), (g), (h) and (i).) OCTC suggests deletion of the deviation from the Model Rules regarding these issues. This may require changes to Comments 12 – 14.

3. OCTC suggests that the term "inviolate" in proposed rule 1.15(e) be deleted as it is confusing and unnecessary in light of the rest of the sentence. All client funds should be maintained in a trust account until the time it is permitted to withdraw them.

4. OCTC finds confusing and inconsistent proposed rule 1.15(f). OCTC sees no compelling reason here to deviate from the Model Rules and, therefore, OCTC suggests that the first sentence of rule 1.15(a) of the Model Rules be reinstated. OCTC is particularly concerned that there are too many exceptions to the prohibition on the commingling of client funds and this will undermine the rule prohibiting commingling of client funds with the lawyer's own funds or allow such commingling if the attorney has the funds somewhere.

5. OCTC supports proposed rule 1.15(k) even though it is not in the Model Rules because it is essentially current rule 4-100(B). However, OCTC is concerned that subparagraph (6) is too limited as it does not provide for the Supreme Court or other court to issue an order for an audit. The rules should not determine jurisdiction or send a message that attorneys can violate a court's order. The Supreme Court has always provided that it has the right to involve itself at any stage of the disciplinary proceedings and investigation. (See *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 301; *In re Rose* (2000) 22 Cal.4th 430, 439; *Obrien v. Jones* (2000) 23 Cal.4th 40, 48. See also *In re Accusation of Walker* (1948) 32 Cal.2d 488, 490.) OCTC also believes that subparagraph (7) should add the word "authorized" to other person to make clear that only authorized persons can request undisputed funds.

6. OCTC is concerned that the language of rule 1.15(l) is too broad and, as written, no part of the rule applies to those attorneys and firms discussed in the subparagraphs. This seems counter to the purpose of the rule and public protection. OCTC is also concerned that subparagraphs (2) and (3) do not state, as subparagraph (1) does, that, if the rule does not apply in those situations, the firms and lawyers handle the funds in accordance with the law of the controlling jurisdiction. OCTC is further concerned how it would be able

~~to obtain copies of those out of state records and believes that the lawyers in those situations should have a disciplinable obligation to provide those to us or ensure that the financial institutions provide those records to us. Further, OCTC is concerned how this paragraph is impacted by the proposed Choice of Law rule in the September batch of proposed rules. (See proposed rule 8.5.)~~

Rule 3.3 Candor Toward the Tribunal.

1. OCTC is concerned that proposed rule 3.3 addresses only candor toward a tribunal. However, California law, unlike paragraph 3.3(a)(1), currently provides that an "attorney shall employ for purposes of maintaining causes confided to the member such means only as consistent with truth." Thus, the current rule covers, not just tribunals, but statements to others, including opposing counsel, parties, etc. Thus, unless this is covered in some other rule, OCTC believes that California's current rule should be incorporated into this rule or proposed rule 3.4. OCTC recognizes that proposed rule 3.4 is titled Fairness to Opposing Party and Counsel, but that proposed rule does not include this requirement of truth and candor either and that rule also is only designed to cover opposing parties and counsels.

2. OCTC is concerned that this proposed rule requires knowingly. It is unclear what that means, but if that requires intentional and not misstatements or concealment based on gross negligence, OCTC opposes it since that as is not consistent with California law. (See e.g. *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280.) In fact, while good faith in the statement may be a defense to a charge of misrepresentation, an attorney's unqualified and unequivocal statements to judges under circumstances that should have caused him at least some uncertainty are at minimum deceptive and support a finding of culpability. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Moreover, some of the proposed rules already permit violations for "knew or reasonably should have known." (See proposed rule 3.6.) For the same reasons, OCTC has concerns and disagrees with Comment 4. OCTC also wants to make clear that it believes the term material does not require that the attorney successfully misled court. Such an interpretation

3. OCTC is concerned that the proposed rule omits the term "artifice" as provided in current rule 5-200(b). If the Commission is intending to further limit the rule, OCTC opposes that. OCTC believes that word should remain in the rule. The proposed rule also omits the current rule that an attorney shall not intentionally misquote to a tribunal the language of a book, statute, or decision. OCTC is unsure if the Commission is intending to remove that, but OCTC believes that this language should remain and be added to the proposed rule. Likewise, the proposed rule omits the language that an attorney "shall not assert personal knowledge of the facts at issue, except when testifying as a witness." OCTC knows of no reason to omit that language and suggests that it be included in the proposed rule. In a similar vein, OCTC is concerned that nowhere in the proposed rules do they provide for 1) when an attorney states or alludes at trial to evidence that the attorney knows or reasonable believes is not relevant or admissible evidence or has already been ruled by the court inadmissible; 2) states the attorney's belief in the credibility of a witness; and 3) includes when an attorney violates discovery orders of a court. OCTC believes these belong in rule 3.3. OCTC recognizes that these are in rule 3.4 of Model

Rule, but believe that they belong here, although what is most important is that they remain in the rules. They or some of them appear to be at least implicitly currently in rule 5-200.

4. OCTC is concerned that Comment 3 is incomplete as written because FRCP and CCP 128.7 requires that statements in pleadings be made "after an inquiry reasonable under the circumstances." Likewise, the California Supreme court has written that "while an attorney may often rely upon statements made by a client without further investigation, circumstances known to the attorney may require an investigation." *(Butler v. State Bar* (1986) 42 Cal.3d 323, 329.)

~~**Rule 6.4 Law Reform Activities Affecting Client Interests.**~~

~~1. OCTC is concerned that, while this rule requires the lawyer to inform an organization in which he or she serves as a director, officer, or member when the reform may affect the interests of the client, nothing in the rule requires the lawyer to inform the client. Perhaps that is already required by the conflict rules, but it should be made clear here.~~

Again, thank you for the opportunity to comment on these rules.

Very truly yours,

Russell G. Weiner

Russell G. Weiner
Interim Chief Trial Counsel

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC)
BATCH #4, Comment Deadline October 23, 2009
SDCBA Legal Ethics Committee Deadline September 22, 2009
Subcommittee Deadline August 31, 2009

LEC Rule Volunteer Name(s): **Rick Hendlin**

Old Rule No./Title: **Rule 5-200 (Trial Conduct)**

Proposed New Rule No./ Title: **3.3. Candor Toward the Tribunal**

QUESTIONS (please use separate sheets of paper as necessary):

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.
Yes [X] No [ ]

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [ ] No [X]

A. Proposed Subparagraph (d) reads:

"In an ex parte proceeding, a lawyer shall inform the tribunal of all facts known to the lawyer that the lawyer knows, or reasonably should know, are <u>needed</u> to enable the tribunal to make an informed decision, whether or not the facts are adverse."

Although reasonable minds could disagree, I tend to agree with a Commission minority that there is **"insufficient reason for departing from the ABA standard, followed in most jurisdictions, and that [paragraph subdivision (d)] is unclear and would subject lawyers to being second-guessed on what facts were 'needed' to enable a tribunal to make an informed decision in a particular matter."**

B. I disagree with the Commission's proposed Comment [9] insofar as it <u>deletes</u> from the Model Rule counterpart [Model Rule Comment [10]] the following: **"either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer"** in the second sentence which reads **"Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false [stricken through: either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer.]**

The Commission's "Explanation of Changes to the ABA Model Rule" states, in part:

"The reason for the change is that the lawyer has not 'offered' the evidence in that situation (See, e.g. Ev.Code §776). Imposing the requirement to take remedial measures to correct false testimony that the lawyer was careful not to elicit from the witness on direct examination but which was adduced by opposing counsel in cross-examining the witness unreasonably interferes with a lawyer's legitimate trial strategy."

My view is that the existing ABA Model Rule making the lawyer take reasonable remedial measures when the lawyer learns of the falsity in response to cross-examination by the opposing lawyer best serves the underlying concept of "Candor toward the Tribunal," and should remain intact.

The Commission's proposed change to the ABA Model Rule would allow a lawyer (or client) to anticipate that the client or other witness called by the lawyer will give false testimony on cross-examination, and thereby relieving the lawyer to the duty to take remedial measures. Or, even after a lawyer has sought to persuade the client that false evidence should not be offered, it would provide a loophole allowing the client to simply lie on cross-examination, and allow the lawyer to sit silently while knowingly false testimony is given.

Query whether under such circumstances this would allow the lawyer to then **"base arguments to the trier of fact on evidence known to be false,"** which is expressly forbidden in the last sentence to **Comment [6]** which states:

"If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false or base arguments to the trier of fact on evidence known to be false."

If should be noted that the "Explanation of Changes to the ABA Model Rule" for Comment [6] notes that a Minority of the Commission believed the clause **"or otherwise permit the witness to present testimony that the lawyer knows to be false,"** in the last sentence of Comment [6], above, "lays a trap for the unwary lawyer who might call a friendly witness who unexpectedly testifies falsely...." The majority believed the reading of the subject clause in conjunction with Comment [5] (not a violation if offered to establish its falsity) and Comment [9] (concerning remedial measures available) "assuages the minority's concerns."

I think a clearer explanation of the relationship between Comment 6 and Comment 9 would be helpful to guide the lawyer in applying the proposed rule.

(3) Is the new rule **worded correctly and clearly**? If "yes, please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [] No [X]

See comments to (2) above.

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [X] No [ ]

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

NOTE: The Commission's explanation to Comment [1] notes, "the Commission has not yet determined the definition of "tribunal." I am unclear whether this has since been defined, but it clearly would be relevant to consideration of this Rule's scope.

CONCLUSIONS (pick one):

[ ] We approve the new rule in its entirety.

[XX] **We approve the new rule with modifications.***

[ ] We disapprove the new rule and support keeping the old rule.

[ ] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

[ ] We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.

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: OCTOBER 23, 2009

Your Information

Professional Affiliation on behalf of the California Public Defenders Association

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** BARTON SHEELA

*** City** SAN DIEGO

*** State** California

*** Email address** (You will receive a copy of your comment submission.) bsrton.sheela@sdcounty.ca.gov

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The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)] | Rule 3.3 [5-200] | Rule 6.3 [n/a]
Rule 1.8.7 [3-310(D)] | Rule 3.6 [5-120] | Rule 6.4 [n/a]
Rule 1.15 [4-100] | Rule 3.7 [5-210] | Batch 4 Discussion Draft (All rules)

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 3.3 Candor Toward the Tribunal [5-200]

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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ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Please see attached letter.

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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CPDA

A Statewide Association of Public Defenders and Criminal Defense Counsel

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October 23, 2009

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

Re: Proposed Rule 3.3

Dear Ms. Hollins:

The California Public Defenders Association remains committed to the principle that attorneys should be honest in their dealings with the court, because this practice promotes public confidence in our system of justice. We believe, however, that portions of Rule 3.3 of the proposed amendments to the Rules of Professional Conduct undermine the Constitutional right to effective assistance of counsel, are contrary to existing law, and would not serve the ends of justice.

The California Public Defenders Association (CPDA) is the largest public defender organization in the nation with a membership of over 4,000 public defenders and private defense counsel. CPDA attorney members act as legal counsel for over 95 percent of the indigents accused of criminal conduct in California. The association, established in 1969, is the state-designated continuing legal education provider for all local public defender offices in the state of California, and also represents the interests of CPDA's criminal defense attorney members in legislative sessions and on significant issues in the appellate courts.

OBJECTIONS TO PROPOSED RULE 3.3

CPDA believes that Section a(2) should be deleted from Proposed Rule 3.3. As the Proposed Rule is currently written, it deprives a defendant of effective assistance of counsel in a criminal case.

The Constitution guarantees an accused the right to the effective assistance of counsel. *Powell v. Alabama* (1932) 287 U.S. 45; *Strickland v. Washington* (1984) 466 U.S. 668; *People v. Pope* (1979) 23 Cal.3d 412.This would be a hollow guarantee if the accused's attorney were to work against his or her client. This would destroy the duty of loyalty that a defense attorney owes to the client. "Representation of a criminal defendant entails certain

basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest." (*People v. Doolin* (2009) 45 Cal.4th 390, 411; citing *Strickland v. Washington* (1984) 466 U.S. 668, 688) Yet that is exactly what this proposed subsection would require, for it would force counsel to abandon the duty of loyalty to the client in favor of disclosing harmful information to the court. Instead of permitting an attorney to stand silent, the Proposed Rule would require a defendant's attorney, on pain of discipline, to voluntarily make a legal argument against his or her client. Additionally, Comment [4] to the Rule would require a defendant's attorney to go so far in this voluntary argument to cite cases from other jurisdictions.

The proposed rule would also undercut the adversarial nature of the criminal justice process. In *United States v. Cronic* (1984) 466 U.S. 648, 656-657, the Supreme Court said that "[t]he right to the effective assistance of counsel is . . . the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." The adversarial nature of the criminal justice process would be destroyed if the attorney for the accused cannot serve as an advocate for the accused and as an adversary of the prosecution. Again, the accused would be deprived of the effective assistance of counsel.

Section a(1) of the Proposed Rule continues the present prohibition against making false statements of fact or law to the court, and CPDA agrees that this is proper. This section would preclude an attorney from misleading the court by citing legal authority that the attorney knows is inapposite, based on other controlling legal authority. The inclusion of section a(1) protects the court from being mislead by an attorney without forcing an attorney to become, in essence, an advocate against the client.

It is also clear that the proposed revision contradicts existing California law. In *Schaefer v. State Bar*, (1945) 26 Cal.2d 739, 747-

748, the court held that the then-existing California Rules of Professional Conduct did not support the discipline of a attorney who had failed to cite contrary authority to the court when opposing counsel was present at the hearing. CPDA believes that because a prosecutor will be present to urge the Government's position in court, the judge will be afforded access to whatever authority the prosecution believes is germane to the case, because the prosecutor in a criminal case has "the responsibility of a minister of justice...." (ABA Model Rule 3.8, Comment 1)

Lastly, CPDA is aware of the comments that Michael Judge, the Public Defender of Los Angeles County, and Janice Fukai, the Alternate Public Defender of Los Angeles County, have submitted in opposition to section a(2) of Proposed Rule 3.3 in his letter of October 20, 2009. We join in his reasoning and his comments.

OBJECTIONS TO THE COMMENTS TO PROPOSED RULE 3.3

Proposed comment [4]

In light of CPDA's opposition to section a(2) of the Proposed Rule, we believe that much of comment 4 should be deleted.

We have no objection to the first sentence of the comment nor to the last sentence of the comment. We do object to those sentences in between, based on our earlier comments in opposition to section a(2). With the middle portion deleted, we believe the comment should read:

> "Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. In addition, a lawyer may not knowingly edit and submit to a tribunal language from a book, statute, rule, or decision in such a way as to mislead the court, or knowingly fail to correct an inadvertent material misquotation that the lawyer previously made to the tribunal."

Proposed comment [7]

CPDA disagrees with the portion of the comment which requires that the attorney seek permission from the court to withdraw when the attorney believes that the client will be committing perjury and asks that that portion of the comment be deleted.

Of the authorities cited, only *People v. Brown* (1988) 203 Cal.App.3d 1335, 1340 suggests this should be the case. None of the other cases require the attorney to attempt to withdraw from further representation. Nor does the seminal case of *Nix v. Whiteside*, (1986) 457 U.S. 157, 166, which is discussed in all of the authorities cited in the comment.

Even when the attorney suspects that the client intends to commit perjury, there is no requirement to declare a conflict of interest or to withdraw from representation of the client. (*People v. Bolton* (2008) 166 Cal.App.4th 343, 357.) As recognized by the California Supreme Court, "Although attorneys may not present evidence they know to be false or assist in perpetrating known frauds on the court, they may ethically present evidence that they suspect, but do not personally know, is false. Criminal defense attorneys sometimes have to present evidence that is incredible and that, not being naive, they might personally disbelieve. Presenting incredible evidence may raise difficult tactical decisions if counsel finds evidence incredible, the fact finder may also but, as long as counsel has no specific undisclosed factual knowledge of its falsity, it does not raise an ethical problem." (*People v. Riel* (2000) 22 Cal.4th 1153, 1217.)

CPDA believes that such a procedure is, as stated in *People v. Johnson* (1998) 62 Cal. App. 4th 608, 623, is "an 'ostrich-like approach' which does little to resolve the problem." For this reason, we suggest that the comment be modified to delete the requirement that the attorney seek to withdraw from representation before presenting such testimony.

Proposed Comment [8]

CPDA agrees with the first two sentences of proposed Comment [8]. However, CPDA believes that proposed sentences three and four should be deleted, and sentence five should be changed.

Our objection to sentence four is precautionary. Sentence four reads "See Rule 1.0(f)." Since the Committee has not yet proposed a Rule 1.0(f), that cross–reference is premature.

Proposed sentence three detracts from, and obscures, rather then adds to and clarifies, the first two sentences. The first two sentences highlight the lawyer's own belief, which, of course, must be "reasonable." This is the right blend of subjective and objective standards.

Sentence three tilts too far toward an objective–only standard and will unduly chill "[d]efense counsel's obligation ... 'to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.' " *People v. Bolton* (2008) 166 Cal.App.4th 343, 357 (quoting ABA Standards for Criminal Justice: Prosecution and Defense Function (1993) ABA Defense Function Standards, Standard 4-1.2, p. 120.) And it creates the possibility that an attorney would be subject to discipline because a "Monday-morning quarterback" draws the conclusion that the attorney knew of the falsity by inferring knowledge "from the circumstances."

This concern is amplified by the phrase in the fifth and final sentence of proposed Comment [8], "... an obvious falsehood...." This phrase should be changed: it does not specify to whom the falsehood must be obvious. The fifth sentence should read "a falsehood that is obvious to the lawyer," or, better and simpler, "a falsehood that is known to the lawyer."

Again, *People v. Bolton, supra*, 166 Cal.App.4th at 357 states the correct standard, and, simultaneously, states the reason for CPDA's position on Comment [8]. "Criminal defense attorneys sometimes have to present evidence that is incredible.... [B]ut, as long as counsel has no ... factual knowledge of its falsity, it does not raise an ethical problem." We believe that the *Bolton* case should be cited in either comment [7] or [8], to provide additional guidance to attorneys.

Sincerely,

Bart Sheela
President,
California Public Defenders Association

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MICHAEL P. JUDGE
PUBLIC DEFENDER

EXECUTIVE OFFICE

October 20, 2009

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

Re: **Proposed Rule 3.3, Candor Toward the Tribunal**

Dear Ms. Hollins,

I write to express my strong opposition to the proposed Rule 3.3, Candor Toward the Tribunal.

Although the ABA has provided for many years that a lawyer must not fail to disclose to the court legal authority known to be directly adverse to the position of the client, this rule has never been adopted in California. Instead, current Rule 5-200 provides that counsel may not make a "false statement of fact or law" to the court. (Rule 5-200, subd. (b).)

The proposed Rule 3.3 provides that a lawyer shall not knowingly "fail to disclose to the tribunal controlling authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." (Proposed Rule 3.3, subd. (a)(2).)

The existing rule bars counsel from making a false statement to the court. I have no quarrel with a rule barring counsel from making affirmative misstatements of law to a court. When counsel is faced with the dilemma of remaining silent or disclosing authority harmful to the client, a rule barring affirmative misstatements of law permits counsel to remain silent, thereby remaining loyal to the client. In contrast the proposal would create a new rule which would require counsel to volunteer to the court authority contrary to the position of the client. A rule which requires counsel to affirmatively offer case law harmful to the client undermines two critical core values of our criminal justice system in California.

The first core value of our system is counsel's duty of loyalty to his or her client. The duty of counsel to be a zealous advocate for his or her client is a central value of our justice system. (See, e.g., *People v. Pangelina* (1984) 153 Cal.App.3d 1, 6; *People v. Pope* (1979) 23 Cal.3d 412, 424-425; *People v. Fosselman* (1983) 33 Cal.3d 572.) The Court of Appeal, citing a California Supreme Court decision, has explained:

> Once an attorney has been assigned to represent a client, he is bound to do so to the best of his abilities under the circumstances despite the not uncommon difficulty of that task, particularly in the context of criminal trials. (See rule 6-101(2), Rules Prof. Conduct of State Bar.) This duty is not affected by the fact that a client may be uncooperative or that, as in this case, a trial court's ruling on a substantive motion appears to be arbitrary or incorrect. The existence of these admittedly adverse conditions does not relieve counsel of the duty to act as a vigorous advocate and to provide the client with whatever defense he can muster. Any other course would be contrary to the attorney's obligation faithfully to discharge the duties of an attorney at law to the best of his knowledge and ability. (Bus. & Prof. Code § 6067.)

(*People v. Shelley* (1984) 156 Cal.App.3d 521, 528-529, internal quotation marks omitted; citing *People v. McKenzie* (1983) 34 Cal.3d 616, 631.)

Counsel's duty of loyalty to his or her client has been recognized by both the California and United States Supreme Courts: "Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest." (*People v. Doolin* (2009) 45 Cal.4th 390, 411; citing *Strickland v. Washington* (1984) 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674.)

The Court of Appeal has explained counsel's duty of loyalty to the client, characterizing that duty as an "overarching duty to advocate the defendant's cause." (*King v. Superior Court* (2003) 107 Cal.App.4th 929, 949.) Thus, a core value of our system is counsel's duty to his or her client. There can be no ambiguity here: the proposed rule would require counsel to harm the client, perhaps devastating the client's position, and perhaps leading to a sentence of death or life in prison, by volunteering to the court authority which hurts the client's position.

Since the rules of professional conduct apply only to lawyers, this means that a defendant would be far better off representing himself or herself. A pro per defendant has no duty to disclose contrary authority, while a lawyer would be ethically compelled to disclose that contrary authority. It should be a fundamental premise of the Rules of Professional Conduct that clients should not have a strong incentive to represent themselves instead of having counsel.

The second core value of our system of criminal justice is the adversarial system. As the dissenting justice in *In re Visciotti* explained:

> The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. *Herring v. New York*, 422 U.S. 853, 862 [45 L.Ed.2d 593, 600, 95 S.Ct. 2550] (1975). It is that very premise that underlies and gives meaning to the Sixth Amendment. It is meant to assure fairness in the adversary criminal process. *United States v. Morrison*, 449 U.S. 361, 364 [66 L.Ed.2d 564, 567-568, 101 S.Ct. 665] (1981). Unless the accused receives the effective assistance of counsel, a serious risk of injustice infects the trial itself. *Cuyler v. Sullivan*, 446 U.S. [335,] 343 [(1980) (64 L.Ed.2d 333, 343, 100 S.Ct. 1708)]. [¶] Thus, the adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate. *Anders v. California*, 386 U.S. 738, 743 [18 L.Ed.2d 493, 497-498, 87 S.Ct. 1396] (1967).

(*In re Visciotti* (1996) 14 Cal.4th 325, 363 -364, dis. opn., J., internal quotation marks omitted.)

The critical value of an adversarial system is undermined when counsel for the party who has diligently researched an issue is required to assist his or her opponent, who may have done nothing, by revealing the authority which requires the court to rule against that party.

The California Supreme Court has stressed that the law should not place defense counsel in criminal cases in the position of "honoring counsel's commitment to the court" while simultaneously attempting to honor his or her duty to the client: "Nor should the law place a defense attorney in the untenable position of having to choose between honoring

counsel's commitment to the court (that jury trial on the prior conviction allegation would be waived) and counsel's duty to his or her client (to offer all available defenses to the charges and allegations contained in the accusatory pleading)." (*People v. Saunders* (1993) 5 Cal.4th 580, 591.) Yet the proposed rule does precisely this. Whenever counsel is in the position of being aware of authority contrary to the client's position, counsel would be placed exactly in that "untenable position" either of assisting the court or protecting the client. That is a quintessential ethical conflict of interest.

The current statute recognizes the special rule applicable to criminal defense lawyers. The Business and Professions Code bars attorneys from maintaining actions or defenses unless those actions and defenses appear legal or just, "except the defense of a person charged with a public offense." (Bus. & Prof. Code § 6068, subd. (c).) The special role of criminal defense lawyers frequently requires us to challenge the prosecution, or to remain silent, when in any other context a concession or voluntary admission would be ethically required. Application of the proposed rule to criminal defense attorneys would force us to volunteer adverse case authority to the court, with the inevitable result of damaging the client and undermining the adversarial system.

Criminal defense attorneys may be aware of facts that tend to inculpate a client, which they are not permitted to disclose, but which under the proposed rule would generate a duty to disclose adverse authority, from which the prosecution and court could readily deduce the theretofor undisclosed facts.

For these reasons, I oppose adoption of the proposed Rule 3.3. I also note that there is no indication that the problem which proposed Rule 3.3 is intended to address is widespread or common. There are no reported cases where counsel failed to disclose contrary authority. Frequently, such disclosure is tactically advantageous to counsel and enhances counsel's credibility. However, I am unaware of instances where nondisclosure actually resulted in erroneous judicial rulings.

I must also note that the proposed rule is very narrow, applicable only to "controlling authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." (Proposed Rule 3.3, subd. (a)(2).) However, this narrow articulation of the rule is wholly undermined by the comment section 4, which states, "the lawyer must disclose the authorities the court needs to be aware of in order to rule intelligently on the matter." The comment also refers to "a tribunal that is fully informed."

The narrow duty to disclose controlling authority articulated in the proposed Rule itself is thus undermined by comments which appear to impose on counsel a duty to ensure that the judge is fully informed and has all the authorities necessary to rule intelligently. That duty is much broader than the narrow duty imposed by the rule. Although I oppose adoption of the proposed rule in its entirely, if it is adopted, the comment should be rewritten to reinforce the narrowness of the rule.

Finally, with respect to the Proposed Rule 3.6, Trial Publicity, the proposed Rule seems fair and allows the defense leeway under Rule 3.6, subdivision (c), to make statements when necessary to protect a client from the prejudicial effect of recent adverse publicity; moreover comment (6) explains that a response can be made to publicity initiated by third persons (police bloggers, etc.) when necessary to avoid prejudice to the client's rights.

The commission, however, does not include ABA comment (5) which sets forth some examples of subjects more likely than not to prejudice a proceeding. These subjects are also the statements most likely to occur, such as (1) criminal record of a party; (2) statements by defendant or refusal to make a statement; (3) refusal of a person to submit to a test; (4) opinion of guilt or innocence; and (5) information that would most likely be inadmissable as evidence in a trial. I believe comment (5) should be restored.

Sincerely,

JANICE FUKAI
Alternate Public Defender

MICHAEL P. JUDGE
Public Defender

LOS ANGELES COUNTY, CALIFORNIA

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, October 23, 2009 2:46 PM
To: Hollins, Audrey
Cc: 'Shawn M Harpen'; 'Garner, Scott'; 'Bagosy, Jennifer'; 'Yoder, Mike'
Subject: Orange County Bar Comments Re Rule Revisions
Attachments: OCBA Comments on Rules Due Oct 23 2009.pdf

Dear Ms. Collins:

Please find attached the comments from the Orange County Bar Association regarding the following proposed amended rules. We appreciate the opportunity to offer our comments to the Bar's Special Commission for the Revision of the Rules of Professional Conduct. Please note that we will not be submitting comments on Rule 1.8.6.

Please let me know if you have any questions. I would also appreciate your acknowledgement of receipt of these comments.

Rule 1.8.7
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Law Reform Activities Affecting Client Interests [n/a]

Trudy C. Levindofske, CAE
Executive Director
Orange County Bar Association
Orange County Bar Association Charitable Fund
(949)440-6700, ext. 213

MEMORANDUM

Date: September 4, 2009

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: **Proposed Rule 3.3 – Candor to the Tribunal**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of largest voluntary bar associations 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 supports the adoption of the Proposed Rule, which will clarify the lawyer's obligation of candor to a tribunal, and which represents a significant improvement over the existing California Rule.

The OCBA has several proposed revisions to the comments, as follows:

As to Comment [6], the OCBA agrees with the minority that the language "***or otherwise permit*** the witness to present testimony the lawyer knows to be false," is unclear, and should be deleted.

As to Comments [6] and [7], the OCBA recommends that the Commission use the phrase "criminal defendant" consistently, rather than the term "criminal defense client" used in Comment [7].

As to Comment [9], the OCBA recommends that the phrase, "either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer" be included in the Comment, consistent with the ABA. To do otherwise could lead to gamesmanship, with the lawyer coaching the client that the lawyer cannot elicit false testimony on direct examination, but that the lawyer has no ethical obligations if such testimony is elicited on cross-examination. We also believe that the lawyer's obligation to take remedial measures should apply to false testimony on cross-examination, just as the lawyer has an obligation to take remedial measures if false testimony is elicited in a deposition by the adverse party's counsel – which is another form of cross-examination.

LACBA
LOS ANGELES COUNTY BAR ASSOCIATION

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ROBIN L. YEAGER

October 21, 2009

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

RE: Rule 3.3 – Candor Toward the Tribunal

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) supports Proposed Rule 3.3 with the various changes to the proposed rule and comments suggested by a majority of the Rules Revision Commission with the following comments and suggestions:

1. PREC supports deleting the language in (b) "including, if necessary, disclosure to tribunal" at the end of the sentence. We suggest adding the phrase "consistent with Business & Professions Code Section 6068(e)" at the end of the sentence, however, in place of the deleted language to make the rule clear as to how to understand "reasonable remedial."

2. PREC agrees that a lawyer should correct a previously improperly cited authority, but believes (with a minority of the RRC) that the duty should end when the lawyer ceases to represent the client.

3. PREC notes the sentence in proposed comment #4 which reads "Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter." We are concerned that this may be too general and broad a phrase in a disciplinary context, even though it is as part of a comment and not part of the Rule itself.

We appreciate the opportunity to comment on the proposed new and amended Rules of Professional Conduct.

Sincerely yours,

James I. Ham
Chair, LACBA Professional
Responsibility and Ethics Committee

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: OCTOBER 23, 2009

Your Information

Professional Affiliation Santa Clara County Bar Association

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** Jil Dalesandro, President

*** City** San Jose

*** State** California

*** Email address** (You will receive a copy of your comment submission.) chrisb@sccba.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)] | Rule 3.3 [5-200] | Rule 6.3 [n/a]
Rule 1.8.7 [3-310(D)] | Rule 3.6 [5-120] | Rule 6.4 [n/a]
Rule 1.15 [4-100] | Rule 3.7 [5-210] | Batch 4 Discussion Draft (All rules)

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 3.3 Candor Toward the Tribunal [5-200]

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.

The Santa Clara County Bar Association (SCCBA) Task Force that reviewed this rule had a The substantial majority who agree with Rule 3.3 as proposed by the Rule Review Commission. Consequently, the SCCBA adopts that views. We agree with the rationale that California should rigorously protect attorney-client confidentiality even when it prevents the attorney from making disclosures to the tribunal regarding a client's or witness's untruthfulness or regarding evidence that may not be accurate. However, we think it should be noted that a small, but strong minority of the SCCBA Task Force support the ABA Model Rule version based on the rationale that this rule is meant to protect the integrity of the judicial process and judicial decision-making and that policy is of greater importance in this circumstance than allowing a client's wrongdoing to be protected by attorney-client confidentiality. The minority further suggests that the fact that the California Supreme Court has never approved such a mandatory rule is irrelevant; if the approach is the correct approach, it should be adopted and presented to the Court.

OFFICE USE ONLY.

* Date	Period	File :
10/30/2009	PC	D-2009-287d Santa Clara County Bar [3.3].pdf

Commented On:	Specify:	Submitted via:
		Online

* Required

PUBLIC COMMENTS [3.6] ~ FILE LIST

D-2009-268 COPRAC [3.6]

D-2009-271 Gerald Genard [3.6]

D-2009-276e Ross Simmon SDCBA Legal Ethics Comm [3.6]

D-2009-283d Orange County Bar [3.6]

D-2009-286d James Ham LACBA [3.6]

D-2009-287e Santa Clara County Bar [3.6]

THE STATE BAR
OF CALIFORNIA

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2107

September 10, 2009

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 3.6 – Trial Publicity

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 3.6 and offers the following comments.

We support the adoption of the proposed Rule and would like to offer our suggestions for a substantive change in Comment [2] and the retention of Comment [5] from the ABA Model Rule.

First, regarding Comment [2], we have concerns about the statement that paragraph (a) "applies to statements made by or on behalf of the lawyer." This comment is not in the ABA Rule and we believe it may cause problems for lawyers who may unknowingly have people speaking "on their behalf." We agree with the rationale for the inclusion of this comment - to prevent lawyers from attempting to do indirectly what they cannot do directly under the proposed Rule. The problem with this language arises when non-lawyers are commenting on a lawyer's case without the lawyer's consent and often without his or her knowledge. This scenario comes up quite frequently in criminal cases, where it is not unusual for prosecutors to turn on the television and see a community spokesperson or a law enforcement official purporting to comment "on behalf of" the prosecutor. We would all agree it would be unfair to subject lawyers to potential discipline when they truly did not authorize or have knowledge of statements made purportedly "on their behalf." This concern could be cured by revising the proposed comment to state that paragraph (a) "applies to statements made, *authorized, or ratified* by the lawyer." (Proposed addition emphasized).

Our second suggestion is with respect to the Commission's decision to delete ABA Comment [5]. We believe this Comment provides important guidance for legal practitioners and therefore we recommend that the Commission retain Comment [5]. The Commission's explanation of

changes section states that Comment [5] refers to subjects that "are more likely to have a material prejudicial effect on a proceeding." ABA Model Rule Comment [5] uses the language "more likely *than not*" to describe a list of potentially prejudicial statements that we believe is instructive to practitioners, some of whom may not be familiar with the likely effects of the types of statements listed.

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

Suzanne Mellard, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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: OCTOBER 23, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization
- ○ Yes
- ◉ No

*** Name** Gerald H. Genard

*** City** Danville

*** State** California

*** Email** ghgena@yahoo.com

The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)] | Rule 3.3 [5-200] | Rule 6.3 [n/a]
Rule 1.8.7 [3-310(D)] | Rule 3.6 [5-120] | Rule 6.4 [n/a]
Rule 1.15 [4-100] | Rule 3.7 [5-210] | Batch 4 Discussion Draft (All rules)

*** Rule**
Rule 3.6 Trial Publicity [5-120]

Agree/disagree
- ○ AGREE with this proposed Rule
- ◉ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

COMMENTS

The proposed rule has a chilling effect on free speech. The commentary about statements which are not limited to admissible evidence is particularly troublesome. For example, if the speaker's opinion is that a trial is politically motivated or that corrupt governmental practices are being swept under the rug, a speaker should be entitled to voice that opinion for the benefit of the public even though there may be an inability to produce admissible evidence to support the opinion due to revelvancy or otherwise. California procedural rules allow trial and appellate courts to decide many matters without written opinions and justifications. This, ki n itself ,is bad enough because of the possibiity of abuse, but to threaten discipline to a lawyer who tries to expose a potential case of abuse is contrary to the core of free speech and to the fundamental requirement of a free society.

OFFICE USE ONLY.

* Date	Period	File :
09/26/2009	PC	D-2009-271 Gerald Genard [3.6].pdf

Commented On:	Specify:	Submitted via:
		Online

* Required

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC)
BATCH #4, Comment Deadline October 23, 2009
SDCBA Legal Ethics Committee Deadline September 22, 2009
Subcommittee Deadline August 31, 2009

LEC Rule Volunteer Name(s): Ross G. Simmons

Old Rule No./Title: 5-120 Trial Publicity

Proposed New Rule No./ Title: 3.6 Trial Publicity

QUESTIONS (please use separate sheets of paper as necessary):

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.
Yes [**X**] No [ ]

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [**X**] No [ ]

(3) Is the new rule **worded correctly and clearly**? If "yes, please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [**X**] No [ ]

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [**X**] No [ ]

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

See Attached.

CONCLUSIONS (pick one):

[**X**] We approve the new rule in its entirety.

[ ] We approve the new rule with modifications.*

[ ] We disapprove the new rule and support keeping the old rule.

[ ] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

[ ] We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.

Continuation Pages; Simmons Comments
Proposed Rule 3.6 Trial Publicity
Batch #4, Proposed Amendments to CRPC

Summary:

In the attached, I have proposed that the LEC approve of Proposed Rule 3.6 as presented. In short, Proposed Rule 3.6 adopts its ABA Model Rule counterpart with only minor corrections that, in fact, aid interpretation. It also clarifies, more as a reminder than as substantively necessary to the rule, that confidences are to be maintained.

Most of the Comments of the ABA Model Rules likewise are a part of Proposed Rule 3.6, although certain sections were replaced with better drafted counterparts adopted by the District of Columbia bar, and there is a clarifying section retained from former CRPC 5-120.

General Comment:

The materials provided in support of this public comment for Batch 4 are vastly superior to any previously received. It was extremely helpful to my review to understand the Commission's process and considerations from which the proposal was derived. I have many, personal and substantive issues with this rule, all of which were resolved by the materials provided.

Comments:

In my view, Proposed Rule 3.6 is the correct course. I so conclude without labored analysis of the provisions of the Proposed Rule, because it is essentially Model Rule 3.6, except with grammatical nips and tucks, interpretationally better. One can quarrel with the propriety of the rule and the wisdom of its enactment itself (as I do), and yet that is a historical matter no longer of substantive moment.

(Having said that, I was pleased to see that there was discussion of its possible elimination, if nothing more than for the purposes of that consideration being a part of this proposal's "legislative intent." I agree with the Commission, though, that because of the circumstances giving rise to its initial adoption, as well as the charge of the Commission more generally, mere repeal would not be a sensible, productive approach to former CRPC 5-120.)

CRPC 5-120 suffered through a tortured conception. First, it was crafted in California only following a legislative mandate, in the context of the State Bar Act, that such a rule be adopted (anecdotally most likely as a reaction to the media surrounding the then-recently concluded O.J. Simpson prosecution, although the efficacy of this rule or any rule in that setting remains objectively unclear). In fact, when CRPC 5-120 in its initial form was originally given to the California Supreme Court for adoption consideration, the Board of Governors of the State Bar of California urged the Court to reject it, the statute having otherwise been satisfied solely by its presentation.

For better or worse, the Court ignored the Board and adopted CRPC 5-120. Oddly, though, the Court did not adopt the rule as proposed by the Board, but instead unartfully (1) adopted the then-applicable Model Rule 3.6, substantively different than that proposed by the Board, but (2) retained the rule comments prepared by the Board, but otherwise inapplicable to Model Rule 3.6.

The result is that present CRPC 5-120 is simply not a cohesive, well-crafted rule, and is worthy of little more than disregard. The Commission has taken a prudent tack in doing so, by selecting current Model Rule 3.6 as its starting place.

Model Rule 3.6 (or more precisely, its substantially similar predecessor) has independent, threshold-allure in its own right, having been subject to judicial review in the context of Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). Although the Gentile analysis is an unusual, at times curious presentation, imperfect or otherwise, there is some benefit in having judicial guidance in navigating among the important interests implicated by trial publicity, those of the free speech of the participants, the public's right to information, and the integrity of the judicial system.

There are a number of substantive elements of Model Rule 3.6 that one could analytically explore (such as the standard of review in determining culpability, the merits and wording of its "safe harbors," etc.), and in fact, the form of this rule varies widely as adopted state-by-state. The Commission, wisely in my view, chose not to. If nothing else, deviating substantively from Model Rule 3.6 has the effect of needlessly meandering away from precedential benefit of Gentile, such as it is. But further, to me the desirability of Proposed Rule 3.6 is found in the Commission's charge itself, that being to "[e]liminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues."

Hence, struggling through the minutiae of Model Rule 3.6 is just that, and of extraordinarily little consequence. Although intellectually interesting, it is not germane in this context, in my view. This strategy is correct regardless of the substantive provisions of Model Rule 3.6, which the Commission proposes be adopted wholesale with only nonsubstantive improvement. I respectfully agree that this is as it should be.

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, October 23, 2009 2:46 PM
To: Hollins, Audrey
Cc: 'Shawn M Harpen'; 'Garner, Scott'; 'Bagosy, Jennifer'; 'Yoder, Mike'
Subject: Orange County Bar Comments Re Rule Revisions
Attachments: OCBA Comments on Rules Due Oct 23 2009.pdf

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Please let me know if you have any questions. I would also appreciate your acknowledgement of receipt of these comments.

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Membership in Legal Services Organization [n/a]
Rule 6.4
Law Reform Activities Affecting Client Interests [n/a]

Trudy C. Levindofske, CAE
Executive Director
Orange County Bar Association
Orange County Bar Association Charitable Fund
(949)440-6700, ext. 213

MEMORANDUM

Date: September 4, 2009

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: **Proposed Rule 3.6 – Trial Publicity**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations 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 Proposed Rule 3.6 regarding trial publicity is well-written and generally clarifies the rule in a very helpful way. The OCBA's only suggestion concerning Proposed Rule 3.6 relates to Comment [4], which the OCBA believes could be revised to give greater and more specific guidance to lawyers with respect to the types of extrajudicial statements that may violate the Rule.

First, because the three factors listed in Comment [4] are not exclusive, it leaves attorneys to guess at the other factors that may or may not constitute a violation of Rule 3.6. Because the stated purpose of Comment [4] is to provide clearer guidance and avoid a chilling effect on permissible speech, the OCBA believes that broad language referring to "many" factors followed by only three narrow examples would inhibit lawful speech. Consequently, the OCBA believes the Comment should be revised to include as many additional factors as possible.

Second, factor (1) in Comment [4] may be unclear as to which portion of the sentence the phrase "for the purpose of proving or disproving a material fact in issue" is intended to modify. This affects the meaning of the factor as a whole. If, on the one hand, the Comment is intended to refer to the speaker's intent in making the extrajudicial statement – *i.e.*, he or she presented it "for the purpose of proving or disproving a material fact in issue," that has one meaning. If, on the other hand, "for the purpose of proving or disproving a material fact in issue" only modifies "clearly inadmissible as evidence in the matter," then the factor has a different meaning in which the attorney's intent in making the statement is irrelevant, and the content of the statement alone determines whether a potential violation of the Rule exists. Further, there needs to be an allowance for those

instances in which public disclosure of a settlement agreement is required, although inadmissible as evidence in the matter.

Finally, factor (3), "the timing of the statement," is vague, providing no guidance as to what "timing" would or would not determine whether an extrajudicial statement violated the Rule. For example, is the Commission more concerned with statements made before jury selection, after the commencement of trial, during jury deliberations, or at some other phase? The OCBA recommends that factor (3) be clarified to define the specific timing the Commission intended to designate as a factor in a violation of this Rule.

LACBA
LOS ANGELES COUNTY BAR ASSOCIATION

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October 23, 2009

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

RE: Rule 3.6 – Trial Publicity

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 3.6:

Proposed Rule 3.6(b)(6) permits counsel to issue "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 to the public interest,..."

Under some circumstances, Section (6) could be used by counsel to influence public opinion when a jury proceeding is or could be convened in the matter.

Section (6) should require a counsel who raises an alarm about a participant in the judicial process to have a reasonable basis for the belief that the person's behavior presents a threat to public safety.

Moreover, if the danger is limited to an individual, and not reasonably expected to affect the public interest, the warning should be, as best as possible, calculated to reach the ears of the relevant party only. The warning from counsel should not be issued to the public at large, when the public at large is not under a reasonable threat.

Thank you for the opportunity to comment.

Sincerely yours,

James I. Ham
Chair, LACBA Professional Responsibility and Ethics Committee

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: OCTOBER 23, 2009

Your Information

Professional Affiliation Santa Clara County Bar Association

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** Jil Dalesandro, President

*** City** San Jose

*** State** California

*** Email address**
(You will receive a copy of your comment submission.)
chrisb@sccba.com

The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)] | Rule 3.3 [5-200] | Rule 6.3 [n/a]
Rule 1.8.7 [3-310(D)] | Rule 3.6 [5-120] | Rule 6.4 [n/a]
Rule 1.15 [4-100] | Rule 3.7 [5-210] | Batch 4 Discussion Draft (All rules)

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 3.6 Trial Publicity [5-120]

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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This is an unnecessary rule and constitutionally infirm in that it attempts to prohibit speech that is protected by the 1st Amendment. Much of the conduct/speech that this rule attempts to proscribe is actually covered by other rules which are set in contexts that do not violate the 1st Amendment. For example, an attorney may not misrepresent the facts of a case or engage in conduct such as deceit, deception or fraud that undermines the ability of a litigant to receive a fair trial. The SCCBA understands that the California Supreme Court has previously adopted a rule substantially similar to proposed rule 3.6. Notwithstanding that, this rule should be deleted.

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10/30/2009	PC	D-2009-287e Santa Clara County Bar [3.6].pdf

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PUBLIC COMMENTS [3.7] ~ FILE LIST

D-2009-262 Prof. Patton [3.7]

D-2009-269b COPRAC [3.7]

D-2009-276f Robert Gerber SDCBA Legal Ethics Comm [3.7]

D-2009-277a California Public Defenders Association [3.7]

D-2009-283e Orange County Bar [3.7]

D-2009-286e James Ham LACBA [3.7]

D-2009-287f Santa Clara County Bar [3.7]

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 COMMENT IS: OCTOBER 23, 2009

Your Information

Professional Affiliation Whittier Law School

Commenting on behalf of an organization
- ○ Yes
- ◉ No

*** Name** Professor William Wesley Patton

*** City** 3333 Harbor Blvd. Costa Mesa

*** State** California

*** Email address** (You will receive a copy of your comment submission.) bpatton@law.whittier.edu

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)]
Rule 1.8.7 [3-310(D)]
Rule 1.15 [4-100]
Rule 3.3 [5-200]
Rule 3.6 [5-120]
Rule 3.7 [5-210]
Rule 6.3 [n/a]
Rule 6.4 [n/a]
Batch 4 Discussion Draft (All rules)

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

Rule 3.7 Lawyer as Witness [5-210]

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

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file: ProposedRuleEthics37.doc (33k)

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COMMENTS ON THE COMMISSION FOR THE REVISION OF THE RULES

OF PROFEESSIONAL CONDUCT, PROPOSED RULE 3.7 LAWYER AS A

WITNESS

By

Professor William Wesley Patton

I have commented frequently on various proposed changes to the California Rules of Professional Conduct. I have written extensively on professional conduct, including LEGAL ETHICS IN CHILD CUSTODY AND DEPENDENCY PROCEEDINGS: A GUIDE FOR JUDGES AND LAWYERS (Cambridge University Press, 2006).

Although I agree in concept to many of the proposed changes in California's "Lawyer As A Witness Rule", Proposed Rule 3.7, the new draft has several serious ambiguities that will either confuse attorneys or fail to provide them with sufficient guidance.

1. Rule 3.7 (a):

I agree that the rule should apply to both **jury** and **bench trials**, and disagree with the minority position that all judges in all contexts will not be confused by the attorney's hybrid roles. See, e.g., *United States v. Dyess*, 21 F. Supp. 2d 493, 496 (2002): "While the danger is greater when matters are tried to a jury, it does not disappear when the lawyer testifies in matters tried to the bench."

I am uncertain about the meaning of "testify". Is it being used in its technical sense of only "that evidence which comes from living witnesses who testify orally"? *Mann v. Higgins* (1890) 83 Cal. 66, 69; *In re Jessica B.* 254 Cal. Rptr. 883 (1989). Or does it apply to more informal contexts in contested cases in which an attorney may provide the court with a recommendation, possibly based upon the attorney's personal knowledge? See, e.g., *Welfare & Institutions Code § 317 (e)* which permits an abused child's attorney to make recommendations to the court. Under ABA Model Rule 3.7 the standard applies when an attorney "is likely to be a necessary witness…." How exactly do the terms "witness" and "testify" differ? Which term provides clients with broader protection? I understand why the committee deleted the ABA term "necessary" from the term "witness"; however, I do not fully comprehend the substitution of the word "testify" for "witness". What are the ramifications of that particular change?

2. Rule 3.7 (a) (3) provides an exception for the attorney testifying if counsel obtains the written informed consent of the client.

But the rule does not address the frequent question of what happens when (1) the client is an incompetent adult or a child without the capacity to make a knowing choice among alternatives. For instance, if the adult client lacks capacity to consent, can the attorney merely use the attorney's substitute judgment that if the client were competent that the client would have consented? Or must the attorney for the incompetent adult seek the appointment of a guardian ad litem and then be bound by the GAL's decision regarding whether or not the attorney has consent to testify?

Just so, what rule applies to the attorney who represents a minor pursuant to *Welf. & Inst. § 317(e)* in which the attorney is appointed as a hybrid dual-role professional who serves both as a zealous advocate and as the *CAPTA* guardian *ad litem*? Since the attorney's initial roles are already full of contradictions between zealous advocate and best interest protector, permitting that dual role attorney to use substitute judgment in providing consent to testify under Proposed Rule 3.7(a) (3) raises significant conflicts of interest issues with the rights of the child client who by statute has been declared a party in the litigation.

Similar problems of informed consent permeate many other types of proceedings such as guardianships and conservatorships. However, the proposed rule of testifying provides attorneys in each of these types of cases no guidance on the proper ethical procedure for determining whether and how an attorney can seek or determine whether there is sufficient informed consent or substitute judgment to permit the attorney to testify.

3. Rule 3.7(b) (1) eliminates the ABA language regarding the potential conflict of interest between the client and the testifying attorney. However, as was demonstrated, supra., in many types of California cases, especially those in which there is a debate regarding the client's capacity to consent, there is a real potential for a conflict of interest developing. Therefore, the Committee should retain the ABA language regarding the potential for conflicts of interest.

4. Rule 3.7(b) (6) is rejected by the Committee because the Committee thinks that the conflicts of interest have been satisfied by the informed consent section in section (a) (3). Again, as demonstrated, supra., the informed consent provision does not address the inherent conflicts of interest issues inherent in the representation of an allegedly incompetent client who cannot provide informed consent. For instance, what rule of professional conduct protects a client who is allegedly incompetent when his or her attorney decides, based upon substitute consent, that the client would consent to that attorney testifying for what the attorney thinks is in that client's "best interest", but which is against the incompetent client's stated preferences and goals of the litigation?

5. Rule 3.7 (2) states that the rule "is not applicable in non-adversarial proceedings, as where the lawyer testifies on behalf of the client in a hearing before a legislative body." And the Committee's explanation is that this addition is to clarify that the Rule "is not applicable in legislative proceedings."

The problem is that the language goes well beyond merely stating that the rule does not apply in legislative proceedings" by providing the ambiguous term "non-adversarial proceedings." What is a "non-adversarial hearing" and from whose vantage point is that term determined? Again, assume that an attorney represents a 3 ½ year old child in a *W & I § 300* dependency case. The child tells her attorney that she wants to return home, but her attorney who serves both as her lawyer and CAPTA guardian ad litem agrees with County Counsel that the child should be placed outside her parents' home with foster parents. Even though the child is sufficiently verbal to express her placement desire, her attorney under the statute does NOT even have to tell the court of the child's wishes, and the attorney can argue for a placement that is diametrically opposed to the young child's wishes. Is this an adversarial or non-adversarial proceeding? Since the child's attorney agrees with County Counsel's position that the child should be removed from

home, the child is not contesting the government's recommendation. The only parties contesting the placement are the child's parents. Therefore, how are the terms "adversarial" and "non-adversarial" determined? In terms of the issue of a client's consent to her attorney testifying does the definition of the hearing as adversarial or as non-adversarial depend on the actual client's contest in the case, or does it merely depend upon whether some other party is contesting an issue in the case?

Because of the ambiguities inherent in the term "non-adversarial", the Committee should either replace that term with the term "contested by any party" or define in a comment that term "non-adversarial" applies only to proceedings where no party "contests a matter" [referring back to Proposed Rule 3.7(a)(1) which changed the ABA word "issue" for "matter". However, since this Committee's Explanation of the changes in Rule 3.7(2) states that the change is to make clear that the rule is inapplicable in "legislative proceedings", the wiser course may be to redraft Rule 3.7(2) with the following language:

> "This Rule is not applicable in legislative proceedings where the lawyer testifies on behalf of a client in a hearing before a legislative body."

That change will eliminate the ambiguity in the term "non-adversarial".

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THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2161

October 22, 2009

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 3.7

Dear Mr. Sondheim:

The State Bar 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 3.7 and offers the following comments.

COPRAC supports the proposed rule as written and does not suggest any changes to the text of the actual rule. COPRAC does suggest the addition of a definition of the word "trial" in a comment.

COPRAC has reviewed the explanation of certain minority views with respect to the rule. COPRAC agrees with the majority that the rule should apply to both bench and jury trials. COPRAC does not agree that bench officers would not be confused by a lawyer's dual role since practice background when taking the bench and length of time on the bench vary greatly, and both may impact how any given judge perceives an attorney who also acts as a witness.

COPRAC supports the majority view concerning proposed rule 3.7(a)(3). California has for many years considered the attorney-as-witness circumstance to pose an issue between the client and the attorney. The ABA rule provides to an opposing party the power to seek to disqualify its opponent's chosen counsel through misuse of the advocate-witness rule. See Cottonwood Estates, Inc. v. Paradise Builders, Inc. (Az. 1981) 128 Ariz. 99, 105; 624 P.2d 296, 302 (applying the ABA Code of Professional Responsibility); see also McElroy v. Gaffney (N.H. 1987) 129 N.H. 382, 390-91; 529 A.2d 889, 894 (applying ABA Model Rule 3.7). COPRAC is concerned that the ABA Model Rule version of rule 3.7 could encourage abusive, tactical/strategic disqualification motions.

Since willful violation of rules of professional conduct subjects an attorney to discipline, COPRAC favors drafting such rules as clearly as possible. For this reason, COPRAC suggests a

comment be added that clarifies whether the term "trial" includes other trial-like evidentiary judicial and administrative proceedings. An appropriate definition would be "Any judicial or administrative proceeding over which a judicial or quasi-judicial officer presides where live testimony is offered from which facts will be found."

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC)
BATCH #4, Comment Deadline October 23, 2009
SDCBA Legal Ethics Committee Deadline September 22, 2009
Subcommittee Deadline August 31, 2009

LEC Rule Volunteer Name(s): _____Robert S. Gerber_____

Old Rule No./Title: _____Rule 5-210/Member as Witness_____

Proposed New Rule No./ Title: _____Rule 3.7/Lawyer as Witness_____

QUESTIONS (please use separate sheets of paper as necessary):

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.
Yes [ ] No [X]

I agree with the minority position on this Rule in one respect.

The revised rule now precludes a lawyer as a witness not just in jury trials, but in all trials. Rule 5-210 was adopted to overturn *Comden v. Superior Court* (1979) 20 Cal.3d 907 where the trial court disqualified a law firm when an attorney filed declarations of his communications with opposing representatives. By adopting Rule 5-210 (former Rule 2-111(A)), the Supreme Court effectively overruled its own decision in *Comden*. Part of the approach in Rule 5-210 was to limit its application to situations in which an advocate would testify as a witness before a *jury*. As the dissent in *Comden* suggested, in a bench trial a judge should be able to screen out any prejudicial or self-serving aspect of testimony by an attorney for one of the parties.

No California decisions of which I am aware have criticized current Rule 5-210, nor have there been any significant disciplinary complaints or legal malpractice cases relating to it (according to the Commission).

It should be noted, however, that some 29 other states have not limited the Rule to jury trials, so California stands alone on this issue. Nevertheless, I believe the existing language limiting application of the rule to jury trials should be retained. I would propose adding the word "jury" before the word "trial" in the first line of part (a) of the new Rule.

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [X] No [ ]

(3) Is the new rule **worded correctly and clearly**? If "yes, please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [X] No [ ]

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [X] No [ ]

See No. 1 above.

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

Yes. The Rule would now include a provision with commentary to the effect that it is not applicable in non-adversarial proceedings, as where the lawyer testifies on behalf of the client in a hearing before a legislative body. This is a valuable addition and I would agree with it.

CONCLUSIONS (pick one):

[ ] We approve the new rule in its entirety.

[X] We approve the new rule with modifications.*

[ ] We disapprove the new rule and support keeping the old rule.

[ ] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

[ ] We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.

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 COMMENT IS: OCTOBER 23, 2009

Your Information

Professional Affiliation on behalf of the California Public Defenders Association

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** BARTON SHEELA

*** City** SAN DIEGO

*** State** California

*** Email address** (You will receive a copy of your comment submission.) barton.sheela@sdcounty.ca.gov

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The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)] | Rule 3.3 [5-200] | Rule 6.3 [n/a]
Rule 1.8.7 [3-310(D)] | Rule 3.6 [5-120] | Rule 6.4 [n/a]
Rule 1.15 [4-100] | Rule 3.7 [5-210] | Batch 4 Discussion Draft (All rules)

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 3.7 Lawyer as Witness [5-210]

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

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Please see attached letter.

Attachments

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CPDA

A Statewide Association of Public Defenders and Criminal Defense Counsel

California Public Defenders Association
10324 Placer Lane
Sacramento, CA 95827
Phone: (916) 362-1690 x 8
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Kathleen Cannon, 2007-2008
Leslie McMillan, 2008-2009

October 22, 2009

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

Dear Ms. Hollins:

The California Public Defenders Association believes that any proposed rule restricting an attorney from acting both as an advocate and as a witness should be limited to jury trials as is reflected in current Rule 5-210, and for this reason, we think that Proposed Rule 3.7 should be redrafted to limit its application to jury trials.

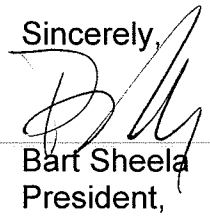
The California Public Defenders Association (CPDA) is the largest public defender organization in the nation with a membership of over 4,000 public defenders and private defense counsel. CPDA attorney members act as legal counsel for the overwhelming majority of the indigents accused of criminal conduct in California. The association, established in 1969, is the state-designated continuing legal education provider for all local public defender offices in the state of California, and also represents the interests of CPDA's criminal defense attorney members in legislative and on significant issues at the appellate court levels.

We believe that there is the possibility that a jury might be confused when an attorney acts as both an advocate and as a witness in a trial. There is also the possibility that the attorney serving in such a dual capacity may err in maintaining strict boundaries between those roles. The case of *People v. Donaldson* (2001) 93 Cal. App. 4th 916 is illustrative of the pitfalls that an attorney must avoid when trying to serve in dual capacities. In *Donaldson*, a prosecutor ended up testifying as a witness in the case to impeach a witness. During the testimony, the prosecutor expressed a personal belief in the guilt of the accused and then compounded the problem by arguing his own credibility as a witness and his personal belief in the guilt of the accused. The case was reversed by the Court of Appeals.

We believe, however, that when the court is the trier of fact, it can give appropriate consideration to the testimony of an attorney who is forced to serve as a witness in those few situations when that does occur.

We agree with the position of a minority of the Commission that comments 1 through 3 of the ABA Model Rules should be included with the Proposed Rule.

Sincerely,



Bart Sheela
President,
California Public Defenders Association

OFFICE USE ONLY.

* Date	Period	File :
10/22/2009	PC	D-2009-277a California Public Defenders Association [3.7].pdf

Commented On:	Specify:	Submitted via:
		Online

* Required

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, October 23, 2009 2:46 PM
To: Hollins, Audrey
Cc: 'Shawn M Harpen'; 'Garner, Scott'; 'Bagosy, Jennifer'; 'Yoder, Mike'
Subject: Orange County Bar Comments Re Rule Revisions
Attachments: OCBA Comments on Rules Due Oct 23 2009.pdf

Dear Ms. Collins:

Please find attached the comments from the Orange County Bar Association regarding the following proposed amended rules. We appreciate the opportunity to offer our comments to the Bar's Special Commission for the Revision of the Rules of Professional Conduct. Please note that we will not be submitting comments on Rule 1.8.6.

Please let me know if you have any questions. I would also appreciate your acknowledgement of receipt of these comments.

Rule 1.8.7
Aggregate Settlements [3-310(D)]
Rule 1.15
Safekeeping Property: Handling Funds and Property of Clients and Other Persons [4-100]
Rule 3.3
Candor Toward the Tribunal [5-200]
Rule 3.6
Trial Publicity [5-120]
Rule 3.7
Lawyer as Witness [5-210]
Rule 6.3
Membership in Legal Services Organization [n/a]
Rule 6.4
Law Reform Activities Affecting Client Interests [n/a]

Trudy C. Levindofske, CAE
Executive Director
Orange County Bar Association
Orange County Bar Association Charitable Fund
(949)440-6700, ext. 213

MEMORANDUM

Date: September 4, 2009

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: **Proposed Rule 3.7 – Lawyer as a Witness**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations 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 supports the adoption of Proposed Rule 3.7, but believes that a minor change to subsection (a)(1) is appropriate in order to ensure that a lawyer may present testimony on any uncontested matters ***or issues*** at trial. Thus, the OCBA suggests modifying the Rule as follows (insertions are underscored and italicized):

> (a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to testify unless:
>
> (1) the testimony relates to an uncontested *issue or* matter; ....

Although the section titled "*Explanations of Changes to the ABA Model Rule*" for this Rule indicates that the word "issue," as proposed in the ABA Model Rule, should be deleted and replaced with the word "matter" in order to broaden public protection, we believe that the use of both words would eliminate any possible confusion, and ensure that a lawyer who is called to testify at a trial on an ***uncontested*** subject may do so under this Rule, in all circumstances.

LACBA
LOS ANGELES COUNTY BAR ASSOCIATION

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October 21, 2009

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

RE: Rule 3.7 – Lawyer as Witness

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 3.7:

After extensive discussion and near unanimous approval (excluding only those abstentions of members of the Commission or the Board of Governors), PREC strongly recommends that the Proposed Rule be revised in subsection (a) to restore the concept from the current rule that this prohibition be applicable only to jury trials. The rationale behind the rule is not served by disciplining a lawyer for giving relevant testimony in a court trial or arbitration, where an attack on the lawyer's credibility as a witness is far less likely to be prejudicial to the lawyer's client. Thus, PREC agrees with the minority view of the Commission that the rule should be applicable only to jury trials.

PREC is further concerned that there is ambiguity in the terminology "uncontested matter" in subsection (a)(1). An uncontested matter could be construed to refer to an issue in a proceeding or to an entire proceeding. To avoid ambiguity and prevent the language from being too limiting, it should be expanded to include an "uncontested issue or matter." This is also more in line with the ABA Rule.

Finally, PREC is concerned about the requirement that informed consent be obtained in writing. This is an unnecessary burden that is impracticable when it arises during trial where it is possible that not all of the clients are even present to sign a consent. It is sufficient if the client provides informed consent, which is more than the ABA Rule requires. There is no reason to further depart from the ABA Rule by requiring a written consent.

The necessity documenting the client's consent in writing is an unreasonable burden that may not be feasible under the circumstances. It would be unfair to discipline a lawyer merely because he or she does not have a computer and printer in the courtroom to be able type a letter, when the client has been adequately informed of the risks and provides an oral consent. Excluding the

abstentions, PREC members again voted nearly unanimously in favor of eliminating the requirement of a writing.

Thank you for the opportunity to comment on this batch of proposed new and amended Rules of Professional Conduct.

Sincerely yours,

James I. Ham
Chair, LACBA Professional
Responsibility and Ethics Committee

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: OCTOBER 23, 2009

Your Information

Professional Affiliation Santa Clara County Bar Association

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** Jil Dalesandro, President

*** City** San Jose

*** State** California

*** Email address** (You will receive a copy of your comment submission.) chrisb@sccba.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)] | Rule 3.3 [5-200] | Rule 6.3 [n/a]
Rule 1.8.7 [3-310(D)] | Rule 3.6 [5-120] | Rule 6.4 [n/a]
Rule 1.15 [4-100] | Rule 3.7 [5-210] | Batch 4 Discussion Draft (All rules)

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 3.7 Lawyer as Witness [5-210]

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.

OFFICE USE ONLY.

* Date	Period	File :
10/30/2009	PC	D-2009-287f Santa Clara County Bar [3.7].pdf

Commented On:	Specify:	Submitted via:
		Online

* Required

PUBLIC COMMENTS [6.3] ~ FILE LIST

D-2009-269a COPRAC [6.3]

D-2009-276g Gina Dronet SDCBA Legal Ethics Comm [6.3]

D-2009-278c California Commission on Access to Justice [6.3]

D-2009-280c Legal Aid Assoc CA [6.3]

D-2009-283f Orange County Bar [6.3]

D-2009-287g Santa Clara County Bar [6.3]

THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2107

September 10, 2009

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 6.3 – Membership in Legal Services Organization

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 6.3 – Membership in Legal Services Organization. COPRAC supports the adoption of proposed Rule 6.3 and the Comments to the Rule.

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

Suzanne M. Mellard

Suzanne Mellard, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC)
BATCH #4, Comment Deadline October 23, 2009
SDCBA Legal Ethics Committee Deadline September 22, 2009
Subcommittee Deadline August 31, 2009

LEC Rule Volunteer Name(s): Gina Dronet

Old Rule No./Title: None

Proposed New Rule No./ Title: 6.3 Membership in Legal Service Organizations

QUESTIONS (please use separate sheets of paper as necessary):

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.
Yes [X] No [ ]

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [X] No [ ]

(3) Is the new rule **worded correctly and clearly**? If "yes, please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [X] No [ ]

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [ ] No [ ]

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

Proposed Rule 6.3 deals with a subject not specifically addressed by the existing California Rules of Professional Conduct: a lawyer's participation in a "legal service organization". Unfortunately, the proposed rule does not define "legal service organization(s)". I could not find a definition of that exact term anywhere in the proposed rules, the State Bar rules, the California Codes, the Federal Statutes, the Code of Federal Regulations, the ABA Rules, or the Model Rules. (In addition, the term is confusingly similar to other terms of art such as "legal service corporations" governed by federal law to provide legal services to the poor, qualified employer

sponsored tax-exempt prepaid group legal plans under Internal Revenue Code sections 120 and 501 (c) 20, and lawyer referral services, which are not intended to be included in the proposed rule.)

Therefore, the proposed rule should be modified to include the intended definition of "legal service organization" by citing to the intended definition if one exists or defining the term in a new subsection (c) as follows:

(c) The term "legal service organization" means those defined in section(s) _____ of _____ [and/or the case of _____].

OR

(c) The term "legal service organization" means . . .

NOTE: Absent the intended definition, I cannot provide the proposed language for the modification. I believe a starting point is California Business & Professions Code section 6213 – 6215, which describe the organizations entitled to receive IOLTA funds under B&P sections 6210 – 6228, (legal service for the poor paid by interest earned on client trust accounts). For convenience, the relevant sections are set forth in the attachment. However, it is unclear whether the drafters intended to include those organizations that currently fall outside these sections because they are not subject to State Bar regulation but may be in the future. See, e.g., Frye v. Tenderloin Housing Clinic, Inc, (2006) 38 Cal.4th 23,40, which held that nonprofit public benefit corporations providing legal services to the public are not subject to existing regulations governing the practice of law by professional law corporations. The Supreme Court directed the State Bar to investigate such organizations and propose appropriate rules in 2006, which are being considered in the rules revision process.

CONCLUSIONS (pick one):

[ ] We approve the new rule in its entirety.

[X] We approve the new rule with modifications.*

[ ] We disapprove the new rule and support keeping the old rule.

[ ] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

[ ] We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.

Continuation Pages; Dronet Comments
Proposed Rule 6.3 Membership in Legal Service Organization
Batch #4, Proposed Amendments to CRPC

Business & Professions Code sections describing intended legal service organizations:

6213. As used in this article:
(a) "Qualified legal services project" means either of the following:
(1) A nonprofit project incorporated and operated exclusively in California which provides as its primary purpose and function legal services without charge to indigent persons and which has quality control procedures approved by the State Bar of California.
(2) A program operated exclusively in California by a nonprofit law school accredited by the State Bar of California which meets the requirements of subparagraphs (A) and (B).
(A) The program shall have operated for at least two years at a cost of at least twenty thousand dollars ($20,000) per year as an identifiable law school unit with a primary purpose and function of providing legal services without charge to indigent persons.
(B) The program shall have quality control procedures approved by the State Bar of California.
(b) "Qualified support center" means an incorporated nonprofit legal services center that has as its primary purpose and function the provision of legal training, legal technical assistance, or advocacy support without charge and which actually provides through an office in California a significant level of legal training, legal technical assistance, or advocacy support without charge to qualified legal services projects on a statewide basis in California.
(c) "Recipient" means a qualified legal services project or support center receiving financial assistance under this article.
(d) "Indigent person" means a person whose income is (1) 125 percent or less of the current poverty threshold established by the United States Office of Management and Budget, or (2) who is eligible for Supplemental Security Income or free services under the Older Americans Act or Developmentally Disabled Assistance Act. With regard to a project that provides free services of attorneys in private practice without compensation, "indigent person" also means a person whose income is 75 percent or less of the maximum levels of income for lower income households as defined in Section 50079.5 of the Health and Safety Code. For the purpose of this subdivision, the income of a person who is disabled shall be determined after deducting the costs of medical and other disability-related special expenses.
(e) "Fee generating case" means a case or matter that, if undertaken on behalf of an indigent person by an attorney in private practice, reasonably may be expected to result in payment of a fee for legal services from an award to a client, from public funds, or from the opposing party. A case shall not be considered fee generating if adequate representation is unavailable and any of the following circumstances exist:
(1) The recipient has determined that free referral is not possible because of any of the following reasons:
(A) The case has been rejected by the local lawyer referral service, or if there is no such service, by two attorneys in private practice who have experience in the subject matter of the case.

(B) Neither the referral service nor any attorney will consider the case without payment of a consultation fee.

(C) The case is of the type that attorneys in private practice in the area ordinarily do not accept, or do not accept without prepayment of a fee.

(D) Emergency circumstances compel immediate action before referral can be made, but the client is advised that, if appropriate and consistent with professional responsibility, referral will be attempted at a later time.

(2) Recovery of damages is not the principal object of the case and a request for damages is merely ancillary to an action for equitable or other nonpecuniary relief, or inclusion of a counterclaim requesting damages is necessary for effective defense or because of applicable rules governing joinder of counterclaims.

(3) A court has appointed a recipient or an employee of a recipient pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction.

(4) The case involves the rights of a claimant under a publicly supported benefit program for which entitlement to benefit is based on need.

(f) "Legal Services Corporation" means the Legal Services Corporation established under the Legal Services Corporation Act of 1974 (P.L. 93-355; 42 U.S.C. Sec. 2996 et seq.).

(g) "Older Americans Act" means the Older Americans Act of 1965, as amended (P.L. 89-73; 42 U.S.C. Sec. 3001 et seq.).

(h) "Developmentally Disabled Assistance Act" means the Developmentally Disabled Assistance and Bill of Rights Act, as amended (P.L. 94-103; 42 U.S.C. Sec. 6001 et seq.).

(i) "Supplemental security income recipient" means an individual receiving or eligible to receive payments under Title XVI of the federal Social Security Act, or payments under Chapter 3 (commencing with Section 12000) of Part 3 of Division 9 of the Welfare and Institutions Code.

(j) "IOLTA account" means an account or investment product established and maintained pursuant to subdivision (a) of Section 6211 that is any of the following:

(1) An interest-bearing checking account.

(2) An investment sweep product that is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund.

(3) An investment product authorized by California Supreme Court rule or order.

A daily financial institution repurchase agreement shall be fully collateralized by United States Government Securities or other comparably conservative debt securities, and may be established only with any eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money-market fund shall be invested solely in United States Government Securities or repurchase agreements fully collateralized by United States Government Securities or other comparably conservative debt securities, shall hold itself out as a "money-market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940 (15 U.S.C. Sec. 80a-1 et seq.), and, at the time of the investment, shall have total assets of at least two hundred fifty million dollars ($250,000,000).

(k) "Eligible institution" means a bank or any other type of financial institution authorized by the Supreme Court.

6214. (a) Projects meeting the requirements of subdivision (a) of Section 6213 which are funded either in whole or part by the Legal Services Corporation or with Older American Act funds shall be presumed qualified legal services projects for the purpose of this article.

(b) Projects meeting the requirements of subdivision (a) of Section 6213 but not qualifying under the presumption specified in subdivision (a) shall qualify for funds under this article if they meet all of the following additional criteria:

(1) They receive cash funds from other sources in the amount of at least twenty thousand dollars ($20,000) per year to support free legal representation to indigent persons.

(2) They have demonstrated community support for the operation of a viable ongoing program.

(3) They provide one or both of the following special services:

(A) The coordination of the recruitment of substantial numbers of attorneys in private practice to provide free legal representation to indigent persons or to qualified legal services projects in California.

(B) The provision of legal representation, training, or technical assistance on matters concerning special client groups, including the elderly, the disabled, juveniles, and non-English-speaking groups, or on matters of specialized substantive law important to the special client groups.

6214.5. A law school program that meets the definition of a "qualified legal services project" as defined in paragraph (2) of subdivision (a) of Section 6213, and that applied to the State Bar for funding under this article not later than February 17, 1984, shall be deemed eligible for all distributions of funds made under Section 6216.

6215. (a) Support centers satisfying the qualifications specified in subdivision (b) of Section 6213 which were operating an office and providing services in California on December 31, 1980, shall be presumed to be qualified support centers for the purposes of this article.

(b) Support centers not qualifying under the presumption specified in subdivision (a) may qualify as a support center by meeting both of the following additional criteria:

(1) Meeting quality control standards established by the State Bar.

(2) Being deemed to be of special need by a majority of the qualified legal services projects.

CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

c/o State Bar of California - 180 Howard Street - San Francisco, CA 94105 - (415) 538-2251- (415) 538-2524/fax

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Director, Legal Services Outreach
State Bar of California
San Francisco

October 23, 2009

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

Re: Comment on proposed Rules 6.3, 6.4, 1.8.6, and 1.8.7

Dear Ms. Hollins:

On behalf of the California Commission on Access to Justice, I am writing to provide input to the rules identified above.

- ~~**Proposed Rule 1.8.6** – The Access Commission recommends a minor revision to Rule 1.8.6 – to add to the exception those non-profit charitable organizations which represent clients without a fee.~~

  ~~This rule, titled "Payments Not From Client", addresses the situation where someone other than the client is paying the attorneys fees, such as an employer, a family member, or an insurance company. The rule requires "informed written consent" from the client. The proposed Rule includes an exception that is in the current California rule (3-310[F]), but is not in the ABA rule. The exception says that "no disclosure or consent is required if the lawyer is rendering legal services on behalf of a public agency that provides legal services to other public agencies or to the public." The rationale for this exception is "…because the concerns addressed by the Rule do not come into play in those situations." While the exception will cover attorneys working with County Counsel who represent local school districts, and will also cover the Public Defender, it fails to cover legal services programs.~~

  ~~The Commission's stated rationale for the exception – enhancing access to justice – also applies to legal services programs. If this rule goes into effect, legal aid programs would have to fully inform each client that any fees are paid by someone else, and then get the client's written consent, before rendering any service. Not only would this shut down hotlines and other phone-based services, but it would unnecessarily slow down in-person services and result in fewer low-income people receiving services. And nothing would be gained by making this Rule applicable to legal services programs. Therefore, the Access Commission urges that this rule be amended by including in the exception those non-profit charitable organizations which represent clients without a fee.~~

- ~~**Proposed Rule 1.8.7** - The Access Commission urges that this Rule on Aggregate Settlements be modified to permit attorneys to obtain prior approval from clients. While the proposed rule is only slightly more difficult than existing rule 3-310 (D), even the existing rule does not comport with the reality of aggregate litigation. When a suit is filed on behalf of multiple plaintiffs, such as employees, tenants, etc., the rule would require full, extensive disclosure to each client of considerable information, and the informed written consent of each client. When such a case is settled, for example on the courthouse steps, it is very common that not all of the clients are present. Therefore, the settlement would be delayed while all of the clients are located, the agreement is perhaps translated, and written consent is obtained from all. We believe that such a process would unduly restrict and even discourage potential settlements. Therefore, we believe that the Rule should permit attorneys to obtain prior consent to such settlements, and that a follow-up notification be required within a reasonable amount of time after the settlement is finalized.~~

- **Proposed Rule 6.3** – This proposed rule has not existed in California in the past, and the Access Commission strongly supports its inclusion in our Rules of Professional Conduct. The rule as drafted is excellent, and it will help provide valuable guidance and protection for those wishing to serve on the boards of legal services programs. The mission of legal aid programs to serve the legal needs of low-income communities will often be in conflict with the interests of large corporations. But that should not be a barrier for an attorney who makes his or her living as a corporate attorney who wishes to provide public service by joining a legal aid board. We wholeheartedly support the adoption of this Rule.

- ~~**Proposed Rule 6.4** – Likewise, the Access Commission strongly supports the addition of proposed Rule 6.4. This Rule will encourage attorneys to participate in law reform organizations, and provides a reasonable procedure for them to follow whenever their clients might be benefited by the work of that organization. Working to improve the law is an important role for lawyers, and it is critical that lawyers feel that they can be involved in these activities without fearing ethical problems because of the potential impact on clients.~~

Thank you for this opportunity to comment. Please feel free to contact me if you have any questions.

Respectfully submitted,



Hon. Steven K. Austin
Co-Chair

"The Unified Voice of Legal Services"

LAAC
Legal Aid Association of California

VIA FACSIMILE (415) 538-2171

October 22, 2009

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

Re: Public Comment on proposed Rules 6.3, 6.4, 1.8.6 and 1.8.7

Dear Ms. Hollins:
I am writing on behalf of the Legal Aid Association of California (LAAC), and our member legal services nonprofit organizations, with comments on four of the proposed Rules of Professional Conduct.

Founded in 1984, the Legal Aid Association of California (LAAC) is a non-profit organization created for the purpose of ensuring the effective delivery of legal services to low-income and underserved people and families throughout California. LAAC is the statewide membership organization for more than 70 non-profit legal services organizations in the state.

Our members provide high-quality legal services to our state's most vulnerable populations. These services to low-income and other underrepresented individuals form an essential safety net in California and often ensure that the programs' clients have access to life's basic necessities, such as food, safe and affordable housing, freedom from violence, health care, employment, economic self-sufficiency, and access to the legal system.

Comments on Proposed Rule 6.3 - SUPPORT
LAAC supports the proposed Rule 6.3 on lawyers serving as a member or director of a legal services organization.

Comments on Proposed Rule 6.4 - SUPPORT
LAAC supports proposed Rule 6.3 regarding attorneys serving as directors, officers or members of an organization involved in the reform of the law or its administration.

433 California Street, Suite 815| San Francisco, CA 94108
Phone (415) 834-0100 | Fax (415) 834-0202

Comments on Proposed Rule 1.8.6 – SUPPORT IF AMENDED
This rule address the situation where someone other than the client is paying the attorneys fees, such as an employer, a family member, or an insurance company and requires "informed written consent" from the client. The proposed rule includes an exception that is in the current California rule (3-310[F]), such that "no disclosure or consent is required if the lawyer is rendering legal services on behalf of a public agency that provides legal services to other public agencies or to the public." This exception would cover situations such as a County Counsel who represents local school districts and Public Defender programs, but does not cover legal services nonprofit corporations.

The Commission's stated rationale for the exception, which it identifies as enhancing access to justice, is "because the concerns addressed by the Rule do not come into play in those situations." The same is true for legal services nonprofit organizations that represent clients without a fee. Legal services nonprofit corporations be included in this exception; without this, there is a significant risk that legal services nonprofits would be forced to eliminate critical hotlines and other phone-based services, that currently serve many low-income clients and could also slow down the provision of in-person assistance, such that many fewer low-income Californians would be able to receive the vital legal help they need. LAAC strongly recommends that the exception be modified to include non-profit charitable organizations that represent clients without a fee, as well as the public agencies already included in the proposed rule. LAAC supports proposed Rule 1.8.6 with this amendment.

Comments on Proposed Rule 1.8.7 - OPPOSE
While LAAC understands the ethical considerations that form the basis for this rule, the construct of the proposed rule simply does not comport with the reality of aggregate litigation. The requirements in the proposed rule would likely result many fewer such cases being resolved through settlement or settlements being significantly delayed. This important topic requires additional discussion and a rule that actually permits the efficient settlement of aggregate cases. The Commission should revisit and modify this proposed rule accordingly, including returning to the language of the ABA Model Rule, which requires informed consent, in a writing signed by the client.

Thank you for your kind consideration of these comments.

Sincerely,

Julia R. Wilson
Executive Director

433 California Street, Suite 615| San Francisco, CA 94108
Phone (415) 834-0100 | Fax (415) 834-0202

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, October 23, 2009 2:46 PM
To: Hollins, Audrey
Cc: 'Shawn M Harpen'; 'Garner, Scott'; 'Bagosy, Jennifer'; 'Yoder, Mike'
Subject: Orange County Bar Comments Re Rule Revisions
Attachments: OCBA Comments on Rules Due Oct 23 2009.pdf

Dear Ms. Collins:

Please find attached the comments from the Orange County Bar Association regarding the following proposed amended rules. We appreciate the opportunity to offer our comments to the Bar's Special Commission for the Revision of the Rules of Professional Conduct. Please note that we will not be submitting comments on Rule 1.8.6.

Please let me know if you have any questions. I would also appreciate your acknowledgement of receipt of these comments.

Rule 1.8.7
Aggregate Settlements [3-310(D)]
Rule 1.15
Safekeeping Property: Handling Funds and Property of Clients and Other Persons [4-100]
Rule 3.3
Candor Toward the Tribunal [5-200]
Rule 3.6
Trial Publicity [5-120]
Rule 3.7
Lawyer as Witness [5-210]
Rule 6.3
Membership in Legal Services Organization [n/a]
Rule 6.4
Law Reform Activities Affecting Client Interests [n/a]

Trudy C. Levindofske, CAE
Executive Director
Orange County Bar Association
Orange County Bar Association Charitable Fund
(949)440-6700, ext. 213

MEMORANDUM

Date: October 13, 2009

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

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 6.3 – Membership in Legal Services Organization**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations 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 does not believe it is necessary to adopt Rule 6.3, which is essentially Model Rule 6.3, plus the addition, in two places, of language that serves as a reminder that emphasizes the importance of maintaining client confidences and secrets. The OCBA has concerns that a disciplinary rule like this could chill attorneys from volunteering for certain legal services organizations.

If the Bar decides to adopt proposed Rule 6.3, the OCBA notes the following with respect to the proposed language:

The Rule as worded seems to implement the desired incentive – encouraging lawyers to support and participate in legal services organizations – while providing a non-controversial proviso to protect client confidences. It also safeguards against conflicts by having the lawyer recuse himself or herself if the decision or action of the organization may have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer. The OCBA suggests the proposed Rule be amended to include, at the end, the language that has been adopted in Georgia: "There is no disciplinary penalty for a violation of this Rule." This would act to offset any disincentive for attorneys to participate in legal services organizations if the proposed rule is adopted, but still provide helpful guidance to volunteering attorneys.

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: OCTOBER 23, 2009

Your Information

Professional Affiliation Santa Clara County Bar Association

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** Jil Dalesandro, President

*** City** San Jose

*** State** California

*** Email address** (You will receive a copy of your comment submission.) chrisb@sccba.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)] | Rule 3.3 [5-200] | Rule 6.3 [n/a]
Rule 1.8.7 [3-310(D)] | Rule 3.6 [5-120] | Rule 6.4 [n/a]
Rule 1.15 [4-100] | Rule 3.7 [5-210] | Batch 4 Discussion Draft (All rules)

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 6.3 Membership in Legal Services Organization [n/a]

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.

OFFICE USE ONLY.

* Date	Period	File :
10/30/2009	PC	D-2009-287g Santa Clara County Bar [6.3].pdf

Commented On:	Specify:	Submitted via:
		Online

* Required

PUBLIC COMMENTS [6.4] ~ FILE LIST

D-2009-275e State Bar OCTC [6.4]

D-2009-276h Erin Penning SDCBA Legal Ethics Comm [6.4]

D-2009-278d California Commission on Access to Justice [6.4]

D-2009-280d Legal Aid Assoc CA [6.4]

D-2009-283g Orange County Bar [6.4]

D-2009-284 Jeffrey Jaech [6.4]

D-2009-285b Ted Cassman CACJ [6.4]

D-2009-287h Santa Clara County Bar [6.4]

D-2009-288 Business Law Section [6.4]

THE STATE BAR OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
Russell G. Weiner, Interim Chief Trial Counsel

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http://www.calbar.ca.gov

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October 20, 2009

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 July 2009. Here are our comments:

~~**Rule 1.8.6 Payments Not from Client.**~~

~~1. The Office of the Chief Trial Counsel (OCTC) supports this rule. However, OCTC believes that a comment should be added suggesting to the lawyers that they advise in writing both the client and the paying non-client that the lawyer's duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to the non-client and even with such a designation the lawyer must preserve the client's confidences and secrets. OCTC finds that often the paying non-client complains to us because they do not understand that the lawyer cannot communicate with them.~~

~~**Rule 1.8.7 Aggregate Settlements.**~~

~~1. OCTC supports the proposal to use the term "informed written consent" as that term is used in other California rules. However, OCTC finds the rule as written and the Commission's Comments confusing. For example, OCTC finds Comment 4, which is not in the Model Rules, very confusing and problematic. If the Commission is seeking to allow clients to agree that a neutral third-party may determine the allocation of the aggregate settlement, then that should be in the rule itself, not in a Comment. OCTC also finds unclear and confusing what the Commission means by aggregate package deals in criminal cases. That might need some clarification.~~

Rule 1.15 Handling Funds and Property of Clients and Other Persons.

1. While OCTC supports some of the Commission's additions or changes to the Model Rules, such as the Commission's exclusion of trust accounts maintained in other jurisdictions, and there is merit to its explanation that costs are covered by the rule, OCTC finds most of the changes from the Model Rules confusing and potentially inconsistent. For example, OCTC supports the Model Rules provision requiring that advanced fees be placed in the Client Trust Account (CTA). This will prevent confusion and lack of consistency. Either every lawyer should be placing advanced fees in the CTA or no lawyer should be placing the advanced fees in the CTA. A rule requiring that advanced fees be deposited into the CTA will also protect clients. OCTC has many cases where the attorney does not return unearned fees and claims not to have the funds to do so. If this proposal is adopted, it may require a change to Comment 10.

2. OCTC finds very confusing and inconsistent the proposed rule as to when disputed funds need to be placed in the client trust account. (See proposed rules 1.15(d), (g), (h) and (i).) OCTC suggests deletion of the deviation from the Model Rules regarding these issues. This may require changes to Comments 12 – 14.

3. OCTC suggests that the term "inviolate" in proposed rule 1.15(e) be deleted as it is confusing and unnecessary in light of the rest of the sentence. All client funds should be maintained in a trust account until the time it is permitted to withdraw them.

4. OCTC finds confusing and inconsistent proposed rule 1.15(f). OCTC sees no compelling reason here to deviate from the Model Rules and, therefore, OCTC suggests that the first sentence of rule 1.15(a) of the Model Rules be reinstated. OCTC is particularly concerned that there are too many exceptions to the prohibition on the commingling of client funds and this will undermine the rule prohibiting commingling of client funds with the lawyer's own funds or allow such commingling if the attorney has the funds somewhere.

5. OCTC supports proposed rule 1.15(k) even though it is not in the Model Rules because it is essentially current rule 4-100(B). However, OCTC is concerned that subparagraph (6) is too limited as it does not provide for the Supreme Court or other court to issue an order for an audit. The rules should not determine jurisdiction or send a message that attorneys can violate a court's order. The Supreme Court has always provided that it has the right to involve itself at any stage of the disciplinary proceedings and investigation. (See *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 301; *In re Rose* (2000) 22 Cal.4th 430, 439; *Obrien v. Jones* (2000) 23 Cal.4th 40, 48. See also *In re Accusation of Walker* (1948) 32 Cal.2d 488, 490.) OCTC also believes that subparagraph (7) should add the word "authorized" to other person to make clear that only authorized persons can request undisputed funds.

6. OCTC is concerned that the language of rule 1.15(l) is too broad and, as written, no part of the rule applies to those attorneys and firms discussed in the subparagraphs. This seems counter to the purpose of the rule and public protection. OCTC is also concerned that subparagraphs (2) and (3) do not state, as subparagraph (1) does, that, if the rule does not apply in those situations, the firms and lawyers handle the funds in accordance with the law of the controlling jurisdiction. OCTC is further concerned how it would be able

to obtain copies of those out of state records and believes that the lawyers in those situations should have a disciplinable obligation to provide those to us or ensure that the financial institutions provide those records to us. Further, OCTC is concerned how this paragraph is impacted by the proposed Choice of Law rule in the September batch of proposed rules. (See proposed rule 8.5.)

Rule 3.3 Candor Toward the Tribunal.

1. OCTC is concerned that proposed rule 3.3 addresses only candor toward a tribunal. However, California law, unlike paragraph 3.3(a)(1), currently provides that an "attorney shall employ for purposes of maintaining causes confided to the member such means only as consistent with truth." Thus, the current rule covers, not just tribunals, but statements to others, including opposing counsel, parties, etc. Thus, unless this is covered in some other rule, OCTC believes that California's current rule should be incorporated into this rule or proposed rule 3.4. OCTC recognizes that proposed rule 3.4 is titled Fairness to Opposing Party and Counsel, but that proposed rule does not include this requirement of truth and candor either and that rule also is only designed to cover opposing parties and counsels.

2. OCTC is concerned that this proposed rule requires knowingly. It is unclear what that means, but if that requires intentional and not misstatements or concealment based on gross negligence, OCTC opposes it since that as is not consistent with California law. (See e.g. *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280.) In fact, while good faith in the statement may be a defense to a charge of misrepresentation, an attorney's unqualified and unequivocal statements to judges under circumstances that should have caused him at least some uncertainty are at minimum deceptive and support a finding of culpability. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Moreover, some of the proposed rules already permit violations for "knew or reasonably should have known." (See proposed rule 3.6.) For the same reasons, OCTC has concerns and disagrees with Comment 4. OCTC also wants to make clear that it believes the term material does not require that the attorney successfully misled court. Such an interpretation

3. OCTC is concerned that the proposed rule omits the term "artifice" as provided in current rule 5-200(b). If the Commission is intending to further limit the rule, OCTC opposes that. OCTC believes that word should remain in the rule. The proposed rule also omits the current rule that an attorney shall not intentionally misquote to a tribunal the language of a book, statute, or decision. OCTC is unsure if the Commission is intending to remove that, but OCTC believes that this language should remain and be added to the proposed rule. Likewise, the proposed rule omits the language that an attorney "shall not assert personal knowledge of the facts at issue, except when testifying as a witness." OCTC knows of no reason to omit that language and suggests that it be included in the proposed rule. In a similar vein, OCTC is concerned that nowhere in the proposed rules do they provide for 1) when an attorney states or alludes at trial to evidence that the attorney knows or reasonable believes is not relevant or admissible evidence or has already been ruled by the court inadmissible; 2) states the attorney's belief in the credibility of a witness; and 3) includes when an attorney violates discovery orders of a court. OCTC believes these belong in rule 3.3. OCTC recognizes that these are in rule 3.4 of Model

~~Rule, but believe that they belong here, although what is most important is that they remain in the rules. They or some of them appear to be at least implicitly currently in rule 5-200.~~

~~4. OCTC is concerned that Comment 3 is incomplete as written because FRCP and CCP 128.7 requires that statements in pleadings be made "after an inquiry reasonable under the circumstances." Likewise, the California Supreme court has written that "while an attorney may often rely upon statements made by a client without further investigation, circumstances known to the attorney may require an investigation." *(Butler v. State Bar* (1986) 42 Cal.3d 323, 329.)~~

Rule 6.4 Law Reform Activities Affecting Client Interests.

1. OCTC is concerned that, while this rule requires the lawyer to inform an organization in which he or she serves as a director, officer, or member when the reform may affect the interests of the client, nothing in the rule requires the lawyer to inform the client. Perhaps that is already required by the conflict rules, but it should be made clear here.

Again, thank you for the opportunity to comment on these rules.

Very truly yours,

Russell G. Weiner

Russell G. Weiner
Interim Chief Trial Counsel

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC)
BATCH #4, Comment Deadline October 23, 2009
SDCBA Legal Ethics Committee Deadline September 22, 2009
Subcommittee Deadline August 31, 2009

LEC Rule Volunteer Name(s): Erin Penning

Old Rule No./Title: None

Proposed New Rule No./ Title: Rule 6.4. Law Reform Activities Affecting Client Interests

QUESTIONS (please use separate sheets of paper as necessary):

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.
Yes [XX] No [ ]

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [ ] No [XX]

In some instances, it would be impossible for a lawyer to comply with Proposed Rule 6.4 without revealing client confidences in violation of Rule 1.6 and Cal. Bus & Prof. Code § 6068(e).

California Proposed Rule 6.4 recites in relevant part: "When the lawyer knows that the interests of a client may be materially benefitted or adversely affected by a decision in which the lawyer participates, **the lawyer shall disclose that fact but need not identify the client.**" (Emphasis added.)

However, it is foreseeable that a lawyer involved in law reform will not always be able to disclose that a client's interests may be materially benefitted or adversely affected without disclosing client confidences. The mere fact that a client need not be identified does not solve the problem. Hiding the client's identity does not permit the lawyer to reveal the client's confidences. In addition, a lawyer's record of representing certain clients may be enough in some instances for others to correctly infer the client whose interests would be materially benefitted or adversely affected.

In such instances when a lawyer could not make the disclosure required by Proposed Rule 6.4 without disclosing client confidences, an option must be permitted. Proposed Rule 6.4 should explicitly provide that option, either in the text of the rule or in a comment, by stating that, if disclosure is not permitted by the lawyer's obligations to clients under other Rules and statutes,

the lawyer should instead recuse himself or herself from participating in the decision that may materially benefit or adversely affect the client.

(3) Is the new rule **worded correctly and clearly**? If "yes, please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [ ] No [XX]

In accordance with the comments under section (2), above, Proposed Rule 6.4 could be worded as follows (addition in **bold, underline text**):

> A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted or adversely affected by a decision in which the lawyer participates, the lawyer shall disclose that fact**, if not prohibited by the lawyer's obligations to clients under other Rules and statutes,** but need not identify the client. **If disclosure is prohibited, the lawyer shall not participate in any decision that may materially benefit or adversely affect the interests of his or her client.**

In the alternative, Proposed Rule 6.4 could remain worded as currently proposed but be accompanied by a second Comment worded as follows:

> Comment [2]
>
> If disclosure is prohibited by the lawyer's obligations to any client under other Rules and statutes, then a lawyer cannot provide the disclosure required. If disclosure is prohibited, or if the lawyer chooses not to disclose in accordance with Rule 6.4 for any other reason, the lawyer shall not participate in any decision that the lawyer knows may materially benefit or adversely affect the interests of a client.

The addition of "Comment [2]" may be sufficient to rectify the problem here, given that Rule 6.4 begins, "A lawyer **may** serve as a director, officer or member of an organization involved in reform of the law… ." The Rule is not unequivocally permissive. "May" implies that there could be limits, and those limits could be spelled out in the comments.

Another concern is the impact this rule will have on members who participate in organizations such as the California Conference of Delegates. The addition of another Comment to address this issue is encouraged. It is hard to imagine that the drafters intended all the delegates to make such disclosures to the Conference but including "members" within the ambit or the proposed rule, rather than limiting it to officers and directors of the Conference leads to a questionable outcome.

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [ ] No [ ]

N/A

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

See comments in Section (2), above.

CONCLUSIONS (pick one):

[ ] We approve the new rule in its entirety.

[XX] We approve the new rule with modifications.*

[ ] We disapprove the new rule and support keeping the old rule.

[ ] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

[ ] We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.

CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

c/o State Bar of California - 180 Howard Street - San Francisco, CA 94105 - (415) 538-2251- (415) 538-2524/fax

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Santa Clara

MARY LAVERY FLYNN
Director, Legal Services Outreach
State Bar of California
San Francisco

October 23, 2009

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

Re: Comment on proposed Rules 6.3, 6.4, 1.8.6, and 1.8.7

Dear Ms. Hollins:

On behalf of the California Commission on Access to Justice, I am writing to provide input to the rules identified above.

- ~~**Proposed Rule 1.8.6** – The Access Commission recommends a minor revision to Rule 1.8.6 – to add to the exception those non-profit charitable organizations which represent clients without a fee.~~

  ~~This rule, titled "Payments Not From Client", addresses the situation where someone other than the client is paying the attorneys fees, such as an employer, a family member, or an insurance company. The rule requires "informed written consent" from the client. The proposed Rule includes an exception that is in the current California rule (3-310[F]), but is not in the ABA rule. The exception says that "no disclosure or consent is required if the lawyer is rendering legal services on behalf of a public agency that provides legal services to other public agencies or to the public." The rationale for this exception is "…because the concerns addressed by the Rule do not come into play in those situations." While the exception will cover attorneys working with County Counsel who represent local school districts, and will also cover the Public Defender, it fails to cover legal services programs.~~

  ~~The Commission's stated rationale for the exception – enhancing access to justice – also applies to legal services programs. If this rule goes into effect, legal aid programs would have to fully inform each client that any fees are paid by someone else, and then get the client's written consent, before rendering any service. Not only would this shut down hotlines and other phone-based services, but it would unnecessarily slow down in-person services and result in fewer low-income people receiving services. And nothing would be gained by making this Rule applicable to legal services programs. Therefore, the Access Commission urges that this rule be amended by including in the exception those non-profit charitable organizations which represent clients without a fee.~~

- **~~Proposed Rule 1.8.7~~** ~~- The Access Commission urges that this Rule on Aggregate Settlements be modified to permit attorneys to obtain prior approval from clients. While the proposed rule is only slightly more difficult than existing rule 3-310 (D), even the existing rule does not comport with the reality of aggregate litigation. When a suit is filed on behalf of multiple plaintiffs, such as employees, tenants, etc., the rule would require full, extensive disclosure to each client of considerable information, and the informed written consent of each client. When such a case is settled, for example on the courthouse steps, it is very common that not all of the clients are present. Therefore, the settlement would be delayed while all of the clients are located, the agreement is perhaps translated, and written consent is obtained from all. We believe that such a process would unduly restrict and even discourage potential settlements. Therefore, we believe that the Rule should permit attorneys to obtain prior consent to such settlements, and that a follow-up notification be required within a reasonable amount of time after the settlement is finalized.~~

- **~~Proposed Rule 6.3~~** ~~– This proposed rule has not existed in California in the past, and the Access Commission strongly supports its inclusion in our Rules of Professional Conduct. The rule as drafted is excellent, and it will help provide valuable guidance and protection for those wishing to serve on the boards of legal services programs. The mission of legal aid programs to serve the legal needs of low-income communities will often be in conflict with the interests of large corporations. But that should not be a barrier for an attorney who makes his or her living as a corporate attorney who wishes to provide public service by joining a legal aid board. We wholeheartedly support the adoption of this Rule.~~

- **Proposed Rule 6.4** – Likewise, the Access Commission strongly supports the addition of proposed Rule 6.4. This Rule will encourage attorneys to participate in law reform organizations, and provides a reasonable procedure for them to follow whenever their clients might be benefited by the work of that organization. Working to improve the law is an important role for lawyers, and it is critical that lawyers feel that they can be involved in these activities without fearing ethical problems because of the potential impact on clients.

Thank you for this opportunity to comment. Please feel free to contact me if you have any questions.

Respectfully submitted,



Hon. Steven K. Austin
Co-Chair

"The Unified Voice of Legal Services"

LAAC
Legal Aid Association of California

VIA FACSIMILE (415) 538-2171

October 22, 2009

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

Re: Public Comment on proposed Rules 6.3, 6.4, 1.8.6 and 1.8.7

Dear Ms. Hollins:
I am writing on behalf of the Legal Aid Association of California (LAAC), and our member legal services nonprofit organizations, with comments on four of the proposed Rules of Professional Conduct.

Founded in 1984, the Legal Aid Association of California (LAAC) is a non-profit organization created for the purpose of ensuring the effective delivery of legal services to low-income and underserved people and families throughout California. LAAC is the statewide membership organization for more than 70 non-profit legal services organizations in the state.

Our members provide high-quality legal services to our state's most vulnerable populations. These services to low-income and other underrepresented individuals form an essential safety net in California and often ensure that the programs' clients have access to life's basic necessities, such as food, safe and affordable housing, freedom from violence, health care, employment, economic self-sufficiency, and access to the legal system.

Comments on Proposed Rule 6.3 - SUPPORT
LAAC supports the proposed Rule 6.3 on lawyers serving as a member or director of a legal services organization.

Comments on Proposed Rule 6.4 - SUPPORT
LAAC supports proposed Rule 6.3 regarding attorneys serving as directors, officers or members of an organization involved in the reform of the law or its administration.

433 California Street, Suite 815| San Francisco, CA 94108
Phone (415) 834-0100 | Fax (415) 834-0202

Comments on Proposed Rule 1.8.6 – SUPPORT IF AMENDED
This rule address the situation where someone other than the client is paying the attorneys fees, such as an employer, a family member, or an insurance company and requires "informed written consent" from the client. The proposed rule includes an exception that is in the current California rule (3-310[F]), such that "no disclosure or consent is required if the lawyer is rendering legal services on behalf of a public agency that provides legal services to other public agencies or to the public." This exception would cover situations such as a County Counsel who represents local school districts and Public Defender programs, but does not cover legal services nonprofit corporations.

The Commission's stated rationale for the exception, which it identifies as enhancing access to justice, is "because the concerns addressed by the Rule do not come into play in those situations." The same is true for legal services nonprofit organizations that represent clients without a fee. Legal services nonprofit corporations be included in this exception; without this, there is a significant risk that legal services nonprofits would be forced to eliminate critical hotlines and other phone-based services, that currently serve many low-income clients and could also slow down the provision of in-person assistance, such that many fewer low-income Californians would be able to receive the vital legal help they need. LAAC strongly recommends that the exception be modified to include non-profit charitable organizations that represent clients without a fee, as well as the public agencies already included in the proposed rule. LAAC supports proposed Rule 1.8.6 with this amendment.

Comments on Proposed Rule 1.8.7 - OPPOSE
While LAAC understands the ethical considerations that form the basis for this rule, the construct of the proposed rule simply does not comport with the reality of aggregate litigation. The requirements in the proposed rule would likely result many fewer such cases being resolved through settlement or settlements being significantly delayed. This important topic requires additional discussion and a rule that actually permits the efficient settlement of aggregate cases. The Commission should revisit and modify this proposed rule accordingly, including returning to the language of the ABA Model Rule, which requires informed consent, in a writing signed by the client.

Thank you for your kind consideration of these comments.

Sincerely,

Julia R. Wilson
Executive Director

433 California Street, Suite 615| San Francisco, CA 94108
Phone (415) 834-0100 | Fax (415) 834-0202

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, October 23, 2009 2:46 PM
To: Hollins, Audrey
Cc: 'Shawn M Harpen'; 'Garner, Scott'; 'Bagosy, Jennifer'; 'Yoder, Mike'
Subject: Orange County Bar Comments Re Rule Revisions
Attachments: OCBA Comments on Rules Due Oct 23 2009.pdf

Dear Ms. Collins:

Please find attached the comments from the Orange County Bar Association regarding the following proposed amended rules. We appreciate the opportunity to offer our comments to the Bar's Special Commission for the Revision of the Rules of Professional Conduct. Please note that we will not be submitting comments on Rule 1.8.6.

Please let me know if you have any questions. I would also appreciate your acknowledgement of receipt of these comments.

Rule 1.8.7
Aggregate Settlements [3-310(D)]
Rule 1.15
Safekeeping Property: Handling Funds and Property of Clients and Other Persons [4-100]
Rule 3.3
Candor Toward the Tribunal [5-200]
Rule 3.6
Trial Publicity [5-120]
Rule 3.7
Lawyer as Witness [5-210]
Rule 6.3
Membership in Legal Services Organization [n/a]
Rule 6.4
Law Reform Activities Affecting Client Interests [n/a]

Trudy C. Levindofske, CAE
Executive Director
Orange County Bar Association
Orange County Bar Association Charitable Fund
(949)440-6700, ext. 213

MEMORANDUM

Date: October 13, 2009

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

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 6.4 – Membership in Law Reform Activities Affecting Client Interests**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations 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 does not believe it is necessary to adopt Rule 6.4, which is essentially Model Rule 6.4, with one proposed minor exception. The OCBA has concerns that a disciplinary rule like this could chill attorneys from volunteering for organizations addressing law reform.

If the Bar decides to adopt proposed Rule 6.4, the OCBA notes the following with respect to the proposed language.

As it currently stands, this Rule would be the same as the Model Rule, except in two places it would add the language "or adversely affected" to the duty of disclosure. The OCBA respectfully suggests adopting language like that used by Florida, namely – "materially affected" instead of "materially benefitted or adversely affected."

There are two reasons for this. First, proposed Rule 6.3(b) uses the phrasing "material adverse effect," so, for consistency, the Florida wording for Rule 6.4 seems more appropriate. Second, the Florida wording may prove more workable because it requires disclosure if there is either a material benefit or a material adverse effect, as opposed to California, which would require disclosure of any possible adverse effect – a standard that may lead to excessive disclosures, diluting the effect of significant disclosures and ultimately discouraging participation in these organizations.

Thus, for consistency with Rule 6.3 and to avoid potentially excessive disclosures, the OCBA proposes to adopt Rule 6.4, but replace "materially benefitted or adversely affected" with "materially affected" in each of the two instances where it is used.

The OCBA also suggests the proposed Rule be amended to include, at the end, the language that has been adopted in Georgia: "There is no disciplinary penalty for a violation of this Rule." As was noted with proposed Rule 6.3, this language would act to offset any disincentive for attorneys to participate in organizations addressing law reform while still providing helpful guidance to participating attorneys.

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 COMMENT IS: OCTOBER 23, 2009

Your Information

Professional Affiliation State Bar Trusts & Estates Section Executive Committe

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** Jeffrey Jaech

*** City** Fresno

*** State** California

*** Email address** (You will receive a copy of your comment submission.) jjaech@bakermanock.com

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The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)] | Rule 3.3 [5-200] | Rule 6.3 [n/a]
Rule 1.8.7 [3-310(D)] | Rule 3.6 [5-120] | Rule 6.4 [n/a]
Rule 1.15 [4-100] | Rule 3.7 [5-210] | Batch 4 Discussion Draft (All rules)

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 6.4 Law Reform Activities Affecting Client Interests [n/a]

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: Rule 6.4 102309_1.PDF (53k)

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Attachment ? Browse... Upload

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jjaech@bakermanock.com

Proposed comment re Rule 6.4:

The Executive Committee of the Trusts and Estates Section of the State Bar urges that the last sentence of proposed Rule 6.4 be deleted as unnecessary and impractical, or at least clarified such that it does not apply to organizations that are merely advisory.

The Executive Committee appears to be an organization described by proposed Rule 6.4, one "involved in the reform of the law or its administration." Most Executive Committee members are attorneys with private practices, and many of the reforms and other issues addressed by the Executive Committee naturally "may" materially affect clients of many of the members. If the last sentence of the proposed rule is enacted, Executive Committee members, under threat of disciplinary action, would need to make regular boilerplate disclosures to the Executive Committee, even though all members already are aware of the obvious fact that the matters before the Executive Committee may affect members' clients. These disclosures would be meaningless acts, and may effectively relieve a member from disclosing a particular client interest directly and significantly relevant to the matter being considered by the Executive Committee. Furthermore, such disclosures would not in any way protect or benefit the attorneys' clients, which is the presumed purpose of the Rules. If an organization were to decide that such disclosures are necessary to preserve the integrity of its process, then the organization could adopt and enforce its own disclosure requirement.

Alternatively, the last sentence of the proposed rule could be limited to apply only to organizations that have the authority to change the law or its administration. If so limited, then the participants in the many bar committees, which have merely advisory or advocacy powers, need not be concerned about being disciplined for failing to make obvious and meaningless disclosures to the committees.

@PFDesktop\::ODMA/MHODMA/DMS;DMS;774691;1

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DEADLINE TO SUBMIT COMMENT IS: OCTOBER 23, 2009

Your Information

Professional Affiliation California Attorneys for Criminal Justice (

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** Ted W. Cassman

*** City** Berkeley

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) cassman@achlaw.com

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The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)] | Rule 3.3 [5-200] | Rule 6.3 [n/a]
Rule 1.8.7 [3-310(D)] | Rule 3.6 [5-120] | Rule 6.4 [n/a]
Rule 1.15 [4-100] | Rule 3.7 [5-210] | Batch 4 Discussion Draft (All rules)

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 6.4 Law Reform Activities Affecting Client Interests [n/a]

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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6.4 – Law Reform Activities Affecting Client's Interests.

CACJ objects to this proposal as unnecessary and unworkable. For example, the proposed rule would require that every officer of CACJ disclose to CACJ every time a decision in which he or she participates might benefit (or, less likely, adversely affect) one of his or her clients. Under the proposed rule, every other officer of CACJ would have to make such disclosures to CACJ every time he or she participates in a discussion concerning the position that CACJ should take on proposed legislation for a new penal statute or amendment to a penal statute. We think that is unduly burdensome and unreasonable. Currently in California there is no provision addressing this issue. That is the way it should remain.

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* Date	Period	File :
10/23/2009	PC	D-2009-285b Ted Cassman CACJ [6.4].pdf

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PROPOSED RULES OF PROFESSIONAL CONDUCT
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All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: OCTOBER 23, 2009

Your Information

Professional Affiliation Santa Clara County Bar Association

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** Jil Dalesandro, President

*** City** San Jose

*** State** California

*** Email address** (You will receive a copy of your comment submission.) chrisb@sccba.com

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The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)] | Rule 3.3 [5-200] | Rule 6.3 [n/a]
Rule 1.8.7 [3-310(D)] | Rule 3.6 [5-120] | Rule 6.4 [n/a]
Rule 1.15 [4-100] | Rule 3.7 [5-210] | Batch 4 Discussion Draft (All rules)

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 6.4 Law Reform Activities Affecting Client Interests [n/a]

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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This rule as proposed should not be adopted. The Santa Clara County Bar Association supports the rationale for having this rule: to encourage attorneys to participate in law reform organizations. However, the rule elevates fiduciary duties that the attorney owes the organization as a Board member to an attorney rule of conduct subjecting the attorney to discipline. The attorney's duty as an attorney runs to the client; the attorney's duty as a member of the Board or a committee runs to the organization and is governed by the conflict of interest rules that govern that organization. As such, the last sentence should be deleted or be modified to read: "While a lawyer may be required to disclose a conflict of interest related to a client pursuant to fiduciary duties as an officer or member of such an organization, the lawyer shall protect the confidentiality of the client as required by Business & Professions Code Sec. 6068(e)(1)." The comment to this rule should be revised accordingly.

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10/30/2009	PC	D-2009-287h Santa Clara County Bar [6.4].pdf

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BUSINESS LAW SECTION
THE STATE BAR OF CALIFORNIA

November 4, 2009

State Bar Special Commission for the Revision of the Rules of Professional Conduct
c/o Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Dear Commissioners:

This letter commenting on Proposed Rule 6.4 is provided by the Executive Committee ("Executive Committee") of the State Bar of California Business Law Section (the "Section"). Sections of the State Bar are established under the Rules of the State Bar to serve the profession, the public, and the legal system. (See Rules of the State Bar, Title 3, Division 2, Chapter 1) Each year, the Section proposes legislation, upon the approval of the State Bar Board of Governors, to the California Legislature to reform and improve the law. It also provides comments and recommendations on legislation proposed by others at the state and federal level as well as on corresponding administrative proposals, all in accordance with review and approval procedures approved by the State Bar Board of Governors. The Section also comments on uniform codes and regulations at the state and national level, all in accordance with review and approval procedures approved by the State Bar Board of Governors. Other Sections of the State Bar engage in similar activities.

The Section is administered by an Executive Committee of 16 members, which reviews and approves all proposed legislation and legislative and regulatory comments. The Section also has 13 standing committees and other ad hoc committees from time to time, many of which initiate such participation in the legislative process under the umbrella of the Section. The approximately 200 members of these committees all volunteer their time and energy to the activities of the Sections and are expert in and interested in the area of law covered by the committee. Often, members are leaders in their field. The members come from solo or small firms, large firms, in house corporate counsel, law school faculties and legal departments of government agencies. Committee members must have five years of legal experience before they are eligible to serve on those committees. The members of the Executive Committee have all served on at least one standing committee, in most cases as Chair or co-Chair of it.

It is not unusual for legislative staffers or State employees from departments regulating an area to be a member of a standing committee or regularly attend standing committee meetings. Several committees have "Legislative Days" in Sacramento, visiting with legislators and government officials and their staffers. Some committees are regularly requested by state agencies to assist in review of regulatory proposals and some have been requested by members of the legislature or their staff to provide input on pending or potential legislative proposals.

180 Howard Street, San Francisco, CA 94105-1639 • Tel 415-538-2570 • Fax 415-538-2368 • http://www.calbar.org/buslaw

DISCUSSION OF MODEL RULE 6.4

The Executive Committee applauds the Commission for the work it is doing to examine the California Rules of Professional Conduct and bring them up to date, specifically in comparison with the American Bar Association's Model Rules of Professional Conduct and the rules of professional conduct in all other states. The Executive Committee appreciates the opportunity to comment on the proposed rules. There is only one rule on which the Executive Committee wishes to comment in the two sets of rules on which the Commission is currently requesting comment.

The Executive Committee opposes, or in the alternative supports with amendments, proposed MRCP 6.4 for the following reasons.

LEGAL REASONS

While attractive on the surface, the proposed rule is a duplicative remedy in search of a harm.

The Comment to the proposed Rule 6.4 conflates the conflict of interest duties of a lawyer to not represent a person or use a client's information with the fact a that lawyer (and the lawyer's firm) has a client base with an interest in a decision of a "law reform organization." The only explanation for the purpose of Model Rule 6.4 comes in the Model Rule Comments in the reference to Rule 1.2(b) and in the sentences preceding that reference. Rule 1.2(b) permits a lawyer to represent a client where the lawyer has a concurrent conflict of interest with another client, provided several tests are met, including informed written consent from each affected client.

However, the Comment to the proposed Rule 6.4 states that there is no conflict of interest, as a lawyer has no attorney-client relationship with the law reform organization. Even if there were a conflict, the proposed rule does not require compliance with the conflict of interest rules; rather it requires disclosure to "law reform organizations" in certain circumstances. Since there is no conflict of interest, the reference to Rule 1.2(b) is at best puzzling, if not confusing, to the practitioner. In sum, as the Comment to proposed Rule 6.4 states, there is no harm, i.e., conflict of interest, to be remedied.

It seems the purpose of Model Rule 6.4 is to permit a quasi-conflict of interest, yet other Model Rules address the issue of conflicts of interest, including this quasi-conflict of interest or interests of third parties. Model Rule 1.7(a)(2) prohibits a lawyer from representing a current client if there is a "significant risk" that the representation will be "materially limited" by the lawyer's responsibilities to "a third person or by a personal interest of the lawyer".

The ABA comments on Rule 1.7(a) provide in pertinent part:

///

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.

.....

The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client.

Consequently, a lawyer's duties to a current client effectively prevent a lawyer from acting adversely to that client, as the penalty for such adverse action is that the lawyer cannot represent the client. Even where there is a true conflict of interest with a current client, the lawyer is not penalized if acting for the benefit of the client, nor is any disclosure to the client, much less to any one else, required.

Model Rule 1.8 expands on the provisions of Model Rule 1.7. Model Rule 1.8 addresses not representation of a client but when a lawyer may use information acquired from a client for purposes other than representation of the client. Model Rule 1.8(b) provides that a lawyer shall not use information relating to a client to the disadvantage of the client, except as permitted or required by the Model Rules. The comment to Model Rule 1.8, in Paragraph [5], informs the lawyer that disadvantageous use of information violates the lawyer's duty of loyalty to the client. The lawyer may not use client information to benefit the lawyer or a third person. The Comment continues on to list the Rules that permit the use of client information. Rule 6.4 is not among those rules. Thus, Rule 6.4 is not a permissive provision overriding a lawyer's duty to not use client information to the disadvantage of a current client or to benefit the lawyer or a third person. The lawyer cannot use client information to the detriment of a client or for the benefit of a third person.

Model Rule 1.9 covers duties to former clients. Model Rule 1.9 prohibits representation of others in certain circumstances. Model Rule 1.9(c), like Model Rule 1.8(b) just discussed, prohibits the use of information to the disadvantage of the former client, except as otherwise permitted or when the information has become generally known. In addition, a lawyer may not reveal information relating to the representation of the former client, except as otherwise permitted. The Comments to this Model Rule shed no additional light on this provision. Just like Model Rule 1.8(b), no limitation or disclosure is required if information is used for the benefit of a former client.

Model Rule 1.11 addresses conflicts of interest for government officers. A current or former government lawyer may not use information in violation of Model Rule 1.9(c) (discussed above) and may not use "confidential government information" (as defined) about a person in the representation of a client whose interests are adverse to the person and the confidential government information could be used to the "material disadvantage" of the person. Again, the only limitation is on the use of information to the disadvantage of government or a person about whom the lawyer has confidential government information.

Finally, Model Rule 1.18 addresses how a lawyer may use information acquired from a prospective client. That information may be used in the same way a lawyer may use information acquired from a former client under Model Rule 1.9 (discussed above). Similar to the other conflict of interest rules, Comment [6] to Model Rule 1.18 permits a lawyer to use information in the "same or substantially related matter" unless it would be "sufficiently harmful" if used in the matter.

In sum, the various conflict of interest Model Rules address when a lawyer may represent, or not, a client and when a lawyer may use client information. As the Comment to Model Rule 6.4 states, there is no attorney-client relationship with the legal reform organization, so that prong of the conflict of interest rules is satisfied. The second prong of those rules addresses use of the information. In all cases, the lawyer may not use information adversely to the client (or prospective client); no limitation is set upon use of information for the benefit of a client. The key limitation is in Model Rule 1.8(b), where the lawyer may not use client information for the benefit of any third party. We believe the other Model Rules adequately address the issues that are the subject of proposed Model Rule 6.4 making adoption of Model Rule 6.4 unnecessary.

CHILLING EFFECT OF PROPOSED RULE 6.4

The adoption of proposed Model Rule 6.4 likely will have a chilling effect on lawyer participation in civic organizations. In the ABA Model Rules' own language:

> Scope
>
> [14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may,"

> are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.

Proposed Rule 6.4 is a "may" rule with regard to being a member of a law reform organization but is a "shall" rule with regard to disclosure.

California takes a more disciplinary approach. Under Business and Professions Code §6077 the rules of professional conduct are "binding" on all State Bar members and the State Bar may discipline members for willful breach.

Since the disclosure rule is a trap for the unwary, and a nullity (as discussed below), the Commission should weigh carefully the need for a rule that will cause conscientious lawyers to over-disclose in the desire to avoid potential disciplinary proceedings and trap less conscientious (but usually not "willful") lawyers who fail to disclose.

Further, the portion of the rule that "permits" a lawyer to be a member of a law reform organization is unnecessary and could "chill" lawyers' participation in civic organizations. Lawyers have always participated in law reform and administration of the law. That portion of the rule raises a number of questions where none existed before. Should John Marshall, the first U.S. Supreme Court Justice, have been required to disclose potential impacts on clients as he served on the U.S. Supreme Court or in the Virginia House of Burgesses (see Jean Edward Smith, JOHN MARSHALL: DEFINER OF A NATION, (Henry Holt and Company 1996))?

Yes, standards have changed. However, the civic participation of lawyers should not be discouraged or denigrated. No persuasive reason is presented for subjecting lawyers to potential discipline under proposed Rule 6.4 in a role lawyers have historically played and for which lawyers are well suited by training, particularly when actual conflicts are covered under other provisions of the Model Rules.

PRACTICAL REASONS

1. The Rule, as Proposed, is Both a Nullity and a Trap for the Unwary.

Under the proposed rule any lawyer involved in "organizations seeking law reform" should simply announce to the organization that the lawyer (and, presumably, the lawyer's firm) "knows" that "a private client might be materially benefited or adversely affected." The trap for the unwary is that if a lawyer forgets to make the announcement, makes the announcement at the wrong time or wrongly decides that the organization is not involved in law reform, the lawyer is subject to discipline.

While the proposed rule tries to limit the scope of the responsibility to disclose knowledge of material benefit or adverse impact on a client by a decision in which the lawyer participates, the comment undercuts that narrow scope. As the Comment states, any lawyer practicing antitrust

law is deemed to represent a client when involved in any antitrust legislative proposal. By analogy, any lawyer involved with any legislative proposal related to the lawyer's expertise is deemed to represent an affected client and should provide the disclosure. As the description of the Business Law Section indicates, every committee member should make a disclosure at some (unknown) time, since every committee member is an expert in that area of law, even though that fact is obvious by reason of the lawyer's membership on the committee. The reality of practice is that a lawyer and a law firm will have such a broad range of clients that the lawyer should assume that some client will be benefitted or harmed, and avoid the risk of discipline by routinely disclosing.

We suggest that the Commission also consider that lawyers are leading citizens, serving on various governmental entities. Those lawyers are performing a traditional role, as recognized by the ABA Model Rules in its Preamble to the Model Rules. Yet proposed Rule 6.4 undercuts that service by branding such service as for the benefit of clients. The State Bar should not discourage attorneys from participating in law reform or public service or taint them with working for the interests of clients.

The nullity is that lawyers will disclose so routinely that the disclosure will have no effect. Routine disclosure also resolves such issues as how often the lawyer should make the disclosure, and to whom. The mechanics of fulfilling this new disclosure requirement are woefully missing, leaving the practitioner little choice but to disclose at every turn, lest the lawyer become subject to disciplinary action.

2. The Comment to Proposed Rule 6.4 States that a Lawyer is "professionally obligated to protect the integrity of the [law reform] program".

Where is the source and authority of this new obligation? What is its scope? This duty is not set out in Business and Professions Code section 6068, which otherwise sets forth the duties of California lawyers, or elsewhere in the Model Rules. The Comment seeks to short-circuit the scope of the obligation by saying it is discharged by "appropriate" disclosure. Is it that easy? This new obligation is a far leap from the previous discussion in the Comment, which indicates that a lawyer may not be able to participate in law reform because that "might indirectly affect a client" and the lawyer should comply with the lawyer's obligations to his/her clients, including avoiding conflicts of interest. As discussed above, there is no attorney-client relationship with the law reform organization, and any conflicts of interest are already addressed in the Model Rules. Again, all these decisions about how to best fulfill a lawyer's obligations are taken under the risk of State Bar disciplinary action.

3. The Proposed Rule Does Not Address the Responsibility of the Organization to which Such Notice is Given.

While outside the scope of these rules, the lawyer will be asked what the organization should "do" with the disclosed information. Since it is the lawyer's obligation "to protect the integrity" of the program, the Comment should address how the lawyer should guide the organization.

4. The Proposed Rule Covers Organizations "involved in reform of the law or its administration".

There is no guidance on which organizations are included. The Comment refers to a bar association. However, environmental organizations often recommend legislation. Should a lawyer sitting on the organization's board provide a disclosure when the board approves a legislative proposal? Many other types of organizations may engage in legislation or rulemaking activities.

5. The Proposed Rule Permits a Lawyer to Participate in an Organization "involved in reform of the law or its administration" even Though the Reform May Affect a Client.

Is this rule inclusive, that is, a lawyer may be a member of organizations with dissimilar purposes – or is the proposed rule exclusive, that is, may a lawyer participate only in law reform organizations? Further, many kinds of organizations can take actions other than law reform that may affect a client. For example, a human rights organization may sue a client or a company similar to a client. Since the proposed rule turns on the potential for harm or benefit to a client, perhaps, a lawyer should disclose when making decisions regarding other types of actions. The conflict of interest rules are not limited to law reform organizations.

In sum, proposed Rule 6.4 is unclear in its scope and implementation, while subjecting a lawyer engaged in the worthwhile activity of law reform, for which a lawyer has particular training, to the risk of disciplinary action if proper disclosure is not made. Alternatively, the disclosure will become so common as to render it rote and meaningless.

RECOMMENDATION: DO NOT ADOPT

The Executive Committee recommends that, like New York State, California not adopt proposed Rule 6.4, for the reasons stated in this letter.

RECOMMENDATION: AMENDMENTS

In the alternative, the Executive Committee recommends the following amendments if the Commission chooses to adopt proposed Rule 6.4.

1. Amend the rule, as the State of Georgia has done, to provide that a lawyer is not subject to discipline for violation of the rule.

2. To permit a lawyer to participate in organizations, in addition to law reform and administration organizations, the first sentence of the proposed rule would read as follows:

> "A lawyer may serve as a director, officer or member of any organization, including any organization that may be involved in reform of the law or its

administration, notwithstanding that the involvement may affect the interests of a client of the lawyer."

3. Amend the Comment so it reads as follows:

Public Service
Rule 6.4 Organization Activities Affecting Client Interests - Comment

[1] Lawyers involved in organizations generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program or other organization that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rules 1.7, 1.8, 1.9, 1.11 and 1.18. When a lawyer participates in a decision that materially benefits or adversely affects a client, the lawyer should protect the integrity of the organization by making an appropriate disclosure within the organization.

The positions expressed herein have not been adopted by the Section or its overall membership or by the State Bar's Board of Governors or its overall membership, and are not to be construed as representing the position of the State Bar of California. There are currently over 9,000 members of the Section. Membership in the Section is voluntary and funding for its activities, including all legislative activities, is obtained entirely from voluntary sources.

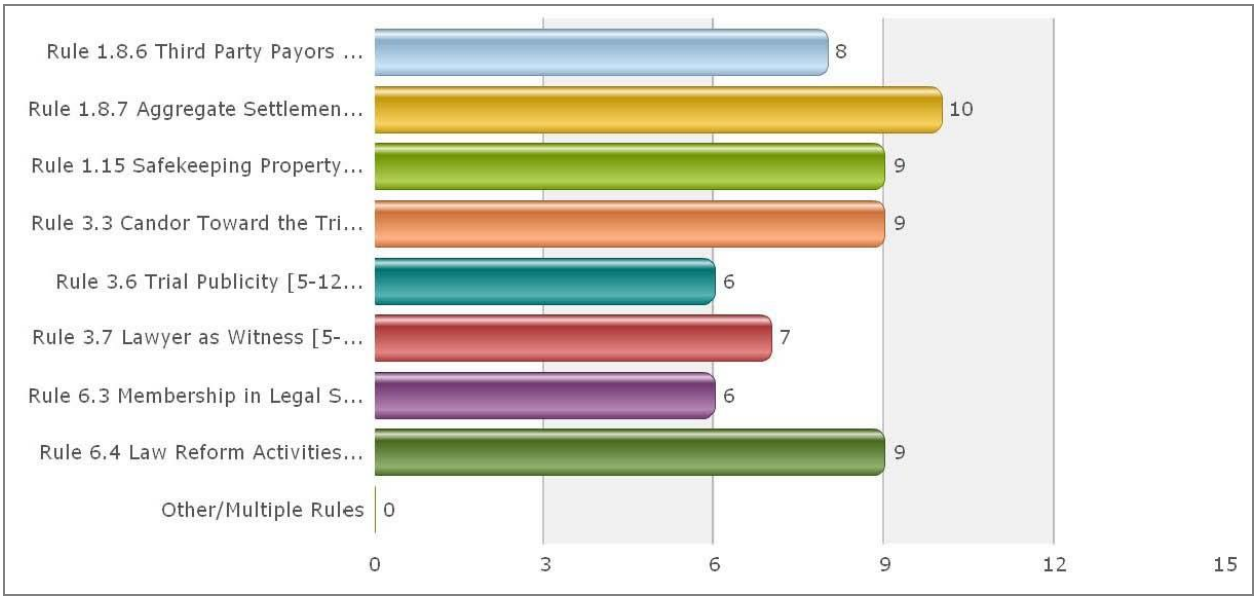
We hope the foregoing is useful in your deliberations. Please do not hesitate to contact the undersigned at (916) 329-7400 ext. 222 if you would like to be in touch with a representative of the Executive Committee versed in the matters covered by this letter and authorized to speak on its behalf. I will be happy to put you in touch with such person.

Respectfully,

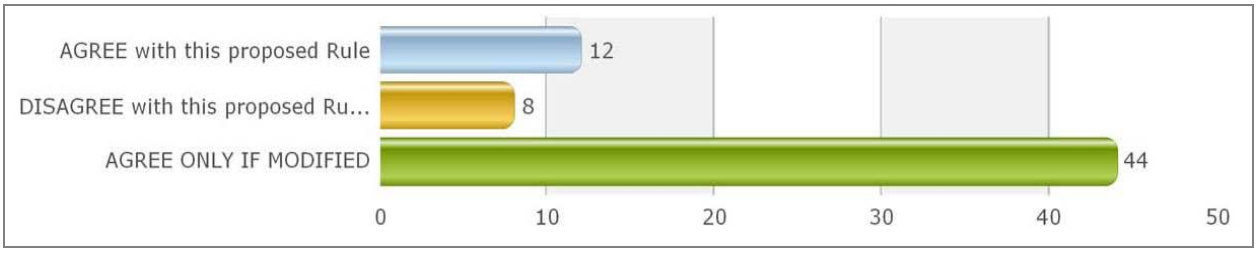
Paul Pascuzzi
Chair, Executive Committee
Business Law Section of the State
Bar of California

BATCH 4

Selected 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: 64

Full Text of the Public Comments Received
on Previously Submitted Rules in Batches 1, 2 & 3
Returned to the Commission for Further Consideration

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)]

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

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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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FAX (310) 392-9029
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.

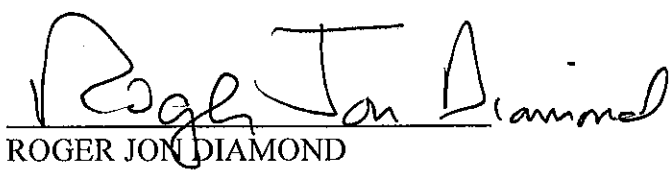
I know that clients are perfectly satisfied to pay retainers that they know are not refundable. The record keeping burden on attorneys who will then have to put the money in trust accounts will be overwhelming.

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

CACJ California Attorneys for Criminal Justice

1540 River Park Dr., Ste 224-A
Sacramento, CA 95815
Telephone: 916/643-1800
Facsimile: 916/643-1836
Website: www.cacj.org
DIRECTOR: Gail Jones

PRESIDENT
Rickard Santwier
1055 E. Colorado Blvd., Ste 310
Pasadena CA 91106
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Santwier@sbcglobal.net

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Marion Miller, Eureka
Joseph. Mockus, San Francisco
Jessie Morris Jr, Woodland
Stephen Munkelt, Nevada City
Joseph O'.Neill, Oxnard
Douglas Rappaport, San Francisco
Steven J. Rease, Salinas
Thomas Roehr, Sacramento
Robert Sanger, Santa Barbara
Callie Glanton Steele, Los Angeles
Andrew Stein, Bellflower
Bobbie Stein, San Francisco
Lydia Stiglich, San Francisco
Scott Sugarman, San Francisco
Kelly Tanalepy, Sacramento
E. Katherine Tinto, Los Angeles
Julie Traun, San Francisco
Vincent Tucci, Irvine
L. Stephen Turer, Santa Rosa
Robert Wilson, Pasadena
Thomas S. Worthington, Salinas
John Zitny, San Bernadino

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

Audrey Hollins
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10 Howard Street
San Francisco, CA 94105

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

247642.1

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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.

PROPOSED RULE (CLEAN VERSION)

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.

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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BARRY TARLOW*
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May 20, 2008

Via telefax: (415) 538-2171, email (Audrey.Hollins@calbar.ca.gov) & Federal Express

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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BLAIR BERK
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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., Avantl, 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

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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

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Los Angeles, CA 90014

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THE STATE BAR OF CALIFORNIA

LOS ANGELES COUNTY BAR ASSOCIATION HONORS THE Bill of Rights BICENTENNIAL 1791 • 1991

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
Michael J. Brill
Paul A. Catalano
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Roland L. Coleman, Jr.
Audrey B. Collins
Knox M. Cologne, III
Stephen R. English
Eudon Ferrell
Fred J. Fujioka
Barry I. Goldman
Janice Kamenir-Reznik
Robert N. Kwan
Richard M. Macias
F. Bentley Mooney, Jr.
Christopher M. Moore
Nancy L. Newman
Andrew J. Nocas
David J. Pasternak
Barbara A. Reeves
Andria Kay Richey
[illegible] J. Segura
[illegible] Miller Siegel
[illegible]bert S. Span
[illegible]an J. Troy
Laurie D. Zelon

P.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 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.

II.B-247

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.

IB-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

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1333 N CALIFORNIA BLVD
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CALIFORNIA 94596
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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

I.B. - 257

TULARE COUNTY BAR ASSOCIATION
208 W. MAIN STREET, SUITE 2
VISALIA, CALIFORNIA 93291

PHONE (209) 732-2513

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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 94102-5238

TELEPHONE: (415) 241-2157

RECEIVED
MAY 23 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.

II.B-247

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.

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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
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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

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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.

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6/5/2008	PC	C-2008-196 Robert A. Khan	Entire Rule	1.5	Online

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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** 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.

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- ○ AGREE ONLY IF MODIFIED

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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?

[CONTINUED...] [SEE ATTACHMENT FOR FULL TEXT]

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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.

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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

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

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]

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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 <u>any</u> 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

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** 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]

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.

My state bar # is 166349

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* Date	Period	File :	Commented On:
6/5/2008	PC	C-2008-201 Kurt David Hermansen [1.5]	Entire Rule

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THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
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All information submitted is regarded as public record.

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

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

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.

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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* Date	Period	File :	Commented On:	Specify:	Submitted via:
6/5/2008	PC	C-2008-202 Anonymous [1.5(f)]	Rule Section(s) Only	1.5(f)	Online

* Required

Close

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

CONFIDENTIALITY NOTICE. This message is intended only for the eyes of the addressed recipient and is a confidential communication protected by the attorney client privilege. If you have received this in error, please help us correct the mistake by letting us know. Thank you.

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

CDBA

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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



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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.

****

(c) Rafael Chodos 2008

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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JAMES T BIGGS
LARA A S CALLAS
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

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

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]

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6/5/2008	PC	C-2008-215 Allen Bloom [1.5]	Entire Rule	1.5	Online

* Required

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.

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.

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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

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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	(f)	Online

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FULL TEXT OF COMMENTS SUBMITTED BY DAVID HARRIS

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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 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

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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]

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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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6/6/2008	PC	C-2008-218 Michael Stepanian [1.5(f)]	Entire Rule	1.5	Online

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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.**

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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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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.**

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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]

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* 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

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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

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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

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

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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

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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.

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 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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6/5/2008	PC	C-2008-227 Steven Feldman [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** 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.

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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

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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.

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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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#FELLOW OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

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† ALSO ADMITTED IN NEW JERSEY

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

06-08-08 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 **AML** 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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NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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June 6, 2008

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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

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

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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)

STANLEY I. GREENBERG
A LAW CORPORATION
6080 CENTER DRIVE, SUITE 800
LOS ANGELES, CALIFORNIA 90045-1574

CERTIFIED SPECIALIST - CRIMINAL LAW
THE STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION

(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

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"HABEAS"

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. <u>The Proposed Changes Will Fundamentally Alter The Way Law Is Practiced And Ignore Sound Public Policy Considerations</u>

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. <u>The Waiver Suggested under Proposed Rule 4-110(c)(3) Is Unnecessary, Offensive and Coercive</u>

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

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June 10, 2008

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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

LAW OFFICES OF
LOUIS S. KATZ
JUDITH ELLEN GAETZ CERTIFIED SPECIALIST - CRIMINAL LAW CHARLES R. GARRY
STATE BAR OF CALIFORNIA BOARD OF LEGAL SPECIALIZATION (1969 - 1991)
345 FRANKLIN STREET
SAN FRANCISCO, CA 94102
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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.

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June 13, 2008

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

RE: Rule 1.5 - Fees for Legal Services [4-200]

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee ("PREC") respectfully submits the following comments to proposed Rule 1.5 of the California Rules of Professional Conduct (current Rule 4-200, Fees for Legal Services). In particular, PREC wishes to comment on Rule 1.5(f) and Comment 2 of the proposed rule.

At the outset, PREC agrees with the established ethical principle that an attorney may not make an agreement for, charge, or collect an unconscionable or illegal fee. *See* Proposed Rule 1.5(a). Rule 1.5(a) states existing law. PREC believes that proposed Rule 1.5(a) fully protects against the risk of an unconscionable "non-refundable" fee without the unanticipated consequences and ambiguities created by proposed Rule 1.5(f), and without unnecessarily disturbing long established and legitimate fee arrangements.

Proposed Rule 1.5(f) provides that 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 [2] to proposed Rule 1.5 provides that the 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."

The narrow definition of "true retainer" in proposed Rule 1.5(f), coupled with the prohibition against agreeing to, charging, or collecting a "non-refundable" fee, appears to contradict the established and customary practice of charging a "flat fee" for the delivery of certain legal services. For example, criminal defense counsel often charge a flat fee to represent an accused. These agreements typically provide that the lawyer will represent the defendant through and including, if necessary, trial of the matter. The

agreements provide, however, that the entire flat fee is earned even if the matter resolves by dismissal or a plea bargain, prior to trial. Likewise, lawyers sometimes charge "flat fees" to draft and negotiate agreements or handle discrete matters. In bankruptcy matters, fees are also characterized as "flat" or earned upon receipt, even though it is anticipated that future services will be provided, in order to induce a lawyer to render legal services to a debtor without being unreasonably exposed to the risk that creditors will be able to reach funds earmarked for the debtor's legal representation. Whether such a fee might be subject to *future* negotiation as a result of changed circumstances between the debtor client and the lawyer does not require that the fee be characterized as "unearned" or make the arrangement unfair or unethical.

Flat fee agreements allocate economic risk between lawyer and client with respect to the cost, and amount of work that will be required, to complete a representation. As between lawyer and client, the flat fee is considered earned, regardless of the amount of future time or effort involved in completing a particular representation. The arrangement provides clients with the advantage of certainty of legal representation for a fixed cost. Lawyers assume the risk that some matters will require more work to complete, while others may require less work to complete. Flat fee arrangements represent a legitimate, bargained-for exchange, between lawyer and client.

In addition, new competitive and economic pressures are challenging the traditional hourly fee rate model. Corporations, insurance companies, and other high volume consumers of legal service are seeking and demanding new types of fee arrangements which alter the traditional hourly service paradigm. These alternative billing arrangements often seek to manage legal costs by incorporating discounts for volume, encouraging efficiency, and promoting the stability of the legal team assigned to a client's projects. One such potential "alternative billing" arrangement provides that the law firm will receive a flat fee to ensure their availability to represent the client in certain matters or categories of matters, but also includes an agreement that the law firm will provide a specified level of future service during the retention period, if called upon by the client. Under this hybrid retainer fee, the future service is provided either at no additional cost, or may be based on a formula other than standard hourly rates. Alternatively, the flat fee may be combined with an agreement to bill at a discounted or gradually increasing rate, depending upon the volume of future work or other considerations. In these cases, the alternative or hybrid billing arrangement may provide that the flat fee portion is earned by the law firm upon receipt, regardless of the actual amount of work that is ultimately assigned by the client to the law firm.

These new alternative billing or "hybrid retainer" arrangements represent a thoughtful allocation of economic risks and rewards between clients and lawyers. The law firm agrees to undertake up to a certain volume of work for a certain, pre-determined price. The flat fee or retainer portion of the agreement, which is earned upon receipt, is an inducement to the law firm to remain available to represent the client, regardless of the actual volume of work assigned, and in consideration of volume fee discounts or other assumptions of economic risk. Without the flat fee or retainer guarantee, the law firm might not otherwise agree to accept the fee discount portion of the agreement or other associated economic risks, such as foregoing other, higher paying, assignments.

In situations where a client terminates a flat fee representation, questions sometimes arise regarding whether a portion of the flat fee should be refunded to the client. In this circumstance, competing

considerations must be reconciled. On the one hand, a client always has the right to discharge existing counsel and hire new counsel. The client may discharge existing counsel with, or without, cause.[1] On the other hand, the attorney's right to a fee also must be considered. For example, because an attorney might not otherwise have agreed to a discounted fee without also receiving a retainer earned upon receipt, the question of what portion of a fee should be returned upon the attorney's discharge does not necessarily turn simply on a calculation of the amount of time spent by the lawyer before discharge. A lawyer may legitimately be entitled to retain a larger portion of a fee because the fee arrangement was premised on a different bargain and the lawyer would not have accepted the work at the agreed price without the earned retainer. Thus, a lawyer may be perfectly justified in charging a non-refundable retainer that is not strictly a "true retainer."

The issues raised in these circumstances are properly addressed under proposed Rule 1.5(a), and under the rule requiring a lawyer to return to a client any unearned fee. Such situations cannot be addressed by a *per se* prohibition against charging a "non-refundable" fee, a flat fee, or a hybrid retainer that includes a non-refundable earned retainer component and an additional hours or discounted fee payment component. Prohibiting "non-refundable" fees, as in Rule 1.5(f), does not address the true concern, which is ensuring that unearned fees are returned to a client and that any non-refundable portion of a fee is not, under all the circumstances, unconscionable. *See* Proposed Rule 1.5(a) & (c) and existing Rule 4-200(a) & (c).

At the time of contracting, both parties enter into a fee agreement with the expectation and understanding that a flat fee or the retainer portion of a hybrid fee agreement is "non-refundable," regardless of the outcome of the matter or the stage of the proceeding at which the result is obtained. Thus, Rule 1.5(f)'s strict prohibition against making an agreement for, charging, or collecting a non-refundable fee is problematic, because it appears to make such agreements a *per se* disciplinable offense and precludes the opportunity to make a later reasonable fee adjustment in the event of the lawyer's early termination based on the various factors discussed in proposed Rule 1.5(c) or existing Rule 4-200(c).

The Rules of Professional Conduct are intended to protect the public and the integrity of the judicial system. PREC sees no public protection or judicial integrity policy justification for precluding flat fees, or alternative billing arrangements that include a non-refundable "retainer" component and a discounted or volume hourly billing component. We note, furthermore, that the ABA Model Rules do not prohibit flat fees or "non-refundable" fees. The absence of such a prohibition in the ABA Model Rules appears to acknowledge the legitimacy of flat fee arrangements as well as "hybrid retainers" that include embedded time commitments, volume discounts or other measures of service to be provided.

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[1] One justification offered for prohibiting "non-refundable" fees is that such arrangements could discourage a client from exercising the right to retain new counsel. However valid this concern, it does not justify banning all arrangements providing that a fee is earned upon receipt except for so-called "true retainers." For example, the right of a contingency fee lawyer to assert a quantum meruit claim for fees where a client discharges that attorney *also* acts as an economic disincentive. Another lawyer may be reluctant to take on a case where predecessor counsel spent substantial time on the matter, and a client's choices might thereby be severely limited. Yet, the rules do not prohibit contingency fees despite the associated economic disincentives to changing counsel. Policy considerations justifying this economic disincentive, such as access to justice, appear equally strong in many flat fee and hybrid retainer cases.

Indeed, the public protection and judicial integrity rationales for prohibiting "non-refundable" fees seems equally applicable to a "true retainer" arrangement (one that is paid solely for the purpose of ensuring the availability of the lawyer for the matter). For example, where a substantial true retainer fee is paid to ensure the availability of a lawyer for a matter or for one year, and the client then terminates the relationship after just one month, it is difficult to reconcile the policies against charging an unconscionable fee or requiring the return of an unearned fee with the notion that the lawyer is entitled to treat the *entire* "true retainer" as non-refundable, since the lawyer is no longer required to reserve his or her availability, as bargained for by the client. In such cases, just as in the flat fee and hybrid retainer situations, the parties contemplate a fee payment in exchange for the lawyer's availability or services. When that arrangement is prematurely terminated, the basis of the carefully struck economic bargain has been undermined.

PREC notes that the Rules of Professional Conduct are intended as *rules of attorney discipline.* Their primary purpose is to regulate the professional conduct of lawyers, and to impose discipline for a willful breach of those professional duties. The rules are not a suitable vehicle for attempting to micro-manage varying fee arrangements by inflexible black letter prohibitions that cannot possibly account for the wide range of existing and newly developing fee arrangements. Rule 1.5(f) is not suitable for targeting the isolated unreasonable assertion that a particular fee was fully earned and is not refundable. The proposed rule inflicts unnecessary and unwarranted damage on reasonable fee agreements and unreasonably restricts the development of new alternative fee arrangements. The problem Rule 1.5(f) seeks to address can be addressed by applying the long established factors identified in proposed Rule 1.5(c) and in current Rule 4-200(c) to determine if the fee charged is unconscionable.

Rule 1.5(f) also leaves very important practical questions unanswered. The Rule ambiguously prohibits a "non-refundable" fee. For purposes of imposing discipline, does the rule therefore require that the fee agreement use the term "non-refundable" or, instead, does the rule invite disputes and debate over whether a particular fee agreement *constitutes* a non-refundable fee?

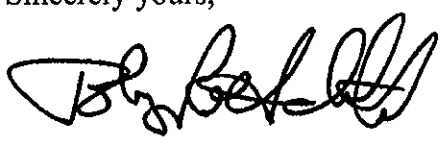
A fee agreement may provide for a flat fee earned upon receipt, without mention of whether a portion of the fee might *later* be refundable under changed circumstances. The understood premise of the agreement, at the time of contracting, was that the lawyer earns the entire fee for the work. Thus, for example, if a client pays a flat fee for representation in a particular criminal matter through trial, and the matter quickly resolves through a plea bargain, can the client assert a violation of Rule 1.5(f) by arguing that a portion of the fee should be "refundable" because the lawyer was not required to go to trial? Would it be a disciplinable offense for the attorney to take the position that no portion of the fee is refundable because the attorney earned the fee? Likewise, can a client receive substantially all services contracted for, then discharge the attorney on the eve of the conclusion of the matter, and allege that the attorney violated Rule 1.5(f) by insisting that no part of the fee is refundable. Alternatively, would an attorney be subject to discipline by taking the position that no portion of the fee is refundable because the discharge was without cause and the attorney would have been entitled to the entire fee had the attorney charged standard rates for time instead of agreeing to a flat fee arrangement involving a trade off between the attorney's standard rates and an agreed flat fee?

The foregoing questions are not idle or academic. With a rule structured like proposed Rule 1.5(f), challenges will arise in the disciplinary context, and will subject attorneys to the vagaries of second guessing of the meaning of a fee agreement. Moreover, even when an attorney recognizes a responsibility to return a portion of a fee – and actually does so because of an unexpected development or premature discharge – the attorney can *still* be disciplined because he or she "contracted for" or "collected" a "non-refundable" fee. It is, therefore, more appropriate to evaluate fees by asking whether what was charged was unconscionable.

PREC respectfully submits that Rules 1.5(a) and 1.5(c) (existing Rules 4-200(a) and 4-200(c)), together with the requirement of existing Rule 4-100(B)(4) (requiring the return of any funds the client is entitled to receive), satisfactorily protect the public and the judicial system from the type of abuse which Rule 1.5(f) is intended to protect against. Rule 1.5(f) is simultaneously under-inclusive (by permitting a "true retainers" even where the bargain is frustrated by termination of the relationship) and over-inclusive (by purporting to prohibit otherwise reasonable flat fee and hybrid retainer agreements that serve valuable and valid purposes and client objectives). Rule 1.5(f) is ineffective at addressing the concern the rule is designed to address and carries with it pernicious unintended consequences and problematic inflexibility.

For these reasons, PREC recommends that proposed Rule 1.5(f) be deleted entirely from the proposed rules. Alternatively, Rule 1.5(f) and Comment 2 should employ a different and expanded definition of "retainer" to acknowledge hybrid retainers and to provide that the rule is not intended to prohibit contracting for, charging, or collecting a flat fee. The comment should also make clear that the question whether some portion of a hybrid retainer or a flat fee should, under some circumstances, be refundable is a matter that best determined on a case by case basis based on the particular facts of the engagement, not by an inflexible rule flatly prohibiting a "non-refundable" fee.

Sincerely yours,



Toby J. Rothschild, Chair
Professional Responsibility and Ethics Committee

cc: Gretchen M Nelson, President
LACBA PREC Members

PUBLIC COMMENTS [1.8.1] ~ FILE LIST

A-2006-126b Philip Humphreys_Chris Munoz [1.8.10]

A-2006-134a(O) Alan Konig [1.8.10]

A-2006-143b LACBA [1.8.10]

A-2006-153 (O) Steve Gupta

A-2007-160 (O) Michael Crocket [1.8.10]

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.

- ○ 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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6/6/2008	PC	C-2008-225 Carol M. Langford [1.8.1]	Entire Rule	1.8.1	Online

* Required

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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June 13, 2008

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State Bar of California
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RE: Rule 1.8.1 - Business Transactions with a Client and Acquiring Interests Adverse to the Client [3-300]

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee ("PREC") respectfully submits the following comments to proposed Rule 1.8.1 of the California Rules of Professional Conduct (current Rule 3-300, Business Transactions with a Client and Acquiring Interests Adverse to the Client). In particular, PREC wishes to comment on Rule 1.8.1 and Comment 2 of the proposed rule.

In large part, the proposed new rule 1.8.1 is similar to the provisions of California rule 3-300. PREC has no proposed revisions to the text of Rule 1.8.1. However, there are several areas in the Comment section of the proposed rule materials, that require further revision. PREC offers the following suggested modifications, and in certain places, deletions of commentary:

1. Comments 1 and 2 addressing the scope of the rule are fine as written.

2. Comment 3 addresses application of the rule to situations in which the lawyer provides services other than legal representation which are ancillary to, or provided together with, legal services. This concept is addressed by ABA Model Rule 5.7. However, Model rule 5.7 expressly provides that a lawyer is "subject to the Rules of Professional Conduct" with respect to the provision of "law-related services," when those services "might reasonably be performed in conjunction with and [which] in substance are related to the provision of legal services." By contrast, the second sentence of proposed Comment 3, which states that the rule applies to "lawyers engaged in the sale of goods or non-legal services that are related to the practice of law, such as when a lawyer sells insurance, brokerage or investment products or services to a client," is ambiguous and not completely accurate. This comment goes beyond incorporating the substance of Model Rule 5.7, because it does not clearly distinguish between "law related services" and services that are related to legal services because the provider is also serving as a lawyer. In other words, Rule 1.8.1 should not be applied simply because one who licensed as a lawyer is providing the non-legal services that would be "law related" if they were being provided in

tandem with legal services, but are stand alone services that can be provided by a non-lawyer (e.g., investment advice). A lawyer who is providing a non-legal service that would be "law-related" if the lawyer were also providing legal services, is not subject to all of the RPC (e.g., 3-310/1.7 requiring written consent to the representation of multiple clients) if the lawyer is not providing any legal representation. The second sentence of Comment 3 should be modified to read: "This Rule also applies to lawyers engaged in the sale of goods or non-legal services that are ancillary to and being provided concurrent with the provision of legal services, such as when a lawyer acting as such sells insurance, brokerage or investment products or services to a client."

3. Comment 4 is correct as written. It makes clear that conduct whereby the lawyer provides services that are not "law related," regardless whether the provider is also providing legal services, is not subject to compliance with this rule.

4. PREC does not recommend any changes to Comment 5, which states the traditional concept that the rule doesn't apply to the initial retention agreement or a subsequent modification to the agreement that does not include a security interest. The majority of our committee agree that modification of a fee agreement, even if it involves the lawyer's pecuniary interest, does not requires a per se declaration of conflict of interest, nor does it compel the lawyer to advise the client to seek independent counsel. As a risk avoidance measure, lawyers would be well advised to provide clients with disclosure and opportunity to obtain independent legal counsel, but the failure to do so is not a disciplinary offense.

5. PREC agrees with the analysis set forth in Comment 6 , and the references to civil cases interpreting fiduciary duties in the renegotiation of fee agreements is helpful.

6. PREC notes that the reference to the *Fletcher v. Davis* case in Comment 7 is incorrect, since Fletcher failed to apply the well accepted rule that only security arrangements that allow the lawyer to summarily extinguish the client's interest in property implicates the duty to comply with rule 3-300. The majority of PREC continues to believe that Fletcher was wrongly decided, and that rule 3-300 does not apply to standard, unsecured lien provisions in attorney client fee agreements. PREC urges the Commission to utilize this opportunity to return the state of the law to its pre-Fletcher state, and to adopt in this comment, a distinction between lien provisions which are coupled with a true summary security interest, from a contractual lien that requires judicial action for enforcement. The latter type of contractual lien should not require compliance with this rule.

7. PREC agrees with the analysis in Comment 8, which is a restatement of the lawyer's duty to make adequate disclosure.

8. Comment 9 contains an incorrect statement of the burden of proof in attorney disciplinary proceedings, in which the burden is on the prosecutor to prove by "clear and convincing evidence to a reasonable certainty that an ethical violation has occurred," and any reasonable doubts are to be resolved in favor of the accused attorney. (See, e.g., *Moore v. State Bar (*1964) 62 Cal.2d 74, 80.) Thus, the statement that "the burden is always on the lawyer" in the last sentence of Comment 9 makes the sentence incorrect, and contrary to the longstanding and proper burden of proof to be borne by the prosecution to prove all willful violations of the RPC. PREC urges that the last sentence of Comment 9 be deleted entirely.

9. Comment 10 addresses the situation where the lawyer is both the drafter and a participant in the transaction. It starts out by saying "The risk to a client is greatest when the client expects the lawyer to represent client in the transaction....etc." This may or may not be true. This sentence should say , "The risk to a client is heightened when the client expects....etc.

10. Comments 10, 11 and 12 each address conflicts of interest (indeed, each includes a specific reference to Rule 1.7, the Model Rule equivalent to Rule 3-310). This is confusing, and the references to the conflict of interest rule is misplaced in proposed comments 10, 11 and 12 to this rule. Rule 3-300 addresses a separate concept, the attorney's financial interest in property of the client. Where the attorney also engages in a personal conflict, or the representation of clients with conflicting interests, Rule 3-310/1.7 will be separately charged by the State Bar prosecutor. The Comments to Rule 1.8.1 should not be muddled by a discussion of conflicts of interest. If the Commission believes it absolutely necessary to cross-reference to Rule 1.7, that can be done in one sentence (see language in current Rule 4-210(B).)

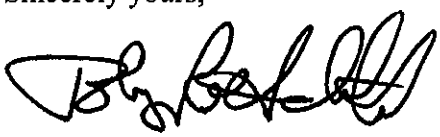
11. Comment 13, titled *Full Disclosure and Consent* refers to attorney competence as a way in which an attorney may be "precluded" from obtaining the client's informed consent. The concept of competency has no pertinence in this rule. Competency can be an issue if the attorney willfully, repeatedly or recklessly fails to perform with competence. (See, current Rule 3-110.) Conflict-based impairment is not a competency issue, and should not be so described. The issue of attorney faithfulness to the client's interests is already sufficiently addressed in Comment 12.

    Proposed Rule 1.8.1 already provides that an attorney is mandated to obtain informed written consent before entering into the transaction. The requirement to obtain informed written consent also should not be described as a competency issue. We recommend that Comment 13 be deleted entirely.

12. Comment 13 refers to attorney competence. This concept is inappropriate in this rule. Competency can be an issue if the attorney willfully, repeatedly or recklessly fails to perform legal services with competence. (See, current Rule 3-110.) Proposed Rule 1.8.1 already provides that the lawyer is mandated to obtain written client consent before entering into the transaction. This comment adds nothing except uncertainty to the rule.

13. PREC has no proposed revisions to Comments 14 and 15, with which the majority of our members agree.

Sincerely yours,



Toby J. Rothschild, Chair
Professional Responsibility and Ethics Committee

cc: Gretchen M Nelson, President
LACBA PREC Members

PUBLIC COMMENTS [1.8.10] ~ FILE LIST

A-2006-126b Philip Humphreys_Chris Munoz [1.8.10]

A-2006-134a(O) Alan Konig [1.8.10]

A-2006-143b LACBA [1.8.10]

A-2006-153 (O) Steve Gupta

A-2007-160 (O) Michael Crocket [1.8.10]

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

/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

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 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]

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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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.

LACBA
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

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 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

*** 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

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

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.

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

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THE STATE BAR OF CALIFORNIA

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Comments submitted are regarded as public record.

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]

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.

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

COMMENT TO PROPOSED RULE 1.8.10:

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. 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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.

PUBLIC COMMENTS [8.3] ~ FILE LIST

A-2006-118w SDCBA [8.3]

A-2006-126g Philip Humphreys_Chris Munoz [8.3]

A-2006-134e(O) Alan Konig [8.3]

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

/by/ Christopher Muñoz

Rule 8.3

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

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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 8.3

*** 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.

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Rule 8.3

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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.